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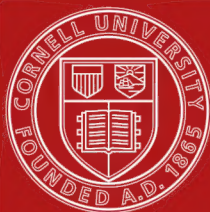
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A treatise on the law of real property.



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A TREATISE
ON THE
LAW OF REAL PROPERTY

IN THREE VOLUMES

BY
JAMES M. KERR

Revised

VOLUME III.

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CHAPTER XXVI.

EQUITABLE ESTATES—TRUSTS.

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SECTION I.—NATURE AND ORIGIN.

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SECTION 1667. **Introductory—Definition.**—A trust, like a use, was originally, and is still, an obligation arising out of a confidence reposed in a person, to whom the legal title of property is conveyed, that he will faithfully apply the property according to the wishes of the parties creating the trust,¹ and exists where the legal interest is

¹ *Beers v. Lyons*, 21 Conn. 604, 613, 614; (6 How.) 143; s.c. 38 Am. Dec. 433;
Commissioners v. Walker, 7 Miss. Anderson's L. Dict. 1056;
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in one person and the equitable interest in another.¹ Strictly, a trust is a use not executed in the *cestui que use* under the statute of Henry VIII.,² but the legal estate is vested in the grantee or trustee,³ and the use perpetuated under the name of trust. For this reason it has been said that a trust is a use not executed by operation of the statute of uses.⁵ The term "trust" is applied exclusively to those equitable interests which remain such, and the term "use" is applied only to such interests as are converted into legal estates *eo instanti* their creation, or subsequently.⁶ A trust estate is the equitable right to take the rents and profits of the land, whereof the legal estate is vested in another person.⁷ The person having the legal estate, and seized of the property, is called the trustee; the person having the equitable estate, and entitled to the rents and

² Co. Litt. (19th ed.) 272b;

² Stair Inst. LL. Scotland (by Brodie), b. 4, tit. 6, s. 2, vol. 2, 650.

Lord Mansfield's definition—*Goodwright v. Wells*.—It is said by Lord MANSFIELD in *Goodwright v. Wells*, Doug. 747, that a trust is "a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privacy to the estate of the land, and to the person touching the land, for which the *cestui que trust* has no remedy but by subpoena in chancery."

A trust is a "confidence, but not necessarily a confidence expressly reposed by one party in another, for it may be raised by implication of law; and the trustee of the estate need not be actually capable of confidence, for the capacity itself may be supplied by legal fiction, as where the administration of the trust is committed to a body corporate; but a trust is a confidence, as distinguished from *jus in re* and *jus in rem*, for it is neither a legal property nor a legal right to property."

Wainwright v. Elwell, 1 Mad. 634;

Bac. Read. on Uses, 5.

¹ *Wallace v. Wainwright*, 87 Pa.

St. 263.

² See: *Ante*, § 1641.

³ *Ware v. Richardson*, 3 Md. 505; s.c. 56 Am. Dec. 762, 770.

⁴ *Johnson v. Fleet*, 14 Wend. (N. Y.) 176, 180.

⁵ See: *Cushing v. Blake*, 30 N. J. Eq. (3 Stew.) 689, 698;

1 Spence Eq. Jur. 494.

⁶ *Jones v. Bush*, 4 Harr. (Del.) 1; *Ayer v. Ayer*, 33 Mass. (16 Pick.) 327-330;

Fisher v. Fields, 10 John. (N. Y.) 495, 505;

Doe d. Gratrex v. Homfray, 6 Ad. & E. 206; s.c. 33 Eng. C. L. 127;

Harton v. Harton, 7 Durnf. & E. (7 T. R.) 653; s.c. 4 Rev. Rep. 537;

Doe d. Terry v. Collier, 11 East 377; s.c. 10 Rev. Rep. 529;

Doe d. Liecester v. Biggs, 2 Taunt. 109; s.c. 11 Rev. Rep. 533;

2 Bl. Com. 336;

4 Kent Com. (13th ed.) 314;

2 Pom. Eq. Jur., §§ 984-986;

1 Prest. Est. 186-190;

1 Spence Eq. Jur. 491, 493, 494;

1 Tud. Ld. Cas. 268-276.

⁷ See: *Talbott v. Todd*, 5 Dana (Ky.) 190, 199;

Sturges v. Knapp, 31 Vt. 1;

Pooley v. Budd, 14 Beav. 34; s.c. 7 Eng. L. & Eq. 229;

2 Bl. Com. 336;

2 Story Eq. Jur. (13th ed.), § 964.

profits, is called the *cestui que trust*, or beneficiary.¹ These estates were original interests resting in conscience alone, and are at the present day cognizable in the courts of equity only. They are governed by the same general rules, applicable in equity, which were formerly applied to uses,² notwithstanding the fact that trusts more nearly approach legal estates than uses.³

SEC. 1668. **Origin of trusts—Early English statute.**—The origin of trusts, or rather the adoption of them into the English law, may be traced to the same source as uses, of which they are in a sense the continuation.⁴ Lewin says that the origin of trusts “may be traced in part at least to the ingenuity of fraud. By the interposition of a trustee the debtor thought to withdraw his property out of the reach of his creditor, the freeholder to intercept the fruits of tenure from the lord of whom the lands were held, and the body ecclesiastic to evade the restrictions directed against the growing wealth of the church by the statutes of mortmain. Another inducement to the adoption of the new device was the natural anxiety of mankind to acquire that free power of alienation and settlement of their estates which, by the narrow policy of the common law, they had hitherto been prevented from exercising.”⁵ The object and intention of the statute 27 Henry VIII. certainly was to destroy that double property in land which had been introduced into the English law by the invention of uses. If, therefore, the intention of the Legislature had been carried into full effect, no use could ever after have existed for more than an instant; for the moment a use was created the statute would have transferred the legal seisin and possession to such use. But the strict construction which the judges put upon that statute defeated, in a great measure, its object. They determined that there were some uses to which the

¹ 1 Cruise Dig. (4th ed.) 381;
2 Story Eq. Jur. (13th ed.), § 964.

² Fisher v. Fields, 10 John. (N. Y.)
495, 505, 506.

³ See: Price v. Sisson, 13 N. J.
Eq. (2 Beas.) 168, 179;

Banks v. Sutton, 2 Pr. Wms. 713;
Burgess v. Wheate, 1 W. Bl. 180;
Post, this chapter, section X.,
“Jurisdiction of Trusts.”

⁴ See: Ante, § 1611.

⁵ Lewin on Trusts (8th ed.) 1.

statute did not transfer the possession. The consequence was that uses were not entirely abolished, but still continued separate and distinct from the legal estate, and were taken notice of and supported by the Court of Chancery, under the name of "trusts."¹

SEC. 1669. **Incidents of trusts—Introductory.**—A trust, like a use,² is alienable and devisable³ by an instrument in writing signed by the party, in accordance with the requirements of the statute of frauds.⁴ The estate is also subject to curtesy;⁵ is liable for the debts of the *cestui que trust*;⁶ is liable to dower in some of the states,⁷ though not in other states,⁸ nor according to the common law.⁹ The estate is liable to merger where the legal and equitable estate unite in the same person;¹⁰ and the *cestui que trust* is regarded as the owner of the estate, and entitled to demand the title thereof.¹¹

SEC. 1670. **Same—Right to title.**—Uses are of a personal character, and attach only to the trustee named in the in-

¹ 1 Cruise Dig. (4th ed.) 381, § 1; Vaugh. 50.

² See: *Ante*, §§ 1636, 1637.

³ Elliott v. Armstrong, 2 Blackf. (Ind.) 198;

Newhall v. Wheeler, 7 Mass. 189;

Zabriskie v. Morris, etc., R. R.

Co., 33 N. J. Eq. (6 Stew.) 22;

Cushing v. Blake, 30 N. J. Eq. (3 Stew.) 689, 695;

Rogers v. Colt, 21 N. J. L. (1 Zab.) 704.

⁴ Peabody v. Tarbell, 56 Mass. (2 Cush. 226;

Hall v. Young, 37 N. H. 134;

Sturtevant v. Sturtevant, 20 N.

Y. 39; s.c. 75 Am. Dec. 371;

Strimpfler v. Roberts, 18 Pa. St.

283; s.c. 57 Am. Dec. 606.

⁵ Cushing v. Blake, 30 N. J. Eq. (3 Stew.) 689, 696.

See: Jarvis v. Prentice, 19 Conn. 272;

Bush's Appeal, 33 Pa. St. 85, 88;

Robison v. Codman, 1 Sum. C. C.

121, 128; s.c. Fed. Cas. No. 11970.

⁶ See: *Post*, § 1671.

⁷ By statute, in New Jersey, a widow is entitled to dower in

an equitable estate of her husband.

Cushing v. Blake, 30 N. J. Eq. (3 Stew.) 689, 696.

See: Brewer v. Connell, 11 Humph. (Tenn.) 500;

Jenny v. Jenny, 24 Vt. 324.

Where immediately before his marriage a man secretly conveys his estate to a trustee for himself, in order to defeat his wife of dower, the conveyance will be deemed fraudulent and void.

See: Brewer v. Connell, 11 Humph. (Tenn.) 500;

Jenny v. Jenny, 24 Vt. 324.

⁸ Hamlin v. Hamlin, 19 Me. 141;

Hawley v. James, 5 Paige Ch. (N. Y.) 318, 452;

Danforth v. Lowry, 3 Hayw. (Tenn.) 61, 68.

⁹ Ray v. Pung, 5 Barn. & Ald. 561; s.c. 7 Eng. C. L. 308;

D'Arcy v. Blake, 2 Sch. & L. 283;

See: Danforth v. Lowry, 3 Hayw. (Tenn.) 61, 68.

¹⁰ See: *Post*, § 1672.

¹¹ See: *Post*, § 1670.

strument ;¹ and in equity the *cestui que trust* is recognized as the general owner of the land,² he having the absolute interest in the trust and the trustee being merely passive in respect to it.³ The legal title, however, is in the trustee so long as the execution of the trust requires it, and then it vests in the person beneficially entitled,⁴ and he can compel the trustee to convey the legal estate, either to himself, or to any person named, in fee-simple.⁵ But the *cestui que use* cannot call for the legal title when, from the nature of the trust, his ownership is not immediate and absolute, and when it would defeat, or put it in his power to defeat, the legitimate ultra-limitation of the trust.⁶ At common law the trustee might convey or en-

¹ See : *Post*, § 1687.

Thus where land was devised to the executor named in the will in trust for certain purposes, the executor renounced, and an administrator with the will annexed was appointed, it was held that the administrator did not become trustee, nor succeed to any right in the trust estate.

Dunning v. Ocean National Bank, 61 N. Y. 497 ; s.c. 19 Am. Rep. 293.

² *Arnold v. Brown*, 41 Mass. (24 Pick.) 89 ; s.c. 35 Am. Dec. 296 ;

Jamison v. Glascock, 29 Mo. 191 ; *Murphy v. Grice*, 2 Dev. & B. (N. C.) Eq. 199 ;

Brown v. Wright, 4 Yerg. (Tenn.) 57 ;

Cholmondely v. Clinton, 2 Jac. & W. 143 ;

Watts v. Ball, 1 Pr. Wms. 108 ; *Burgess v. Wheate*, 1 W. Bl. 161.

³ See : *Battle v. Petway*, 5 Ired. (N. C.) L. 576 ; s.c. 44 Am. Dec. 59 ;

Vaux v. Parke, 7 Watts & S. (Pa.) 19.

⁴ *Nicoll v. Walworth*, 4 Den. (N. Y.) 385 ;

Bennett v. Garlock, 10 Hun (N. Y.) 328, 339 ;

Anderson v. Mather, 44 N. Y. 249, 257 ;

Doe d. Cadogan v. Ewart, 7 Ad. & E. 636 ; s.c. 34 Eng. C. L. 337.

⁵ *Arrington v. Cherry*, 10 Ga. 429 ;

Stewart v. Chadwick, 8 Iowa 463 ;

Morton v. Southgate, 28 Me. 41 ; *Bass v. Scott*, 2 Leigh (Va.) 359.

⁶ *Battle v. Petway*, 5 Ired. (N. C.) L. 576 ; s.c. 44 Am. Dec. 59.

See : *Gillis v. McKay*, 4 Dev. (N. C.) L. 172 ;

Jasper v. Maxwell, 1 Dev. (N. C.) Eq. 357, 361 ;

Dick v. Pitchford, 1 Dev. & B. (N. C.) Eq. 480 ;

Turnage v. Greene, 2 Jones (N. C.) Eq. 63, 65 ;

Snowden v. Pales, 6 Sim. 524.

Rules governing trusts—**Intention of the grantor.**—"Trusts, in this respect, are governed by the same rules which govern legal interests. *Jasper v. Maxwell*, 1 Dev. (N. C.) Eq. 361 ; *Dick v. Pitchford*, 1 Dev. & B. (N. C.) Eq. 480 ; *Battle v. Petway*, 5 Ired. (N. C.) L. 576 ; s.c. 44 Am. Dec. 59 ; *Snowdon v. Pales*, 6 Sim. 524. The intention is so far respected that a *cestui que trust* is held not to be entitled to call for the legal estate, when, from the nature of the trust, his ownership is not immediate and absolute, and when it would defeat or put it in his power to defeat or endanger a legitimate ulterior limitation of the trust. Hence, when the express purpose is, that the trustee shall have the management of the trust property, and shall receive and lay out the profits with his own hands at future

cumber the estate during his life, and dispose of it at his death; and if not disposed of the estate descended to his heirs.¹ But in this country the general rule is that a trustee cannot charge the trust estate by his executory contracts, unless authorized to do so by the terms of the instrument creating the trust.² In equity, any one taking the legal estate from the trustee holds it as a trustee for the benefit of the *cestui que trust*, and the estate cannot be by him encumbered or charged with his own debts, or rendered subject to the dower or curtesy of husband or wife.³

periods; in such cases the trustee cannot be compelled to give up his legal estate to the *cestui que trust*. So, if the trust is not for a particular person only, but it is limited over for other persons, for whose protection the trustee's legal estate is necessary, or may be highly useful, it is plain that the duty of the trustee to those entitled in future requires him to retain his estate, and therefore the court would not decree him to convey it. Suppose a conveyance by deed of a slave in trust for one for life, and then in trust for another, which was formerly the only method by which personal property could, by an act *inter vivos*, be limited over after a life estate. Beyond doubt, equity would not compel nor allow the trustee to convey the legal estate to the tenant for life, but require him to retain it for the security of the remainderman. And so in any case of a contingent limitation over, it would be the duty of the trustee to retain the title and the control over the possession of the trust property; and the court of equity will not take it from him, as was held in the case cited of *Dick v. Pitchford*, 1 Dev. & B. (N. C.) Eq. 485, and *Battle v. Petway*, 5 Ired. (N. C.) L. 576; s.c. 44 Am. Dec. 59."

¹ *Duffy v. Calvert*, 6 Gill (Md.) 487; *Boone v. Chiles*, 35 U. S. (10 Pet.) 177, 213; bk. 9 L. ed. 388.

² *New v. Nicoll*, 73 N. Y. 127; s.c. 29 Am. Rep. 111.

The court say that "when a trustee is authorized to make an expenditure and he has no trust funds, and the expenditure is necessary for the protection, reparation, or safety of the trust estate, and he is not willing to make himself personally liable, he may by express agreement make the expenditure a charge upon the trust estate. In such a case he could himself advance the money to make the expenditure, and he would have a lien upon the trust estate, and he can by express contract transfer this lien to any other party who may upon the faith of the trust estate make the expenditure."

Citing: *Randall v. Dusenbury*, 63 N. Y. 645; s.c. 39 N. Y. Super. Ct. R. (7 J. & S.) 174;

Noyes v. Blakeman, 6 N. Y. 567; s.c. 3 Sandf. (N. Y.) 531;

Stanton v. King, 8 Hun (N. Y.) 4.

³ See: *McBrayer v. Cariker*, 64 Ala. 50;

Creveling v. Fritts, 34 N. J. Eq. (7 Stew.) 134;

Coster v. Clarke, 3 Edw. Ch. (N. Y.) 428;

Canoy v. Troutman, 7 Ired. (N. C.) L. 155;

Heth v. Richmond, F. & P. R. Co., 4 Gratt. (Va.) 482; s.c. 50 Am. Dec. 88;

Hallett v. Collins, 51 U. S. (10 How.) 174; bk. 13 L. ed. 376;

Robison v. Codman, 1 Sum. 121, 128; s.c. Fed. Cas. No. 11970.

As to curtesy and dower in trust

SEC. 1671. **Same—Liability for debts.**—Lands held in trust for another are liable to process of law against the *cestui que trust* in some states,¹ and not in others, in which, however, they may be reached by processes in equity.² Such lands cannot be taken upon execution against the trustee for his own debts,³ nor can he encumber them even for the payment of the purchase-money.⁴ By the statute of Charles II.,⁵ commonly called the statute of frauds, the trustee is made liable for the debts of the *cestui que trust*, and he is held similarly liable in all those states in which the English statute of frauds has been adopted.⁶ But it is held that in order to bring a case within the provisions of this statute, it must appear that the trust is a clear and simple one, for the benefit of the judgment debtor only; a trust created partly for the benefit of the *cestui que trust*, and partly for the benefit of the trustee, or partly for that of a third person, is not affected by the statute.⁷

SEC. 1672. **Same — Merger.**—The general rule is that where the legal and equitable estates unite in one person, the equitable estate is merged in the legal, on the principle that a man cannot be a trustee for himself;⁸ and also in accordance with the inflexible rule of law that

estates, see: *Ante*, §§ 878, 990, 1669.

¹ Pritchard v. Brown, 4 N. H. 397, 415; s.c. 17 Am. Dec. 431.

See: Stanley v. Gilmer, 27 Ga. 589;

M'Mechen v. Marman, 8 Gill & J. (Md.) 57;

Hutchins v. Heywood, 50 N. H. 491;

Upham v. Varing, 16 N. H. 462; Bush's Appeal, 33 Pa. St. 85.

² Gillispie v. Walker, 3 B. Mon. (Ky.) 505;

Russell v. Lewis, 19 Mass. (2 Pick.) 508;

Hopkins v. Carey, 23 Miss. 54;

Mathews v. Stephenson, 6 Pa. St. 496.

³ Williams v. Fullerton, 20 Vt. 346.

⁴ Dickerson's Appeal, 7 Pa. St. 255; Wilhelm v. Folmer, 6 Pa. St. 296;

Robison v. Codman, 1 Sum. C. C.

131, 128; s.c. Fed. Cas. No. 11970.

⁵ 29 Char. II., c. 3, § 10.

⁶ Foote v. Colvin, 3 John. (N. Y.) 216; s.c. 3 Am. Dec. 478;

Ontario Bank v. Root, 3 Paige Ch. (N. Y.) 478, 481;

Shute v. Harder, 1 Yerg. (Tenn.) 1, 3; s.c. 24 Am. Dec. 427;

Coults v. Walker, 2 Leigh (Va.) 280.

⁷ Ontario Bank v. Root, 3 Paige Ch. (N. Y.) 478, 481;

Davis v. Garret, 3 Ired. (N. C.) L. 459;

Doe d. Hull v. Greenhill, 4 Barn. & Ald. 684; s.c. 6 Eng. C. L. 653;

Harris v. Booker, 4 Bing. 96; s.c. 13 Eng. C. L. 417.

⁸ James v. Morey, 2 Cow. (N. Y.) 246; s.c. 14 Am. Dec. 475;

Wade v. Paget, 1 Bro. C. C. 363;

Collier v. Walters, L. R. 17 Eq. Cas. 252, 253; s.c. 7 Moak Eng. Rep. 798.

where a greater and a less estate meet in the same person without any intermediate estate, the less one merges in the greater *eo instanti*.¹ This doctrine is to be taken with the limitation that in equity the rule is controlled by the express or implied intention of the party in whom the interests or estates unite;² and a merger will not be deemed to be effected in equity where intervening rights would thereby be prejudiced.³ Neither does the general rule as to mergers apply where the legal and equitable estates are not co-extensive and commensurate,⁴ or justice requires that they should be kept separate.⁵

¹ *Mason v. Lord*, 40 N. Y. 476, 489;

Bascom v. Smith, 34 N. Y. 320, 329;

Champney v. Coope, 32 N. Y. 543, 548, rev'g 34 Barb. (N. Y.) 539;

Mickles v. Townsend, 18 N. Y. 575, 582;

Clift v. White, 12 N. Y. 519, 525, 535; s.c. 15 Barb. (N. Y.) 75;

Spencer v. Ayrault, 10 N. Y. 202, 204;

Reed v. Latson, 15 Barb. (N. Y.) 9, 14;

Casey v. Buttolph, 12 Barb. (N. Y.) 631, 639;

Averill v. Wilson, 4 Barb. (N. Y.) 180, 191;

James v. Morey, 2 Cow. (N. Y.) 246; s.c. 14 Am. Dec. 475;

Hitchcock v. Harrington, 6 John. (N. Y.) 290; s.c. 5 Am. Dec. 229, 233;

Skeel v. Spraker, 8 Paige Ch. (N. Y.) 182, 186;

Russell v. Austin, 1 Paige Ch. (N. Y.) 192, 195;

Pelletreau v. Jackson, 11 Wend. (N. Y.) 10, 115;

Roberts v. Jackson, 1 Wend. (N. Y.) 478, 484; 2 Bl. Com. 177.

² *James v. Morey*, 2 Cow. (N. Y.) 246; s.c. 14 Am. Dec. 475.

See: *Gardner v. Astor*, 3 John. Ch. (N. Y.) 53; s.c. 8 Am. Dec. 465;

Compton v. Oxenden, 4 Brown Ch. Cas. 403; s.c. 2 Ves. Jr. 264;

Forbes v. Moffatt, 18 Ves. 384; s.c. 11 Rev. Rep. 222.

³ *Edgerton v. Young*, 46 Ill. 464; *Lyon v. Ilvaine*, 24 Iowa 9;

James v. Morey, 2 Cow. (N. Y.) 246; s.c. 14 Am. Dec. 475;

Davis v. Pierce, 10 Minn. 376;

Hinchman v. Emans, 1 N. J. Eq. (1 Saxt.) 100;

Forbes v. Moffatt, 18 Ves. Jr. 390; s.c. 11 Rev. Rep. 222.

⁴ *Badgett v. Keating*, 31 Ark. 400; *Donalds v. Plumb*, 8 Conn. 447, 453;

Campbell v. Carter, 14 Ill. 286;

Simonton v. Gray, 34 Me. 50;

Hunt v. Hunt, 31 Mass. (14 Pick.) 374; s.c. 25 Am. Dec. 400;

Healy v. Alston, 25 Miss. 190;

Hopkinson v. Dumas, 42 N. H. 296, 307;

Bolles v. State Trust Co., 27 N. J. Eq. (11 C. E. Gr.) 308;

Cooper v. Cooper, 5 N. J. L. (1 Halst.) 9;

Reed v. Latson, 15 Barb. (N. Y.) 9;

James v. Morey, 2 Cow. (N. Y.) 246, 248; s.c. 14 Am. Dec. 475;

Rogers v. Rogers, 18 Hun (N. Y.) 409;

Nicholson v. Halsey, 1 John. Ch. (N. Y.) 417, 422;

Gardner v. Gardner, 10 John. Ch. (N. Y.) 47, 53;

Mason v. Mason, 2 Sandf. Ch. (N. Y.) 432;

Wade v. Paget, 1 Dev. (N. C.) Eq. 363;

Butler v. Godley, 1 Dev. (N. C.) L. 94;

Downes v. Grazebrook, 3 Meriv. 208;

Selby v. Alston, 3 Ves. 339; s.c. 4 Rev. Rep. 10;

Brydges v. Brydges, 3 Ves. 126;

3 Prest. Conv. 508;

1 Spence Eq. Jur. 572.

⁵ *Earle v. Washburn*, 89 Mass. (7 Allen) 95.

SEC. 1673. **In what estates trusts created.**—A trust may be created in any freehold interest in land, and also in chattels real and personal property. Thus the capital stock of a corporation may become the subject of a trust,¹ as where a testator bequeaths the “income, profits, and product” of certain stock in a corporation to a person for life, with remainder over.² And where a person buying corporate stock leaves it in the possession and name of the seller, the sale being evidenced only by a declaration thereof in a receipt given for the money paid, and there being no agreement as to the future disposition of the stock, or of the dividends thereon, creates an implied trust in the seller which is enforceable at law and subject to the operation of the statute of limitations.³

SECTION II.—CREATION AND EXTENT OF TRUSTS.

SEC. 1674. **Introductory**—At common law—First rule.

SEC. 1675. **Same**—Same—Second rule.

SEC. 1676. **Same**—Same—Third rule.

SEC. 1677. **Same**—In United States.

SEC. 1678. **Declaration of trust**—Necessity for.

Cone v. Dunham, 59 Conn. 145 ;
s.c. 20 Atl. Rep. 311 ; 8 L. R.
A. 647, 687 ;

Moss's Appeal, 83 Pa. St. 264 ;
s.c. 24 Am. Rep. 164 ;

Wiltbank's Appeal, 64 Pa. St.
256 ; s.c. 3 Am. Rep. 585.

The unpaid subscriptions of the capital stock of a corporation constitutes a trust fund to which the creditors rightfully look for satisfaction of their claims, which cannot be withdrawn without their consent.

Morgan County v. Allen, 103 U.
S. 498 ; bk. 26 L. ed. 498 ;

Hatch v. Dana, 101 U. S. 205 ;
bk. 25 L. ed. 885 ;

Webster v. Upton, 91 U. S. 56 ;
bk. 23 L. ed. 384 ;

Sanger v. Upton, 91 U. S. 56 ;
bk. 23 L. ed. 220 ;

Upton v. Tribilcock, 91 U. S. 45 ;
bk. 23 L. ed. 203 ;

Sawyer v. Hoag, 84 U. S. (17
Wall.) 610 ; bk. 21 L. ed. 731 ;

Putnam v. New Albany & S.
C. J. R. R. Co. (“Burke v.
Smith”), 83 U. S. (16 Wall.)

390 ; bk. 21 L. ed. 361 ;

New Albany v. Burke, 78 U. S.
(11 Wall.) 96 ; bk. 20 L. ed. 155.

Trust in stock.—As to trust in stock
of corporation, see : Steinway
v. Steinway (N. Y.), 9 Nat.
Corp. Rep. 335 ;

Batstone v. Slater, L. R. 19 Eq.
Cas. 253 ; s.c. 11 Moak Eng.
Rep. 826.

² Moss's Appeal, 83 Pa. St. 264 ; s.c.
24 Am. Rep. 164 ;

Wiltbank's Appeal, 64 Pa. St.
256 ; s.c. 3 Am. Rep. 585.

Where the property of a corpo-
ration consists wholly of real
estate, and a part of it is
taken by eminent domain, the
compensation therefor, if dis-
tributed as a dividend to the
shareholders, belongs to the
capital and not to the income
of a trust fund invested in the
shares.

Heard v. Eldredge, 109 Mass.
258 ; s.c. 12 Am. Rep. 687.

³ Cone v. Dunham, 59 Conn. 145 ;
s.c. 20 Atl. Rep. 311 ; 8 L. R.
A. 647.

- SEC. 1679. Same—Who may make.
 SEC. 1680. Same—When made.
 SEC. 1681. Same—How made.
 SEC. 1682. Same—By instrument in writing.
 SEC. 1683. Same—By will.
 SEC. 1684. Same—Form of words.
 SEC. 1685. Same—Words of limitation.
 SEC. 1686. Estate taken by trustee.
 SEC. 1687. Same—Remainder.

SECTION 1674. **Introductory** — At common law — **First rule.**—At common law there were three direct modes of creating trusts.¹ These were, more properly speaking, modes of construction. The first was by limiting a use upon a use. This mode of creating a trust arose from a rule established in the fourth and fifth years of the reign of Philip and Mary, that a use could not be limited on a use.² The reason for this determination was because the words of the statute, being “where any person is seized of any lands and tenements to the use of another person,” did not include uses, as they are neither lands nor tenements.³ The trust was introduced for the purpose

¹ All trusts created by either of these modes are known as express trusts.

See : *Johnson v. Fleet*, 14 Wend. (N. Y.) 176, 180 ;

Cook v. Ellington, 6 Jones (N. C.) Eq. 371.

² See : *Ante*, § 1651.

³ *Tyrrel's Case*, Dyer 155a.

See : *Wilson v. Cheshire*, 1 McC. (S. C.) Eq. 233 ;

Goodwright v. Wells, 2 Doug. 774 ;

Bac. Read. on Stat. Uses, 43.

English criticism of the rule.—The interpretation put upon the statute in *Tyrrel's Case*, *supra*, is classed by Blackstone among the “technical scruples which the judges found it hard to get over ;” and he regrets its introduction, observing of this and another rule restricting the operation of the statute of uses to freehold estates, that “by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect

than to make a slight alteration in the formal words of a conveyance.” 2 Bl. Com. 336. Lord Mansfield, speaking of the same rules, said that “it was the absurd narrowness of the courts of law, resting on literal distinctions, which in a manner repealed the statute of uses, and drove *cestuis que trust* into equity.” 2 Doug. 274. Lord Chancellor Sugden, also, is clearly of opinion that the notion that a use could not arise out of a use, so as to be executed by the statute, was merely a technical subtilty, which ought not to have been sanctioned at all. It was a suggestion which greatly perplexed the judges. (See : *Girland v. Sharp*, Cro. El. 382 ; *Milborn v. Ferrers*, Dyer 114b.) And in *Tyrrel's Case* the point evidently was not firmly held by the court, but was decided with apparent hesitation, and by a mere turn of the scale of opinion. “Upon such authority as this,” says the learned

of evading this rule. Thus a conveyance or devise to A to the use of B to the use of C gives C a trust; the legal estate vests in B,¹ but C retains the beneficial ownership, and is entitled to the rents and profits of the land, as well as to the execution of such conveyances by B as he may choose to direct.²

SEC. 1675. **Same—Same—Second rule.**—The second mode of creating a trust at common law was to name a trustee and charge him with certain duties in respect to the property, the discharge of which duties required that the legal estate should vest in him,³ as where the trustee is charged with the duty of collecting and paying over the rents and profits to the *cestui que trust*,⁴ and the like; in which case the use is not executed, even though all the *cestuis*

Chancellor, "it became, by degrees, a settled point, that a use could not arise out of a use; and it is at this day too firmly settled to be even questioned. For, it is said, the use is only a liberty or authority to take the profits; but two cannot severally take the profits of the same land, therefore there cannot be a use upon a use. (Daw v. Newborough, Com. 244. See: Symson v. Turner, 1 Eq. Cas. Abr. 383.) Perhaps, however, there is not another instance in the books in which the intention of an act of Parliament has been so little attended to. It has frequently been observed by high authority that there is no magic in words. When, therefore, the act said that, where one person was seized to the use of another, the legal estate should be transferred to the *cestui que use*; it meant that the person to whom the estate belonged in conscience should be invested with the legal right to it.

¹ Thatcher v. Omans, 20 Mass. (3 Pick.) 521, 528;

Franciscus v. Reigart, 4 Watts (Pa.) 98, 108;

Doe d. Lloyd v. Passingham, 6 Barn. & C. 305; s.c. 13 Eng. C. L. 146;

Venables v. Morris, 7 Durnf. &

E. (7 T. R.) 342; s.c. 4 Rev. Rep. 455.

² Calvert v. Eden, 2 Har. & McH. (Md.) 279;

Doe d. Lloyd v. Passingham, 6 Barn. & C. 305; s.c. 13 Eng. C. L. 146;

Whetstone v. Bury, 2 Pr. Wms. 146.

See: Nash v. Coates, 3 Barn. & Ald. 839; s.c. 23 Eng. C. L. 366.

In New York a conveyance to A, in trust for B, in trust for C, at once vests the title in C, and would vest it in the *cestui que use* last named, however numerous the trusts created.

Johnson v. Fleet, 14 Wend. (N. Y.) 176, 180.

³ Doe d. Gratex v. Homfray, 6 Ad. & E. 206; s.c. 33 Eng. C. L. 127;

Barker v. Greenwood, 4 Mees. & W. 421;

Bagshaw v. Spencer, 1 Ves. Sr. 142.

See: Schley v. Lyon, 6 Ga. 530; Morton v. Barrett, 22 Me. 257; Lancaster v. Dolan, 1 Rawle (Pa.) 231; s.c. 18 Am. Dec. 625;

Ward v. Amory, 1 Curt. C. C. 419; s.c. Fed. Cas. No. 17146.

⁴ Shankland's Appeal, 47 Pa. St. 113.

See: You v. Flinn, 34 Ala. 409; Copp v. Norwich, 24 Conn. 28; Tilly v. Tilly, 2 Bland Ch. (Md.) 436, 442;

que trust are *sui juris*.¹ This rule of the common law arose from an opinion delivered by the judges in the thirty-sixth year of the reign of Henry VIII., to the effect that where a person made a feoffment in fee to his own use, during his life, and after his decease that another person should take the profits, this was a use in such other person; but that if the feoffor said that after his death his feoffees should take the profits and deliver them to such other person, that this would not constitute a use in such person, because he would have them only by the hand of the feoffees.² A distinction was made between a devise to a person in trust, to pay over the rents and profits to another, and a devise to a person in trust to permit another to receive the rents and profits. In the former case it was held that the legal estate continued in the first devisee in order that he might be able to perform the trust, because where he is directed to pay over the rents and profits he must necessarily receive them; but in the latter case it was held that the legal estate was vested, by the statute, in the person who was to receive the rents.

SEC. 1676. **Same—Same—Third rule.**—The third mode in which a trust was created at common law was to grant an estate less than a freehold to one person for the use of another, which, under the statute of uses, cannot be executed in the *cestui que use*, the word “seized,” used in the statute, being applicable only to freehold estates.³ This mode of creating a trust estate arose from the answer of all the judges in the twenty-second year of the reign of Queen Elizabeth upon a question put to them by the chancellor, to the effect, that where a term for years was granted to A, to the use of or in trust for B, the legal estate in the term remained in A, and was not executed in B by the statute of uses.⁴

SEC. 1677. **Same—In United States.**—The statute of uses

Norton v. Leonard, 29 Mass. (12 Pick.) 152, 158.

¹ Barrett's Appeal, 46 Pa. St. 392.

See: Cushing v. Blake, 30 N. J. Eq. (3 Stew.) 689.

² Bro. Ab., tit. Feoffm. al Use, 52.

³ 1 Cruise Dig. (4th ed.) 389.

See: Tabb v. Baird, 3 Call (Va.) 475, 482.

⁴ 1 Cruise Dig. (4th ed.) 389.

having been adopted in the majority of the states,¹ the rules of the common law regulating the creation and construction of trusts are applicable in this country, where not modified or abrogated by statute. A trust being an obligation upon a person arising out of a confidence reposed in him, to apply property faithfully and according to such confidence,² any failure to perform this trust carries with it a liability, which may be enforced in a court of equity. Thus where a person receives money to be paid to another, or to be applied to a particular purpose, and fails to so apply it, he becomes a trustee and liable as such for his breach of trust.³ And an agent purchasing an outstanding title or interest in property, in contravention of his duty, is held to have done so for the benefit of his principal.⁴ And the same is true of an agent who has entered land and obtained a patent in his own name; he becomes a trustee for his principal, and cannot hold the land under such entry otherwise than as a trustee.⁵ Any person acquiring an interest in violation of a duty required, or a trust imposed, will be regarded as a trustee for the person injured.⁶

¹ See : *Ante*, § 1641, *et seq.*

² *Commissioners v. Walker*, 7 Miss. (6 How.) 143; s.c. 38 Am. Dec. 433.

³ *Hinkle v. Wanzer*, 58 U. S. (17 How.) 353; bk. 15 L. ed. 173; *Taylor v. Benham*, 46 U. S. (5 How.) 233; bk. 12 L. ed. 130; *Sharpless v. Welsh*, 4 U. S. (4 Dall.) 279; bk. 1 L. ed. 833.

⁴ *Rothwell v. Dewees*, 67 U. S. (2 Black.) 613; bk. 17 L. ed. 309; *Ringo v. Binns*, 35 U. S. (10 Pet.) 269; bk. 9 L. ed. 420.

⁵ *Irvine v. Marshall*, 61 U. S. (20 How.) 558; bk. 15 L. ed. 994.

⁶ An agent locating land for himself which he ought to locate for his principal, he is in equity a trustee for his principal.

Massie v. Watts, 10 U. S. (6 Cranch) 148; bk. 3 L. ed. 181.

An attorney cannot buy or hold, otherwise than as trustee, any adverse title or interest touching the thing to which his employment relates.

Baker v. Humphrey, 101 U. S. 494; bk. 25 L. ed. 1065;

Stockton v. Ford, 52 U. S. (11 How.) 232; bk. 13 L. ed. 676.

A contract for the sale of land, upon the execution of notes for the price and the title bond, makes the vendor the trustee for the vendee so far as relates to the legal title, and the vendee a trustee for the vendor as relates to the purchase-money.

Lewis v. Hawkins, 90 U. S. (23 Wall.) 119; bk. 23 L. ed. 113.

Where one having an inceptive title to land makes a contract with another that the latter shall occupy and improve it so that the title can be perfected, the land to be divided, the latter's acquiring an adverse title in the occupant, he becomes trustee for the party from whom he derived possession, to the extent of his interest.

Hallett v. Collins, 51 U. S. (10 How.) 174; bk. 13 L. ed. 376.

Same—Government land.—To charge the holder of the legal title to land under a patent as trustee of another, the claimant must

SEC. 1678. **Declaration of trust—Necessity for.**—To constitute a trust in land it is enough if the owner of the property conveys it to another in trust; and if the property is personalty, if he unequivocally declares, either orally or in writing, that he holds it *in præsentia* in trust for another;¹ but a declaration by the holder of the legal title to land, that he holds it in trust for a third person, which is made without consideration, or by a writing not under seal, does not, under the common law, create an enforceable trust.² A declaration of the trust need not be made to the *cestui que trust* in person; it may be made without

show himself entitled to it, and its refusal to him in consequence of errors in the rulings of the land department upon the law applicable to the facts found.

Bohall v. Dilla, 114 U. S. 47; bk. 29 L. ed. 61;

St. Louis Smelting & Refining Co. v. Kemp, 104 U. S. 636; bk. 26 L. ed. 875.

Under a contract for the sale of government lands for which no patents have been issued, if the vendee receives patents for more lands of the vendor than those described in the contract, he holds the title to such lands in trust for the vendor.

Gibbs v. Diekma, 1 Mor. Tr. 334; bk. 26 L. ed. 177.

Conveyance of land without consideration of any kind, and no distinct trust being expressed, a resultant trust is raised to the grantor.

See: *Farrington v. Barr*, 36 N. H. 86;

Van der Volgen v. Yates, 9 N. Y. 219, aff'g 3 Barb. Ch. (N. Y.) 242.

This doctrine is said to be confined to the ancient common-law conveyances, and not to apply to modern conveyances, with recitals of consideration, to the use of the grantee and his heirs.

Gould v. Lynde, 114 Mass. 366;

Titcomb v. Morrill, 92 Mass. (10 Allen) 15.

Fraud in obtaining advantage or procuring the title to land in equity

raises a trust for the person beneficially interested.

See: *Trapnall v. Brown*, 19 Ark. 39, 48;

Brown v. Doane, 86 Ga. 32; s.c. 12 S. E. Rep. 179; 11 L. R. A. 381;

Farnham v. Clements, 51 Me. 426;

Michigan Air-line R. Co. v. Melten, 44 Mich. 321; s.c. 6 N. W. Rep. 845;

Gale v. Gale, 19 Barb. (N. Y.) 249, 251;

Brown v. Lynch, 1 Paige Ch. (N. Y.) 147;

Jackson ex d. Williams v. Miller, 6 Wend. (N. Y.) 228; s.c. 21 Am. Dec. 516;

Edwards v. Culbertson, 111 N. C. 342; s.c. 16 S. E. Rep. 233; 18 L. R. A. 204;

Finlayson v. Finlayson, 17 Oreg. 347; s.c. 21 Pac. Rep. 57; 3 L. R. A. 801;

Kellum v. Smith, 33 Pa. St. 158; *Griffith v. Godey*, 113 U. S. 89; bk. 28 L. ed. 934;

Cook v. Tullis, 85 U. S. (18 Wall.) 332; bk. 21 L. ed. 933;

Drury v. Milwaukee & S. R. R. Co., 74 U. S. (7 Wall.) 299 · bk. 19 L. ed. 40;

White v. Cannon, 73 U. S. (6 Wall.) 443; bk. 18 L. ed. 923;

Wheeler v. Sage, 68 U. S. (1 Wall.) 518; bk. 17 L. ed. 646;

Chesterfield v. Jansen, 2 Ves. 155.

¹ *Ray v. Simmons*, 11 R. I. 266; s.c. 23 Am. Rep. 447.

² *Pittman v. Pittman*, 107 N. C. 159; s.c. 12 S. E. Rep. 61; 11 L. R. A. 456.

his knowledge, and will be good if he accepts it within a reasonable time after knowledge of it comes to him.¹

SEC. 1679. Same—Who may make.—A declaration of trust can be made only by the owner of the legal estate in land, although it is not necessary for the creation of a trust that the legal estate be transferred to a third person as trustee, the simple declaration by the owner of the land that he holds it in trust for another being sufficient to transfer to such other the beneficial interest, and convert the legal owner into a trustee, where there is sufficient consideration to support the trust,² and the words relied upon are unequivocal.³

¹ See: *Post*, § 1691.

² *Ray v. Simmons*, 11 R. I. 266; s.c. 23 Am. Rep. 447.

See: *Boykin v. Pace's Exr.*, 64 Ala. 68;

Hill v. Den, 54 Cal. 6;

Minor v. Rogers, 40 Conn. 512; s.c. 16 Am. Rep. 69;

Tanner v. Skinner, 11 Bush (Ky.) 120;

Taylor v. Henry, 48 Md. 550; s.c. 30 Am. Rep. 486;

Urann v. Coates, 109 Mass. 581;

Baldwin v. Humphrey, 44 N. H. 609;

Young v. Young, 80 N. Y. 422; s.c. 36 Am. Rep. 634;

Suarez v. Pumpelly, 2 Sandf. Ch. (N. Y.) 336;

Bond v. Bunting, 78 Pa. St. 210;

Morrison v. Beirer, 2 Watts & S. (Pa.) 81;

Gadsden v. Whaley, 14 S. C. 210; *Crop v. Norton*, 2 Atk. 76;

Thorpe v. Owen, 5 Beav. 224;

Scales v. Maude, 6 DeG., M. & G. 43; s.c. 25 L. J. Ch. 433; 1 Jur. N. S. 1147;

Milroy v. Lord, 4 DeG., F. & J. 264;

Kekewich v. Manning, 1 DeG., M. & G. 176;

M'Fadden v. Jenkyns, 1 Hare 458;

Wheatley v. Purr, 1 Keen 551;

Warriner v. Rogers, L. R. 16 Eq. 340; s.c. 42 L. J. Ch. 581; 28 L. T. 863; 21 W. R. 766; 6

Moak Eng. Rep. 781;

Morgan v. Malleeson, L. R. 10 Eq.

475; s.c. 39 L. J. Ch. 680; 23 L. T. 336; 18 W. R. 1125;

Penfold v. Mould, L. R. 4 Eq. 562;

Richardson v. Richardson, L. R. 3 Eq. 686; s.c. 36 L. J. Ch. 653;

Ex parte Pye, 18 Ves. Jr. 140; s.c. 11 Rev. Rep. 173;

1 Spence Eq. Jur. 507.

³ *Young v. Young*, 80 N. Y. 422, 438; s.c. 36 Am. Rep. 634; 641;

Martin v. Funk, 75 N. Y. 134; s.c. 31 Am. Rep. 466.

Requisites for declaration of trust.—

While it is not necessary that the declaration of trust be in terms explicit, the donor must have evinced by acts which admit of no other interpretation that such legal right as he retains is held by him as trustee for the donee. *Heartley v. Nicholson*, 44 L. J. Ch. App. (N. S.) 277; s.c. 19 L. R. Eq. 233; 32 L. T. 822; 23 W. R. 374, per BACON, V. C. The settler must transfer the property to a trustee, or declare that he holds it himself in trust. *Milroy v. Lord*, 4 DeG., F. & J. 264, per Lord KNIGHT BRUCE. In cases of voluntary settlements or gifts the court will not impute a trust where a trust was not in fact the thing contemplated. The distinction between words importing a gift and words creating a trust is pointed out by Sir

SEC. 1680. Same—When made.—A declaration of trust may be made either before or after the conveyance¹ to the trustee, because any declaration in writing, made by the grantee or assignee of property at any time after the conveyance, is competent proof that the property was to be holden in trust according to the terms of such declaration, within a fair and liberal construction of the statute of frauds;² and letters or other papers, however informal, are sufficient to constitute such a declaration.³

SEE. 1681. Same—How made.—A declaration of trust may be either by words or acts, such as the depositing of money in bank to the credit of one's self as "trustee" for certain children named,⁴ or in the name of another person without the depositor's name following it,⁵ or by any other act which indicates the intention to give to another certain personal property, or the benefits of certain land.⁶ Thus where a father verbally promises

GEO. JESSEL in *Richards v. Delbridge*, L. R. 18 Eq. Cas. 11; s.c. 43 L. J. Ch. 459; 22 W. R. 584, as follows: "The making of a man trustee involves an intention to become a trustee, whereas words of gift show an intention to give over property to another, and not to retain it in the donor's hands for any purpose, fiduciary or otherwise."

¹ *Barrell v. Joy*, 16 Mass. 221, 223; *Reid v. Fitch*, 11 Barb. (N. Y.) 399;

Jackson ex d. Erwin v. Moore, 6 Cow. (N. Y.) 706;

Malin v. Malin, 1 Wend. (N. Y.) 625.

² But the mere declaration of a vendee that he intends to buy for another, without evidence of any previous agreement to do so, or of any advance of money for the purpose, raises no trust which can be supported in equity.

Lloyd v. Lynch, 28 Pa. St. 419; s.c. 70 Am. Dec. 137.

Citing: *Robertson v. Robertson*, 9 Watts (Pa.) 32;

Bear v. Whisler, 7 Watts (Pa.) 144, 147;

Sidle v. Waters, 5 Watts (Pa.) 389, 391.

³ *Barrell v. Joy*, 16 Mass. 221, 223; *Scituate v. Hanover*, 33 Mass. (16 Pick.) 222, 224;

Safford v. Rantoul, 29 Mass. (12 Pick.) 233.

⁴ *Sayre v. Weil*, 94 Ala. 466; s.c. 10 So. Rep. 546; 15 L. R. A. 544.

⁵ And a statement by him to the other that he had made the deposit, which would belong to the other at his death, constitutes a deposit in trust which will be valid although the testator retained the deposit books until death.

Re Atkinson, 16 R. I. 413; s.c. 16 Atl. Rep. 712; 3 L. R. A. 392.

⁶ A trust is created by a letter from an uncle to a nephew who had written claiming a sum of money, acknowledging that the nephew had earned it and saying, "I had the money in the bank, the day you were twenty-one years old, that I intended for you;" and "I don't intend to interfere with the money in any way until I think you are capable of taking care of it;" then adding in a post-

to give land to his son, in consideration of love and affection, upon condition that the son makes certain improvements within a specified time, and puts the son in possession, and the son thereupon makes the improvement stipulated, equity will regard the father as trustee for the son.¹ And where a devisee prevents the execution of a codicil in favor of his brother by agreeing to convey to his brother a part of the property devised to him, he will be held a trustee for the latter to the extent of the benefit which testator intended to give him by the codicil.²

SEC. 1682. **Same—By instrument in writing.**—Before the passage of the statute of frauds,³ a trust in lands could be created or transferred by an oral declaration; but since that statute all creations or declarations of express trusts in real estate are required to be manifested and proved by an instrument in writing, signed by the party creating or declaring the trust.⁴ The statute,

script, "You can consider the money on interest."

Hamer v. Sidway, 124 N. Y. 538; s.c. 27 N. E. Rep. 256; 12 L. R. A. 462.

Where one signed and sealed a deed to a trustee in trust for his wife, and acknowledged it, and put it on record, and kept the deed in his possession, and declared openly and repeatedly to his wife and to her brothers and sisters that it was a completed provision for her, and that she was perfectly protected by it, as matter of law the deed was sufficiently delivered; and it is the duty of the court to establish the trust.

Adams v. Adams, 88 U. S. (21 Wall.) 185; bk. 22 L. ed. 504.

¹ The possession of the son conveys notice to the world of his equitable title and of his right to the legal title.

Frame v. Frame, 32 W. Va. 463; s.c. 9 S. E. Rep. 901; 5 L. R. A. 323.

² *Ragsdale v. Ragsdale*, 68 Miss. 92; s.c. 8 So. Rep. 315; 11 L. R. A. 316.

³ 29 Car. II., c. 3, § 7.

⁴ *Walker v. Locke*, 59 Mass. (5 Cush.) 90;

Smith v. Matthews, 3 DeG., F. & J. 139;

1 Spence Eq. Jur. 497.

See: *Patton v. Beecher*, 62 Ala. 579;

De Laurencel v. De Boom, 48 Cal. 581;

Hearst v. Pujol, 44 Cal. 230;

Dean v. Dean, 6 Conn. 285;

Kingsbury v. Burnside, 58 Ill.

310; s.c. 11 Am. Rep. 67;

Ratliff v. Ellis, 2 Iowa 59; s.c. 63 Am. Dec. 471;

Bates v. Hurd, 65 Me. 180;

Bragg v. Paulk, 42 Me. 502;

Brown v. Brown, 12 Md. 87;

McCubbin v. Cromwell, 7 Gill & J. (Md.) 157, 164;

Faxon v. Folvey, 110 Mass. 392;

Homer v. Homer, 107 Mass. 82;

Bartlett v. Bartlett, 80 Mass. (14 Gray) 277, 278;

Arms v. Ashley, 21 Mass. (4 Pick.) 71;

Gibson v. Foote, 40 Miss. 788;

Cornelius v. Smith, 55 Mo. 528;

Packard v. Putnam, 57 N. H. 43;

Moore v. Moore, 38 N. H. 382;

Hall v. Young, 37 N. H. 134;

Barnes v. Taylor, 27 N. J. Eq. (12 C. E. Gr.) 259;

however, does not apply to implied,¹ resulting,² and constructive³ trusts; and these may therefore be proved by parol.⁴ The statute of frauds does not apply to the creation of a trust, it only governs the method of establishing its existence;⁵ but the statute of frauds requires that the writing shall clearly and distinctly set forth and manifest the terms and conditions of the trust, before the court will be required to carry it into execution.⁶ If the writing is but an imperfect presentation of the trust, and the terms there stated are uncertain, parol evidence is not admissible to supply the defects.⁷

Lynch *v.* Clements, 24 N. J. Eq. (9 C. E. Gr.) 431;

Berrien *v.* Berrien, 4 N. J. Eq. (3 Green) 37;

Wheeler *v.* Reynold, 66 N. Y. 227, 234;

Sturtevant *v.* Sturtevant, 20 N. Y. 39; s.c. 75 Am. Dec. 371;

Abeel *v.* Radcliff, 13 John. (N. Y.) 297; s.c. 7 Am. Dec. 377;

Movan *v.* Hays, 1 John. Ch. (N. Y.) 339;

Shelton *v.* Shelton, 5 Jones (N. C.) Eq. 292;

Wallace *v.* Wainwright, 87 Pa. St. 263;

Lloyd *v.* Lynch, 28 Pa. St. 419; s.c. 70 Am. Dec. 137;

Rutledge *v.* Smith, 1 McC. (S. C.) Ch. 119;

Pinney *v.* Fellows, 15 Vt. 525;

Johnson *v.* Ronald, 4 Munf. (Va.) 77;

Allen *v.* Withrow, 110 U. S. 119; bk. 28 L. ed. 90;

Osterman *v.* Baldwin, 73 U. S. (6 Wall.) 116; bk. 18 L. ed. 730;

Flagg *v.* Mann, 2 Sum. C. C. 486; s.c. 7 Fed. Cas. No. 4847;

Fordyce *v.* Willis, 3 Bro. Ch. 577;

Wood *v.* Cox, 2 My. & Cr. 684;

Ambrose *v.* Otty, 1 Pr. Wms. 322.

No trust in relation to real property can be established in Iowa except by an instrument in writing, executed in the same manner as a deed of conveyance.

Allen *v.* Withrow, 110 U. S. 119; bk. 28 L. ed. 90.

The statute of frauds has not been adopted in all the states of the Union, and in those states where it has not been adopted

a trust may be proven by parol.

Foy *v.* Foy, 2 Hayw. (N. C.) 131;

Miller *v.* Thatcher, 9 Tex. 482; s.c. 60 Am. Dec. 172;

4 Kent Com. (13th ed.) 305.

¹ See: *Post*, § 1698, *et seq.*

² See: *Post*, § 1704.

³ See: *Post*, § 1702.

⁴ 1 Spence Eq. Jur. 497, 512.

See: *Post*, § 1700.

⁵ *Steere v. Steere*, 5 John. Ch. (N. Y.) 1; s.c. 9 Am. Dec. 256.

See: *Trapnall v. Brown*, 19 Ark. 48;

McClellan v. McClellan, 65 Me. 500;

Unitarian Soc. v. Woodbury, 14 Me. 281;

Orleans v. Chatham, 19 Mass. (2 Pick.) 29;

Barrell v. Joy, 16 Mass. 221, 223;

Cornelius v. Smith, 55 Mo. 528;

Brown v. Combs, 29 N. J. L. (5 Dutch.) 36;

Jackson ex d. Erwin v. Moore, 6 Cow. (N. Y.) 706;

Movan v. Hays, 1 John. Ch. (N. Y.) 339;

Brown v. Brown, 1 Strob. (S. C.) Eq. 363;

Pinney v. Fellows, 15 Vt. 525;

Flagg v. Mann, 2 Sum. C. C. 486; s.c. 7 Fed. Cas. No. 4847;

Davies v. Otty, 33 Beav. 540;

Ambrose v. Ambrose, 1 Pr. Wms. 322;

Forster v. Hale, 3 Ves. 696, 707; s.c. 7 Ves. 308; 4 Rev. Rep. 128.

⁶ *Steere v. Steere*, 5 John. Ch. (N. Y.) 1; s.c. 9 Am. Dec. 256.

⁷ *Steere v. Steere*, 5 John. Ch. (N. Y.) 1; s.c. 9 Am. Dec. 256.

See: *Patton v. Beecher*, 62 Ala. 579;

SEC. 1683. **Same—By will.**—Whenever a person, by will, gives property and points out the object, the property, and the way in which it shall go, a trust is created, unless the deviser shows clearly that his desire expressed is to be controlled by the trustee, and that he shall have an option to defeat it.¹ Intimations in a will of hope or recommendation will raise a trust,² because they may be treated as imperative, and should be so treated, because the objects of the precatory language are certain, and the subjects contemplated are also certain; unless, indeed, a clear distinction or choice to act or not to act is given, or the prior dispositions of the property impair absolute or uncontrollable beneficiary ownership.³

SEC. 1684. **Same—Form of words.**—No particular or set form of words is necessary to be used in a deed or other instrument in order to create a trust;⁴ it may be shown

- Russell v. Switzer, 63 Ga. 711;
 Chadwick v. Perkins, 3 Me. 399;
 Walker v. Locke, 59 Mass. (5 Cush.) 90;
 Abeel v. Radcliff, 13 John. (N. Y.) 297; s.c. 7 Am. Dec. 371;
 Parkhurst v. Van Cortland, 1 John. (N. Y.) 274;
 Wheeler v. Smith, 50 U. S. (9 How.) 55; bk. 13 L. ed. 44;
 Forster v. Hale, 3 Ves. 696, 707; s.c. 5 Ves. 308; 4 Rev. Rep. 128;
 Brydges v. Brydges, 3 Ves. 120;
 Wright v. Wright, 1 Ves. Sr. 409;
 2 Pom. Eq. Jur., § 1009.
¹ Inglis v. Sailors' Snug Harbor, 28 U. S. (3 Pet.) 99; bk. 7 L. ed. 617.
² Harrison v. Harrison's Admr., 2 Gratt. (Va.) 1; s.c. 44 Am. Dec. 365;
 Post, § 1704.
 See: Harper v. Phelps, 21 Conn. 257;
 Williams v. Worthington, 49 Md. 572; s.c. 33 Am. Rep. 286;
 Barrett v. Marsh, 126 Mass. 213, 216;
 Hess v. Singler, 114 Mass. 56;
 Foose v. Whitmore, 82 N. Y. 405; s.c. 37 Am. Rep. 572;
 McMahon v. Allen, 4 E. D. Smith (N. Y.) 519;
 Cook v. Ellington, 6 Jones (N. C.) Eq. 371;
 Pennock's Estate, 20 Pa. St. 268, 274; s.c. 59 Am. Dec. 718;
 Anderson v. Hammond, 2 Lea (Tenn.) 281; s.c. 31 Am. Rep. 612;
 Inglis v. Trustee of Sailors' Snug Harbor, 28 U. S. (3 Pet.) 99; bk. 7 L. ed. 617;
 Re Hutchinson, L. R. 8 Ch. Div. 540; s.c. 25 Moak Eng. Rep. 459.
³ Harrison v. Harrison's Admr., 2 Gratt. (Va.) 1; s.c. 44 Am. Dec. 365.
 Citing: Jeremy Eq. Jur., b. 1, c. 1, § 2, pp. 99, 102;
 Lewin on Trusts, c. 5, § 2, pp. 77, 81;
 2 Rep. Leg., c. 21, § 6;
 2 Stroy's Eq. Jur. (13th ed.), §§ 1068–1070.
⁴ "In trust," in a will, may be construed to create a use, if the intention of the testator or the nature of the devise require it. King v. Mitchell, 33 U. S. (8 Pet.) 326; bk. 8 L. ed. 962.
 The ordinary sense of the term "in trust" is descriptive of a fiduciary estate or technical trust; and this sense ought to be retained until the other sense is clearly established to be that intended by the testator.

to exist by letters, notes or memoranda, endorsements on envelopes, acknowledgments and admissions in equity, pleadings, and the like; ¹ provided, only, the words used manifest clearly the intention to create a trust *verba de presenti*, and that the person named shall have the beneficiary interest in the estate.² We have already seen

- King *v.* Mitchell, 33 U. S. (8 Pet.) 326; bk. 8 L. ed. 962.
- ¹ De Laurencel *v.* De Boom, 48 Cal. 581;
- Union Mut. Ins. Co. *v.* Campbell, 95 Ill. 267; s.c. 35 Am. Rep. 166;
- Moore *v.* Pickett, 62 Ill. 158;
- Kingsbury *v.* Burnside, 58 Ill. 310; s.c. 11 Am. Rep. 67;
- McLaurie *v.* Partlow, 53 Ill. 340;
- McClellan *v.* McClellan, 65 Me. 500;
- Bates *v.* Hurd, 65 Me. 180;
- Montague *v.* Hayes, 76 Mass. (10 Gray) 609;
- Scituate *v.* Hanover, 33 Mass. (16 Pick.) 222;
- Barrell *v.* Joy, 16 Mass. 221;
- Patton *v.* Chamberlain, 44 Mich. 5; s.c. 5 N. W. Rep. 1037;
- Norman *v.* Burnett, 25 Miss. 183;
- Packard *v.* Putnam, 57 N. H. 43;
- Hutchinson *v.* Tindall, 17 N. J. Eq. (2 C. E. Gr.) 357;
- Baldwin *v.* Humphrey, 44 N. Y. 609;
- Wright *v.* Douglass, 7 N. Y. 564;
- Throop *v.* Hatch, 3 Abb. (N. Y.) Pr. 23;
- Tracy *v.* Tracy, 3 Bradf. (N. Y.) 57;
- Fisher *v.* Fields, 10 John. (N. Y.) 495;
- Steere *v.* Steere, 5 John. Ch. (N. Y.) 1; s.c. 9 Am. Dec. 256;
- Cozine *v.* Graham, 2 Paige Ch. (N. Y.) 177;
- Broadrup *v.* Woodman, 27 Ohio St. 553;
- Ivory *v.* Burns, 56 Pa. St. 300;
- Ray *v.* Simmons, 11 R. I. 266; s.c. 23 Am. Rep. 447;
- Johnson *v.* Delony, 35 Tex. 42;
- Barron *v.* Barron, 24 Vt. 375;
- Pratt *v.* Ayer, 3 Chand. (Wis.) 265;
- Smith *v.* Matthews, 3 DeG., F. & J. 139;
- Forster *v.* Hale, 3 Ves. 696; s.c. 5 Ves. 308; 4 Rev. Rep. 128.
- ² Cockrill *v.* Armstrong, 31 Ark. 580;
- Hill *v.* Den, 54 Cal. 6;
- Selden's Appeal, 31 Conn. 548;
- Russell *v.* Switzer, 63 Ga. 711;
- Zuver *v.* Lyons, 40 Iowa 510;
- Barkley *v.* Lane's Exrs., 6 Bush (Ky.) 587;
- Taft *v.* Taft, 130 Mass. 461;
- McElroy *v.* McElroy, 113 Mass. 509;
- Montague *v.* Hays, 76 Mass. (10 Gray) 609;
- Cleveland *v.* Hallett, 60 Mass. (6 Cush.) 403;
- Scituate *v.* Hanover, 33 Mass. (16 Pick.) 222;
- Arms *v.* Ashley, 21 Mass. (4 Pick.) 71;
- Orleans *v.* Chatham, 19 Mass. (2 Pick.) 29;
- Toms *v.* Williams, 41 Mich. 552; s.c. 2 N. W. Rep. 814;
- Lyle *v.* Burke, 40 Mich. 499;
- Ready *v.* Kearsley, 14 Mich. 225;
- Morrison *v.* Kinstra, 55 Miss. 71;
- Norman *v.* Burnett, 25 Miss. 183;
- Smith *v.* Bowen, 35 N. Y. 83;
- Tobias *v.* Ketchum, 32 N. Y. 319;
- Wright *v.* Douglass, 7 N. Y. 564;
- Fisher *v.* Fields, 10 John. (N. Y.) 495;
- Gomez *v.* Tradesman's Bank, 4 Sandf. (N. Y.) 102;
- Wallace *v.* Wainwright, 87 Pa. St. 263;
- Raybold *v.* Raybold, 20 Pa. St. 308;
- Gadsden *v.* Whaley, 14 S. C. 210;
- Richardson *v.* Inglesby, 13 Rich. (S. C.) Eq. 59;
- Whitcomb *v.* Cardell, 45 Vt. 24;
- Barron *v.* Barron, 24 Vt. 375;
- Porter *v.* Bank of Rutland, 19 Vt. 410;
- Harris' Exrs. *v.* Barnett, 3 Gratt. (Va.) 339;
- Smith *v.* Ford, 48 Wis. 115; s.c. 2 N. W. Rep. 134; 4 N. W. 462;
- White *v.* Fitzgerald, 19 Wis. 480;
- Pratt *v.* Ayer, 3 Chand. (Wis.) 265;
- Kitchen *v.* Bedford, 80 U. S. (13 Wall.) 413; bk. 20 L. ed. 637;

that words of entreaty, hope, desire, or recommendation are sufficient to declare a trust where they leave no uncertainty as to the intention of the testator to create a trust, the property to be subjected to the trust, and the person to be benefited by it;¹ but mere words of recommendation or desire do not create a trust in an absolute devisee or legatee,² where the testator does not, by express words, show that the recommendation was intended to be obligatory.³ A naked promise to create a trust will not be sufficient to raise a trust, either express or implied;⁴ but if such promise is made on a valuable consideration, such promise will raise an implied trust which will be enforced in a court of equity.⁵

- Wheeler v. Smith, 50 U. S. (9 How.) 55; bk. 13 L. ed. 44;
 Slocum v. Marshall, 2 Wash. C. C. 397; s.c. Fed. Cas. No. 12953;
 2 Co. Litt. (19th ed.) 290b;
 1 Spence Eq. Jur. 506, 507.
Pennock's Estate, 20 Pa. St. 268, 274-280; s.c. 59 Am. Dec. 718.
 See: *McRee's Admrs. v. Means*, 34 Ala. 349;
Cockrill v. Armstrong, 31 Ark. 580;
Harper v. Phelps, 21 Conn. 257;
Lines v. Darden, 5 Fla. 51;
Ingraham v. Fraley, 29 Ga. 553;
Collins v. Carlisle, 7 B. Mon. (Ky.) 13;
Dresser v. Dresser, 46 Me. 48;
Williams v. Worthington, 49 Md. 572; s.c. 33 Am. Rep. 286;
Tolson v. Tolson, 10 Gill & J. (Md.) 159;
Spooner v. Lovejoy, 108 Mass. 529;
Lucas v. Lockhardt, 18 Miss. (10 Smed. & M.) 466; s.c. 48 Am. Dec. 766;
Erickson v. Willard, 1 N. H. 217;
Van Duyne, 14 N. J. Eq. (1 McCart.) 397;
Foose v. Whitmore, 82 N. Y. 405; s.c. 37 Am. Rep. 572;
Young v. Young, 68 N. C. 309;
Cook v. Ellington, 6 Jones (N. C.) Eq. 371;
Paisley's Appeal, 70 Pa. St. 153;
Lesesne v. Witte, 5 S. C. 450;
Harrison v. Harrison's Admx., 2 Gratt. (Va.) 1; s.c. 44 Am. Dec. 365;
Harding v. Glyn, 1 Atk. 469; s.c. 2 Eq. Ld. Cas. 1833-1848, 1857-1866;
 2 Pom. Eq. Jur., §§ 1014-1017.
⁵ *Pennock's Estate*, 20 Pa. St. 268, 274-280; s.c. 59 Am. Dec. 718.
 See: *Hess v. Singler*, 114 Mass. 56, 59;
Spooner v. Lovejoy, 108 Mass. 529, 534;
Wood v. Seward, 4 Redf. (N. Y.) 271, 275;
Second Reformed Presbyterian Church v. Disbrow, 52 Pa. St. 219, 224;
Kinter v. Jenks, 43 Pa. St. 445, 448;
Walker v. Hall, 34 Pa. St. 483, 487.
³ *Burt v. Herron*, 66 Pa. St. 400, 402.
⁴ But a trust will be enforced notwithstanding the consideration is voluntary, where created and declared in conformity to statute.
Lane v. Ewing, 31 Mo. 75; s.c. 77 Am. Dec. 632.
⁵ *Mansur v. Willard*, 57 Mo. 347;
Lane v. Ewing, 31 Mo. 75; s.c. 77 Am. Dec. 632;
Thompson v. Branch, 1 Meigs (Tenn.) 390, 391; s.c. 33 Am. Dec. 153.
 See: *Andrews v. Hobson*, 23 Ala. 219;
Estate of Webb, 49 Cal. 541;
Minor v. Rogers, 40 Conn. 512; s.c. 16 Am. Rep. 69;
Olney v. Howe, 89 Ill. 556; s.c. 31 Am. Rep. 105;

SEC. 1685. **Same—Words of limitation.**—In the limitation of trusts the same technical words required in creating legal estates at common law are not required to be used. Thus, a fee-simple passes by a conveyance in trust where such estate is necessary to the execution of the trust, although the word “heirs” is not used.¹ This is on the general principle that the estate and powers of a trustee are commensurate with the trust confided in him.² This rule applies only to those states in which the

- Otis v. Beckwith*, 49 Ill. 121;
Wyble v. McPheters, 52 Ind. 393;
Huston v. Markley, 49 Iowa 162;
Taylor v. Henry, 48 Md. 550; s.c.
 30 Am. Rep. 486;
McNulty v. Cooper, 3 Gill & J.
 (Md.) 214;
Davis v. Ney, 125 Mass. 590; s.c.
 28 Am. Rep. 272;
Stone v. Hackett, 78 Mass. (12
 Gray) 227;
Henderson v. Henderson, 21 Mo.
 379;
Owens v. Ownes, 23 N. J. Eq.
 (8 C. E. Gr.) 60;
Young v. Young, 80 N. Y. 422;
 s.c. 36 Am. Rep. 634;
Martin v. Funk, 75 N. Y. 134;
 s.c. 31 Am. Rep. 446;
Dellinger's Appeal, 71 Pa. St.
 425;
Hays v. Quay, 68 Pa. St. 263;
Blanchard v. Sheldon, 43 Vt. 512;
Adams v. Adams, 88 U. S. (21
 Wall.) 185; bk. 22 L. ed. 504;
Neves v. Scott, 50 U. S. (9 How.)
 196; bk. 13 L. ed. 102.
¹ *Chamberlain v. Thompson*, 10
 Conn. 243; s.c. 26 Am. Dec.
 390;
Morton v. Barrett, 22 Me. 357;
 s.c. 39 Am. Dec. 575;
Gould v. Lamb, 52 Mass. (11
 Met.) 84; s.c. 45 Am. Dec.
 187;
Sandford v. Irby, 3 Barn. & Ald.
 654; s.c. 5 Eng. C. L. 376;
Houston v. Hughes, 6 Barn. & C.
 403; s.c. 13 Eng. C. L. 188;
Murthwaite v. Jenkinson, 2 Barn.
 & C. 358; s.c. 9 Eng. C. L. 162;
Doe d. Player v. Nicholls, 1 Barn.
 & C. 336; s.c. 8 Eng. C. L. 144;
Tenny d. Gibbs v. Moody, 3 Bing.
 3; s.c. 11 Eng. C. L. 12;
Oates d. Markham v. Cooke, 3
 Burr. 1684, 1686;
Harton v. Harton, 7 Durnf. & E.
 (7 T. R.) 652; s.c. 4 Rev. Rep.
 537;
Silvester v. Wilson, 2 Durnf. &
 E. (2 T. R.) 444; s.c. 1 Rev.
 Rep. 519;
Shaw v. Wright, 1 Eq. Cas. Abr.
 176;
Wykham v. Wykham, 18 Ves.
 414;
Gibson v. Montfort, 1 Ves. 485;
Biscoe v. Perkins, 1 Ves. & Bea.
 489.
² *Goodrich v. Proctor*, 76 Mass. (1
 Gray) 567, 570;
Gould v. Lamb, 52 Mass. (11
 Met.) 84; s.c. 45 Am. Dec.
 187.
 See: *Pearce v. Savage*, 45 Me.
 90;
Deering v. Adams, 37 Me. 244,
 264;
Farquharson v. Eichelberger, 15
 Md. 63, 73;
Wells v. Heath, 76 Mass. (10
 Gray) 25;
*Attorney-General v. Proprietors
 of the Meeting-house in Federal
 Street*, 69 Mass. (3 Gray) 1, 48;
Cleveland v. Hallett, 60 Mass. (6
 Cush.) 403, 406;
Newhall v. Wheeler, 7 Mass. 189;
Angell v. Rosenbury, 12 Mich. 266;
Fisher v. Fields, 10 John. (N. Y.)
 495, 505;
Welch v. Allen, 21 Wend. (N. Y.)
 147;
Stanley v. Colt, 72 U. S. (5 Wall.)
 168; bk. 18 L. ed. 503;
Neilson v. Lagow, 53 U. S. (12
 How.) 98; bk. 13 L. ed. 909
Villiers v. Villiers, 2 Atk. 71;
Oates v. Cooke, 3 Burr. 1684;
Loveacres v. Blight, Cowp. 356;
Trent v. Hanning, 7 East 97;
Doe d. Davies v. Davies, 1 Ad. &
 E. N. S. (1 Q. B.) 438; s.c. 41
 Eng. C. L. 611;
Shaw v. Weigh, 2 Stra. 803;

common-law rule, in respect to words of limitation, still prevails; and not to those in which words of limitation are not now required in order to create estates in fee-simple.

SEC. 1686. *Estate taken by trustee.*—We have seen in the preceding section that the general rule is that every trustee is presumed to take an estate as large as may be necessary for the execution of the trust reposed in him.¹

Gibson v. Montfort, 1 Ves. Sr. 485.

¹ McCoster v. Brady, 1 Barb. Ch. (N. Y.) 329;

Norton v. Norton, 2 Sandf. (N. Y.) 296;

Ellis v. Fisher, 3 Sneed (Tenn.) 231; s.c. 65 Am. Dec. 52;

Doe d. Shelley v. Edlin, 4 Ad. & E. 582, 588; s.c. 31 Eng. C. L. 262, 264;

Doe d. Pratt v. Timins, 1 Barn. & Ald. 530;

Doe d. Player v. Nicholls, 1 Barn. & C. 336; s.c. 8 Eng. C. L. 144;

Doe d. White v. Simpson, 5 East 562;

Doe v. Needs, 2 Mees. & W. 129. Thus where the trust is to mortgage lands, or to convey them in fee, the trustee will be understood to take a fee, since this quantity of estate will be required to perform the trust (Bagshaw v. Spencer, 1 Ves. Sr. 142); and if the trustee is empowered to receive rents and profits, and to apply them to the use of a person for life, he will take an estate which will enable him to maintain ejectment.

Cox v. Walker, 26 Me. 504:

McLean v. McDonald, 2 Barb. (N. Y.) 534;

Mordecai v. Parker, 3 Dev. (N. C.) 425;

Canoy v. Troutman, 7 Ired. (N. C.) L. 155;

Zabriskie v. Morris & E. R. Co., 33 N. J. Eq. (6 Stew.) 22;

Lair v. Hunsicker, 28 Pa. St. 115;

Beach v. Beach, 14 Vt. 28; s.c. 39 Am. Dec. 204;

Goodlittle v. Jones, 7 Durnf. & E. (7 T. R.) 47.

See: Russell v. Lewis, 19 Mass. (2 Pick.) 508, 510.

In Doe d. Shelley v. Edlin, 4 Ad. & E. 582, 588; s.c. 31 Eng. C. L. 262, 264, the court say: "In Doe d. Player v. Nicholls, 1 Barn. & C. 336; s.c. 8 Eng. C. L. 144, BAYLEY, J., in delivering his judgment, says: 'It may be laid down as a general rule, that where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer, and therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it.' And he adds that Doe d. Pratt v. Timins, 1 Barn. & Ald. 530, and Doe d. White v. Simpson, 5 East 162, are authorities upon that point. And HOLROYD, J., in the same case says that a trust estate is not to continue beyond the period required for the purpose of the trust. If the rules above mentioned, as laid down by these judges, be confined so as to say that the trustees originally take only that quantity of interest which the purposes of the trust require as far as is expressed by the words used in the instrument itself, or by the apparent intention of the maker of the instrument consistent with the language of it, then I admit the rule to be correct. But if it be meant to apply to all cases in general where the trusts are no longer capable of being carried into effect, but yet the instrument, by the legal construction of it, already gave an estate which might continue for a longer period than that during which the objects of the trust had an actual existence,

In those cases where the equitable estate is larger than the legal estate conveyed, the legal estate will be enlarged by implication to meet the proper demands of the trust ;¹ and where the duties imposed on the trustee only require that there be vested in him an estate *pur autre vie*,² the legal interest will be cut down to that extent.³

SEC. 1687. **Same—Remainder.**—We have already seen⁴

then that in my mind will admit of a different consideration. I admit that, for a great number of years past, the courts have held that the trustees take that quantity of interest which the purposes of the trust require ; and the question is, not whether the maker of the instrument has used words of limitation or expressions adequate to convey an estate of inheritance, but whether the exigencies of the trust require a fee, or can be satisfied by a less estate. This is established in a great variety of cases not necessary for me to go through ; they are of a very multifarious description, and many of them embracing very nice distinctions, and admitting a difficulty in their being reconciled. I am satisfied with their established rule as I have above admitted ; they will be found in the references of the cases *Doe d. Pratt v. Timins*, 1 Barn. & Ald. 530, and *Doe d. White v. Simpson*, 5 East 162, above mentioned, to have been cited by Mr. Justice BAYLEY ; and I may refer to the subsequent cases of *Doe d. Brune v. Martyn*, 8 Barn. & C. 497 ; s.c. 15 Eng. C. L. 246 ; *Warter v. Hutchinson*, 1 Barn. & C. 721 ; s.c. 8 Eng. C. L. 304 ; and *Glover v. Monckton*, 3 Bing. 13 ; s.c. 11 Eng. C. L. 16. But these cases are such as that the courts held upon the construction of the instruments themselves, and for the purpose of carrying the trusts into execution, and in some instances coupled with the apparent intention of the testator, that the trustees took only an estate either for years, or for an un-

certain chattel interest, or for the lives of themselves or others, or a base fee determinable upon certain events ; and that construction has been put upon the various wills, though in some of them the testator has used words of limitation, or which of themselves alone, if not coupled with other expressions, would seem to carry an estate of inheritance."

¹ See: *North v. Philbrook*, 34 Me. 532, 537 ;

Williams v. First Presbyterian Soc., 1 Ohio St. 478 ;

Neilson v. Lagow, 53 U. S. (12 How.) 98, 110 ; bk. 13 L. ed. 909.

But if a lesser estate be expressly limited, although it be entirely inadequate to carry the trusts into effect, a greater estate cannot be taken by implication.

Warter v. Hutchinson, 1 Barn. & C. 721, 747 ; s.c. 8 Eng. C. L. 304.

Thus on a conveyance to trustees without words of inheritance a fee will be implied if necessary to effect the purposes of the trust.

Chamberlain v. Thompson, 10 Conn. 243 ; s.c. 26 Am. Dec. 390 ;

Zabriskie v. Morris & E. R. Co., 33 N. J. Eq. (6 Stew.) 22 ;

Fisher v. Fields, 10 John. (N. Y.) 495, 506 ;

Welch v. Allen, 21 Wend. (N. Y.) 147.

² See : *Ante*, § 625, *et seq.*

³ *Doe v. Hicks*, 7 Durnf. & E. (7 T. R.) 433 ;

Balgrave v. Balgrave, 4 Ex. 569.

See : *Ackland v. Lutley*, 9 Ad. & E. 879 ; s.c. 36 Eng. C. L. 457 ;

Henderson v. Williamson, 1 Keen 41.

⁴ See : *Ante*, § 1686.

that a trustee cannot in general be allowed, by mere construction or implication, to take a greater estate than the nature of the trust reposed in him demands ;¹ hence where by express limitation of the deed the trustee has a larger estate, and the trust is only for a life estate, there will be raised a resulting use in the remainder to the grantor and his heirs, which will be executed in the beneficiary under the statute of uses, leaving in the trustee the legal life estate merely.² But where the equitable estate is indefinite in its duration there will be no execution of the resulting use in the grantor until the trust is determined, or the estate rendered certain.³

SECTION III.—DELIVERY AND ACCEPTANCE.

SEC. 1688. Delivery of instrument.

SEC. 1689. Acceptance—By trustee.

SEC. 1690. Same—Same—Effect of declination.

SEC. 1691. Same—By *cestui que trust*.

SECTION 1688. **Delivery of instrument.**—Where a trust is created either by deed, by will, or other instrument in

¹ Doe v. Simpson, 3 East 172 ;

Doe d. Woodcock v. Barthrop, 5 Taunt. 385 ; s.c. 1 Marsh 90 ; 1 Eng. C. L. 200.

See : Gould v. Lamb, 52 Mass. (11 Met.) 84 ; s.c. 45 Am. Dec. 187 ;

Upham v. Varney, 15 N. H. 462.

² Liptrot v. Holmes, 1 Ga. 381 ;

Pearce v. Savage, 45 Me. 90 ;

Deering v. Adams, 37 Me. 264 ;

Morton v. Barrett, 22 Me. 257 ; s.c. 39 Am. Dec. 575 ;

Farquharson v. Eichelberger, 15 Md. 63, 73 ;

Wells v. Heath, 76 Mass. (10 Gray) 17, 25 ;

Cleaveland v. Hallett, 60 Mass. (6 Cush.) 403, 406 ;

Norton v. Norton, 2 Sandf. (N. Y.) 296 ;

Renziehausen v. Keyser, 48 Pa. St. 351 ;

Bush's Appeal, 33 Pa. St. 85 ;

Ward v. Amory, 1 Curtis C. C. 419 ; s.c. Fed. Cas. No. 17146 ;

Doe d. Cadogan v. Ewart, 7 Ad. & E. 636 ; s.c. 34 Eng. C. L. 337 ;

Doe v. Timins, 1 Barn. & Ald. 547 ;

Doe d. Player v. Nicholls, 1 Barn. & C. 336 ; s.c. 8 Eng. C. L. 144 ;

Barker v. Greenwood, 4 Mees. & W. 421 ;

Doe d. Davies v. Davies, 1 Q. B. 438 ; s.c. 41 Eng. C. L. 611 ;

Doe d. Lessee of Woodcock v. Barthrop, 5 Taunt. 382 ; s.c. 1 Marsh 90 ; 1 Eng. C. L. 200.

³ Comby v. McMichael, 19 Ala. 747 ; Liptrot v. Holmes, 1 Ga. 381 ; Morgan v. Moore, 69 Mass. (3 Gray) 319, 323 ;

Selden v. Vermilya, 3 N. Y. 525 ;

Bush's Appeal, 33 Pa. St. 85 ;

Stacy v. Rice, 27 Pa. St. 75 ; s.c. 67 Am. Dec. 447 ;

Doe d. Davies v. Davies, 1 Ad. & E. N. S. (1 Q. B.) 437 ; s.c. 41 Eng. C. L. 611 ;

Doe d. Cadogan v. Ewart, 7 Ad. & E. 636 ; s.c. 34 Eng. C. L. 337 ;

Doe d. Player v. Nicholls, 1 Barn. & C. 341 ; s.c. 8 Eng. C. L. 144.

writing, the instrument should be delivered; but this need not be a formal, ceremonious delivery. Any act on the part of the grantor which manifests an intention to create such estate will be sufficient. Thus where a husband signed and sealed a deed to a trustee, in trust for his wife, and put the deed on record, but thereafter kept the instrument in his possession, this was held to be a sufficient delivery to create an equitable title in the wife.¹ And it has been said that a deed to two trustees is sufficiently delivered when it is placed in the hands of one of them, who received and held it for some time, and then gave it to the party chiefly interested, for safe keeping.²

SEC. 1689. **Acceptance—By trustee.**—It is not essential to the validity of a trust, created by the beneficial owner of the trust property, that there should be a formal acceptance or declaration of the trust by the trustee in whom the legal interest is vested.³ The fact that the trustee in a deed of trust fails to qualify, according to statute, does not affect the validity of the deed, nor give the grantor the right to revoke it. The assent of the trustee is not necessary, because if he refuse, or for any reason fail to act, equity will execute the deed.⁴ But the mere making of a trust deed without any acceptance, either express or implied, by the trustee, is not sufficient to vest in the trustee the title to the land; to accomplish this the trustee must in some way accept the trust.⁵ Parol proof is admissible to show that the trust was never ac-

¹ *Adams v. Adams*, 88 U. S. (21 Wall.) 185; bk. 22 L. ed. 504.

² *Hitz v. National Metropolitan Bank*, 111 U. S. 722; bk. 28 L. ed. 577.

³ *Stone v. King*, 7 R. I. 353; s.c. 84 Am. Dec. 557;

Furman v. Fisher, 4 Cold. (Tenn.) 626, 631; s.c. 94 Am. Dec. 210;

Saunders v. Harris, 1 Head (Tenn.) 206;

Field v. Arrowsmith, 3 Humph. (Tenn.) 442; s.c. 39 Am. Dec. 185;

Brevard v. Neely, 2 Sneed (Tenn.) 164, 171.

⁴ *Furman v. Fisher*, 4 Cold. (Tenn.) 626; s.c. 94 Am. Dec. 210.

⁵ *Baldwin v. Porter*, 12 Conn. 473; *Cooper v. McClun*, 16 Ill. 435; *Maccubbin v. Cromwell*, 2 Gill & J. (Md.) 157;

Burritt v. Silliman, 13 N. Y. 93; s.c. 64 Am. Dec. 530;

Bulkley v. De Peyster, 26 Wend. (N. Y.) 21;

Goss v. Singleton, 2 Head (Tenn.) 67;

Trask v. Donoghue, 1 Aik. (Vt.) 370;

Armstrong v. Morrill, 81 U. S. (14 Wall.) 120; bk. 20 L. ed. 765.

cepted.¹ But where the trustee has accepted the trust, and has entered on its execution, he cannot afterwards, without the consent of the *cestui que trust*, or the direction of a court of equity, surrender or discharge himself of the trust.²

SEC. 1690. **Same—Same—Effect of declination.**—Where the person named as trustee declines the trust, or refuses to act, the trust will not be allowed to fail for want of a trustee to hold the legal estate,³ but a court of equity, on proper application, will appoint another trustee, or otherwise provide for the proper execution of the trust.⁴

¹ *Armstrong v. Morrill*, 81 U. S. (14 Wall.) 120; bk. 20 L. ed. 765.

In this case a written disclaimer made several years after the execution of a trust deed by one named in such deed as trustee, to the effect that he positively refused to accept the trust intended to be created, and that he never did accept the same, or in any wise act as trustee under that instrument, was held admissible in evidence upon proof of his signature, after his death, although it was not under seal or under oath, where it was offered merely to show that he had never accepted the trust.

² *Gilchrist v. Stevenson*, 9 Barb. (N. Y.) 9;

Shepherd v. McEvers, 4 John. Ch. (N. Y.) 136; s.c. 8 Am. Dec. 531;

Cruget v. Halliday, 11 Paige Ch. (N. Y.) 314;

Lowery v. Fulton, 9 Sim. 123;

Doyle v. Blake, 2 Sch. & Lef. 231, 245; s.c. 9 Rev. Rep. 76.

³ *White v. Hampton*, 10 Iowa 238, 244; s.c. 13 Iowa 261;

Harris v. Rucker, 13 B. Mon. (Ky.) 564;

Leggett v. Hunter, 19 N. Y. 445, aff'g 25 Barb. (N. Y.) 81;

Cloud v. Calhoun, 10 Rich. (S. C.) Eq. 358;

Piatt v. Vattier, 34 U. S. (9 Pet.) 405; bk. 9 L. ed. 173.

⁴ *State Bank v. Smith*, 6 Ala. 75;

White v. Hampton, 10 Iowa 238, 244; s.c. 13 Iowa 261;

Miller v. Chittenden, 2 Iowa 315;

Harris v. Rucker, 13 B. Mon. (Ky.) 564;

Griffith's Admr. v. Griffith, 5 B. Mon. (Ky.) 511;

Druid Park Heights Co. v. Oettinger, 53 Md. 46;

Tainter v. Clark, 87 Mass. (5 Allen) 66;

Gibbs v. Marsh, 43 Mass. (2 Met.) 243;

Wilson v. Towle, 36 N. H. 129;

Burrill v. Sheil, 2 Barb. (N. Y.) 457;

Matter of Mechanics' Bank, 2 Barb. (N. Y.) 446;

Crocheron v. Jaques, 3 Edw. (N. Y.) 207;

Shepherd v. McEvers, 4 John. Ch. (N. Y.) 136; s.c. 8 Am. Dec. 561;

King v. Donnelly, 5 Paige (N. Y.) 46;

In re Ledwich, 6 Ired. (N. C.) Eq. 561;

McGirr v. Aaron, 1 Pen. & W. (Pa.) 49; s.c. 21 Am. Dec. 361;

Cloud v. Calhoun, 10 Rich. Eq. (S. C.) 358;

Gibbes v. Smith, 2 Rich. Eq. (S. C.) 131;

Furman v. Fisher, 4 Cold. (Tenn.) 626; s.c. 94 Am. Dec. 210;

Mills v. Haines, 3 Head (Tenn.) 332, 335;

Stone v. Griffin, 3 Vt. 400;

Washington, A. & G. R. Co. v. Alexandria & N. R. Co., 19 Gratt. (Va.) 592; s.c. 100 Am. Dec. 710;

Adams v. Adams, 88 U. S. (21 Wall.) 185; bk. 23 L. ed. 504;

Peter v. Beverley, 35 U. S. (10 Pet.) 532; bk. 9 L. ed. 522;

SEC. 1691. **Same—By cestui que trust.**—We have already seen that it is requisite that the declaration of a trust should be made to some one,¹ but it is not necessary that it be made to the proposed *cestui que trust*. It may be made in his absence and without his knowledge, or even for persons not in being,² whether it be for the payment of money or for any other purpose; and no expression of the assent of the person or persons for whose benefit the trust is made is required as a preliminary to the vesting of the legal estate in the trustee.³ But where property is given to a trustee for the use of a beneficiary, the assent of the latter to receive it on the condition of the grant must be signified either to the grantor or to the trustee before the trust is complete;⁴ and if he gives such assent and accepts the trust within a reasonable time after it has been created, or after he learns of the existence of such trust, its execution will be enforced.⁵ In the absence of evidence to the contrary, the assent of the *cestui que trust* to a trust created in his favor, on the conditions of the grant, will be presumed;⁶ when

Bainbridge v. Blair, 1 Beav. 495;
Howard v. Rhodes, 1 Keen 581;
Buchanan v. Hamilton, 5 Ves.
722;

2 Co. Litt. (19th ed.) 290b.

¹ See: *Ante*, § 1675, *et seq.*

² *Tompkins v. Wheeler*, 41 U. S. (16
Pet.) 106; bk. 10 L. ed. 903.

³ *Tompkins v. Wheeler*, 41 U. S. (16
Pet.) 106; bk. 10 L. ed. 903.

⁴ *Lockhart v. Wyatt*, 10 Ala. 231;
s.c. 44 Am. Dec. 481.

See: *Walton v. Tims*, 7 Ala. 470,
471;

Williams v. Everett, 14 East 582;
Scott v. Porcher, 2 Meriv. 652.

⁵ *Crocker v. Higgins*, 7 Conn. 342;
Woodbury v. Bowman, 14 Me.
154; s.c. 31 Am. Dec. 40;

Bryant v. Russell, 40 Mass. (23
Pick.) 508;
Ward v. Lewis, 21 Mass. (4 Pick.)
518, 521;

Barrell v. Joy, 16 Mass. 221;
Scull v. Reeves, 3 N. J. Eq. (2 H.
W. Gr.) 84; s.c. 29 Am. Dec.
694;

Berly v. Taylor, 5 Hill (N. Y.) 577;
Weston v. Barker, 12 John. (N.
Y.) 276; s.c. 7 Am. Dec. 319;

Shepherd v. McEvers, 4 John. Ch.
(N. Y.) 136; s.c. 8 Am. Dec. 561;
Neilson v. Blight, 1 John. Cas.
(N. Y.) 205;

Skipwith's Exrs. v. Cunningham,
8 Leigh (Va.) 271; s.c. 31 Am.
Dec. 642;

*Bank of Metropolis v. Gutt-
schlick*, 39 U. S. (14 Pet.) 19;
bk. 10 L. ed. 335.

**Trust created for benefit of third per-
son, without his knowledge at
the time, may be afterwards
affirmed and enforced by him.**

Woodbury v. Bowman, 14 Me.
154; s.c. 31 Am. Dec. 40;

*Bank of Metropolis v. Gutt-
schlick*, 39 U. S. (14 Pet.) 19;
bk. 10 L. ed. 335.

⁶ *Hempstead v. Johnston*, 18 Ark.
123; s.c. 65 Am. Dec. 458;
Saylors v. Saylors, 3 Heisk.
(Tenn.) 525;

Farquharson v. McDonald, 2
Heisk. (Tenn.) 404, 409;

Stockard v. Stockard's Admr., 7
Humpb. (Tenn.) 303; s.c. 46
Am. Dec. 79;

Furman v. Fisher, 4 Cold. (Tenn.)
626; s.c. 94 Am. Dec. 210;

otherwise, affirmative acts must be shown establishing assent.¹ Consequently an estate vested in his trustee is not overreached by the lien of a judgment obtained against the grantor, intermediate the creation of the trust estate and the acts of the beneficiary indicating his assent to the trust.² The acceptance may be given at any time after the conveyance is made, unless renounced or waived; and such acceptance, in fact, will relate back to the day of execution.³ The assent of the beneficiary being presumed, the trust cannot be revoked after the trustee has taken on himself the trust, unless the beneficiary refuses to accept.⁴

SECTION IV.—KINDS OF TRUSTS.

- SEC. 1692. Introductory—Charitable trusts.
 SEC. 1693. Active and passive trusts.
 SEC. 1694. Discretionary and directory.
 SEC. 1695. Executed and executory.
 SEC. 1696. Express trusts.
 SEC. 1697. Same—In land.
 SEC. 1698. Implied trusts—Definition.
 SEC. 1699. Same—How created.
 SEC. 1700. Same—Not within the statute of uses.
 SEC. 1701. Same—Within statute of limitations.
 SEC. 1702. Same—Constructive trusts.
 SEC. 1703. Same—Same—Trusts *de son tort*.
 SEC. 1704. Same—Same—Trusts *ex malefacio*.
 SEC. 1705. Same—Same—Acquisition and disposition of property—By trustee.
 SEC. 1706. Same—Same—Same—Fraud in.
 SEC. 1707. Same—Voluntary conveyance in fraud of creditors.
 SEC. 1708. Same—Precatory trusts.
 SEC. 1709. Same—Same—Words and expressions creating.
 SEC. 1710. Same—Same—American doctrine.
 SEC. 1711. Same—Resulting trusts—Introductory.
 SEC. 1712. Same—How created.
 SEC. 1713. Same—Same—Exception to the rule.

Skipwith's Exrs. v. Cunningham,
 8 Leigh (Va.) 271; s.c. 31 Am.
 Dec. 642.

¹ Hempstead v. Johnston, 18 Ark.
 123; s.c. 65 Am. Dec. 458.

² Skipwith's Exrs. v. Cunningham,
 8 Leigh 271; s.c. 31 Am. Dec.
 642.

³ Woodbury v. Bowman, 14 Me. 154;
 s.c. 31 Am. Dec. 40;

Furman v. Fisher, 4 Cold. (Tenn.)
 626; s.c. 94 Am. Dec. 210;

Bank of Metropolis v. Gutt-
 schlick, 39 U. S. (14 Pet.) 19;
 bk. 10 L. ed. 335.

⁴ Saylor v. Saylor, 3 Heisk. (Tenn.)
 531;

Stockard v. Stockard's Admrs., 7
 Humph. (Tenn.) 303; s.c. 46
 Am. Dec. 79.

- SEC. 1714. Same—Same—Where part of trust only declared.
 SEC. 1715. Same—Same—By payment of purchase-money.
 SEC. 1716. Same—Same—Same—Parol proof.
 SEC. 1717. Same—Same—By purchase with funds of another.
 SEC. 1718. Same—Same—Same—Requisites.
 SEC. 1719. Same—Same—Same—Reason for the rule.
 SEC. 1720. Same—Same—Same—Parol proof.
 SEC. 1721. Same—Same—By agreement to purchase for another.
 SEC. 1722. Same—Same—By payment of part of purchase price.
 SEC. 1723. Same—Statutory provisions.
 SEC. 1724. Same—When arises.
 SEC. 1725. Same—Consideration requisite.
 SEC. 1726. Same—How established—Parol evidence.
 SEC. 1727. Passive trusts.

SECTION 1692. **Introductory — Charitable trusts.**—Trusts are divided into various classes, the principal of which are active¹ and passive,² discretionary and directory,³ executed and executory,⁴ express⁵ or implied,⁶ secret or open,⁷ simple or special,⁸ and voluntary or involuntary trusts.⁹ Implied trusts are either constructive,¹⁰ or precatory,¹¹ or resultant.¹² Trusts are also spoken of as naked or dry trusts.¹³ Such trusts will not be sustained when persons equitably entitled to any property take absolutely the entire beneficial interest, and the trustee has no duty to perform; unless it be a special trust intended to accomplish some object, as to preserve contingent remainders,

¹ See : *Post*, § 1693.

² See : *Post*, §§ 1727.

³ See : *Post*, § 1694.

⁴ See : *Post*, § 1695.

It is to be observed that the terms executed and executory, when applied to modern trusts, have a different significance from that which is given to them in referring to the operation of the statute of uses upon uses.

Fearne Cont. Rem. 55, 113, 139;

4 *Kent Com.* (13th ed.) 304, 305.

⁵ See : *Post*, § 1696.

⁶ See : *Post*, §§ 1698–1726.

⁷ This species of trust is now confined principally if not exclusively to personal property, and may render the transaction fraudulent and void, whether the trust be express or implied.

See : *Plaisted v. Holmes*, 58 N. H. 294.

⁸ In *Dodson v. Ball*, 60 Pa. St. 492; s.c. 100 Am. Dec. 586, it is said that trusts are either simple or special. In the former the trustee is passive and performs no duty, and the trust is purely technical; in the latter he is active, being an agent to execute the donor's will, and the trust is operative.

See : *Stacy v. Rice*, 27 Pa. St. 75; s.c. 67 Am. Dec. 447.

⁹ A voluntary trust is an obligation arising out of a personal confidence reposed and voluntarily accepted; an involuntary trust is one created by operation of law.

Anderson's L. Dict. 1059.

¹⁰ See : *Post*, §§ 1702–1708.

¹¹ See : *Post*, §§ 1708–1710.

¹² See : *Post*, §§ 1711–1726.

¹³ See : *Post*, p. 1607.

protect property for the sole and separate use of a married woman, or from the creditors of the *cestui que trust*.¹

A gift of property may be made to charitable uses and trusts; but to be valid and enforceable in law it must be made to a trustee competent to take,² of a thing certain,³ have an ascertained beneficiary,⁴ and for a use which the law recognizes as charitable,⁵ and be so far defined as

¹ *Kay v. Scates*, 37 Pa. St. 31; s.c. 78 Am. Dec. 399.

² *Owens v. Missionary Society of the Methodist Episcopal Church*, 14 N. Y. 380; s.c. 67 Am. Dec. 160.

See: *Beekman v. Bonsor*, 23 N. Y. 298; s.c. 80 Am. Dec. 269.

In New York the law of charitable uses, as it exists in England, is not enforced (*Levy v. Levy*, 33 N. Y. 97, 120, rev'g 40 Barb. (N. Y.) 585; *Beekman v. Bonsor*, 23 N. Y. 298; s.c. 80 Am. Dec. 269), and all gifts creating trusts not expressly authorized by statute are void (*Leonard v. Bell*, 1 Thomp. & C. (N. Y.) 608, 609, aff'g 58 N. Y. 676), and charitable trusts are not excepted from the operation of the statute abolishing all use and trusts (*Clemens v. Clemens*, 37 N. Y. 59, 76).

See: *Bascom v. Albertson*, 34 N. Y. 584, aff'g 5 N. Y. Surr. Ct. 340;

Levy v. Levy, 33 N. Y. 97;

Downing v. Marshall, 23 N. Y. 366; s.c. 80 Am. Dec. 290; 23 How. (N. Y.) Pr. 4;

Beekman v. Bonsor, 23 N. Y. 298; s.c. 80 Am. Dec. 269;

McCaughal v. Ryan, 27 Barb. (N. Y.) 376;

Beekman v. People, 27 Barb. (N. Y.) 260;

Yates v. Yates, 9 Barb. (N. Y.) 324;

Ayres v. Methodist Episcopal Church, 3 Sandf. (N. Y.) 351, 371; s.c. 8 N. Y. Leg. Obs. 17.

³ *Beekman v. Bonsor*, 23 N. Y. 298; s.c. 80 Am. Dec. 269. In this case it was held that a charitable gift of a sum which is left uncertain, or in the discretion of executors who have renounced the trust, is void.

⁴ *Bascom v. Albertson*, 34 N. Y. 584, 590, aff'g 5 N. Y. Surr.

Ct. 340:

Beekman v. Bonsor, 23 N. Y. 298; s.c. 80 Am. Dec. 269;

Owens v. Missionary Society of the Methodist Episcopal Church, 14 N. Y. 380; s.c. 67 Am. Dec. 160;

Heiss v. Murphy, 40 Wis. 291.

Gift of money in trust to executors, to be applied in their discretion to the use of society for the support of indigent and respectable females, without further designation of the beneficiaries, where such executors have renounced the trust, cannot be upheld.

Beekman v. Bonsor, 23 N. Y. 298; s.c. 80 Am. Dec. 269.

Residuary legacy "to the Methodist general American missionary society appointed to preach the gospel to the poor," a society not incorporated until after the testator's death, is invalid; and the next of kin are entitled to the residue as assets undisposed of. It cannot be sustained as a gift to the society for its own benefit for want of corporate power to take at the time, nor define a charitable use with sufficient distinctness to be judicially enforced.

Owens v. Missionary Society of the Methodist Episcopal Church, 14 N. Y. 380; s.c. 67 Am. Dec. 160.

⁵ *Owens v. Missionary Society of the Methodist Episcopal Church*, 14 N. Y. 380; s.c. 67 Am. Dec. 160.

See: *Piper v. Moulton*, 72 Me. 155; *Manners v. Phila. Library Co.*, 93 Pa. St. 165; s.c. 39 Am. Rep. 741, 744;

Zeissweiss v. James, 63 Pa. St. 465; s.c. 3 Am. Rep. 558;

Updegraph v. Commonwealth, 11 Serg. & R. (Pa.) 394;

to be capable of being specifically executed by authority of the court.¹ A gift to charity which tends to create a perpetuity will be invalid,² but a present gift to a charity is never a perpetuity, though intended to be inalienable.³

In all gifts to charitable uses the law makes a very clear distinction between those parts of the instrument which declare the gift and its purposes, and those which direct the mode of its administration.⁴

Unreasonable and impracticable directions for management of a gift for charitable uses will not annul the gift.⁵ Thus, when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity, for equity will substitute another mode, so that the substantial intention will not depend on the insufficiency of the formal intention.

SEC. 1693. Active and passive trusts.—In all cases where an agency, duty, or power is imposed on the trustee, and he is required to carry into effect the general intention of the creator of the trust, it is called an active or special trust;⁶ such as to apply rents to the maintenance of the

Vidal *v.* Girard's Exrs., 43 U. S. (2 How.) 127; bk. 11 L. ed. 205; Attorney-General *v.* Hinxman, 2 Jac. & W. 270;

Chapman *v.* Brown, 6 Ves. 404; s.c. 5 Rev. Rep. 351.

Thus a court of equity will not enforce a trust where its object is the propagation of atheism, infidelity, immorality, or hostility to the existing form of government.

See: *Manners v. Phila. Library Co.*, 93 Pa. St. 165; s.c. 39 Am. Rep. 741, 744;

Zeissweiss v. James, 63 Pa. St. 465; s.c. 3 Am. Rep. 558;

Updegraph v. Commonwealth, 11 Serg. & R. (Pa.) 394;

Vidal *v.* Girard's Exrs., 43 U. S. (2 How.) 127; bk. 11 L. ed. 205.

¹ *Beekman v. Bonsor*, 23 N. Y. 298; s.c. 80 Am. Dec. 269;

Owens v. Missionary Society of the Methodist Episcopal Church, 14 N. Y. 380; s.c. 67 Am. Dec. 160.

² *Kent v. Dunham*, 142 Mass. 216; s.c. 56 Am. Rep. 667.

See: *Beardsley v. Selectmen of Bridgeport*, 53 Conn. 489; s.c. 55 Am. Rep. 152;

Piper v. Moulton, 72 Me. 155;

Fowler v. Fowler, 10 Jur. N. S. 648.

³ *City of Philadelphia v. Girard's Heirs*, 45 Pa. St. 9; s.c. 84 Am. Dec. 470.

See: *Kent v. Dunham*, 142 Mass. 216; s.c. 56 Am. Rep. 667.

⁴ *City of Philadelphia v. Girard's Heirs*, 45 Pa. St. 9; s.c. 84 Am. Dec. 470.

⁵ *City of Philadelphia v. Girard's Heirs*, 45 Pa. St. 9; s.c. 84 Am. Dec. 470.

⁶ *Anderson's L. Dict.* 1057.

See: *Leonard v. Diamond*, 31 Md. 536, 563;

Smith v. Harrington, 86 Mass. (4 Allen) 566;

Welles v. Castles, 69 Mass. (3 Gray) 323;

Upham v. Varney, 15 N. H. 462;

Douglas v. Cruger, 80 N. Y. 15;

Gott v. Cooke, 7 Paige (N. Y.) 521;

William's Appeals, 83 Pa. St. 283, 377;

beneficiary,¹ or in making repairs;² to convey the land;³ to exercise control over the estate for the purpose of preserving contingent remainders;⁴ to invest the pro-

Culbertson's Appeal, 76 Pa. St. 145;

Rife v. Geyer, 59 Pa. St. 393; s.c. 98 Am. Dec. 351;

Barnett's Appeal, 46 Pa. St. 392; s.c. 86 Am. Dec. 502;

Aiken v. Smith, 1 Sneed (Tenn.) 304;

Sherman v. Dodge, 28 Vt. 26;

Brooks v. Marbury, 24 U. S. (11 Wheat.) 78; bk. 6 L. ed. 423;

Ackland v. Lutley, 9 Ad. & E. 879; s.c. 36 Eng. C. L. 457;

Doe d. Cadogan v. Ewart, 7 Ad. & E. 636; s.c. 34 Eng. C. L. 337;

Doe d. Booth v. Field, 2 Barn. & Ad. 564; s.c. 22 Eng. C. L. 237;

Blake v. Anscombe, 1 Bos. & P. (N. R.) 25; s.c. 8 Rev. Rep. 746;

Hovell v. Barnes, Cro. Car. 382;

Robinson v. Grey, 6 East 1;

Doe d. Woodcock v. Barthrop, 5 Taunt. 382; s.c. 1 Marsh 90; 1 Eng. C. L. 200;

1 Co. Litt. (19th ed.) 290b;

1 Cruise Dig. (4th ed.) 384;

1 Prest. Abst. 143;

1 Tud. Ld. Cas. 270.

¹ Vail v. Vail, 4 Paige Ch. (N. Y.) 317;

Gerard Ins. Co. v. Chambers, 46 Pa. St. 485;

Porter v. Doby, 2 Rich. (S. C.) Eq. 49, 52;

Laurens v. Jenney, 1 Spears (S. C.) L. 356;

Doe d. Shelley v. Edlin, 4 Ad. & E. 582; s.c. 31 Eng. C. L. 261;

Silvester v. Wilson, 2 Durnf. & E. (2 T. R.) 444; s.c. 1 Rev. Rep. 519;

Doe v. Ironmonger, 3 East 533.

A trust to hold for the use and benefit of, and to apply the rents to, the beneficiary is executed in the latter, notwithstanding use is made of the word "apply."

Laurens v. Jenney, 1 Spears (S. C.) L. 356.

² Tenny d. Gibbs v. Moody, 3 Bing. 3; s.c. 11 Eng. C. L. 12;

Shapland v. Smith, 1 Bro. C. C. 75;

Brown v. Ramsden, 3 Moore 612.

³ Doe d. Shelley v. Edlin, 4 Ad. & E. 582; s.c. 31 Eng. C. L. 261;

Doe d. Stevens v. Scott, 4 Bing. 505; s.c. 13 Eng. C. L. 609;

Moot v. Buxton, 7 Ves. 209.

Where the direction in the trust merely implies a power of disposition, as this may be executed without any legal title, it is most probable that a trust of this kind would vest the legal estate directly in the beneficiary.

Jameson v. Smith, 4 Bibb (Ky.) 307;

Deering v. Adams, 37 Me. 244, 264;

Guyer v. Maynard, 6 Gill & J. (Md.) 420;

Fay v. Fay, 55 Mass. (1 Cush.) 93, 94;

Burke v. Valentine, 52 Barb. (N. Y.) 412; s.c. 5 Abb. (N. Y.) Pr. N. S. 164;

Jackson v. Schaubert, 7 Cow. (N. Y.) 187;

Dabney v. Manning, 3 Ohio 320, 321; s.c. 17 Am. Dec. 597;

Burr v. Sim, 1 Whart. (Pa.) 252, 266; s.c. 29 Am. Dec. 48;

Hope v. Johnson, 2 Yerg. (Tenn.) 123;

United States Bank v. Beverly, 35 U. S. (10 Pet.) 532; bk. 9 L. ed. 522; s.c. 42 U. S. (1 How.) 134;

bk. 11 L. ed. 75;

Reeve v. Attorney-General, 2 Atk. 223;

Lancaster v. Thornton, 2 Burr. 1027.

⁴ Vanderheyden v. Crandall, 2 Den. (N. Y.) 9, aff'd 1 N. Y. 491;

Barker v. Crandall, 4 Mees. & W. 431;

Biscoe v. Perkins, 1 Ves. & B. 485.

An active trust is created requiring legal estate in trustee by a provision in a will bequeathing land to a trustee, to be leased by him, and the income paid over to the testator's son during his life, remainder to his heirs, and with a further provision that if the trustee desires he may permit the son to let the land and collect the income, but that it is not to be liable for his debts or in anywise under his control.

Rife v. Geyer, 59 Pa. St. 393; s.c. 98 Am. Dec. 351;

ceeds or principal, or apply the income of the estate to a designated purpose;¹ to pay over the rents;² to protect the estate for a given time, or until the death of some person, or until division;³ to raise a certain sum of money, for some designated purpose, from the income of the estate; to sell or mortgage for the payment of debts, legacies, or annuities; or to purchase other lands to be settled to particular uses,⁴ and the like. And the statute will not operate on a trust to sell, notwithstanding a power be given to one of the *cestuis que trust* to control the sale in part.⁵ But a mere charge of debts or legacies, however, will not vest the estate in the trustees, unless there be some direction to them to raise and pay the money, that is, to exercise an active trust for the purpose.⁶

Barnett's Appeal, 46 Pa. St. 392;
s.c. 86 Am. Dec. 502.

¹ Exeter v. Odiorne, 1 N. H. 232;
Vaux v. Parke, 7 Watts & S. (Pa.)
19;

Ashurst v. Given, 5 Watts & S.
(Pa.) 323;

Nickell v. Handly, 10 Gratt. (Va.)
336.

² Meacham v. Steele, 93 Ill. 135;
Morton v. Barrett, 22 Me. 257;
s.c. 39 Am. Dec. 575;

Hutchins v. Heywood, 50 N. H.
500;

Adams v. Perry, 43 N. Y. 487;
Manice v. Manice, 43 N. Y. 303,
modifying 1 Lans. (N. Y.) 348;

Leggett v. Perkins, 2 N. Y. 297;
Brewster v. Striker, 2 N. Y. 19,
aff'g 1 E. D. Smith (N. Y.) 321;

McCoster v. Brady, 1 Barb. Ch.
(N. Y.) 329;

Deibert's Appeal, 78 Pa. St. 296;
Ogden's Appeal, 70 Pa. St. 501;

Wickham v. Berry, 53 Pa. St. 70;
Shankland's Appeal, 47 Pa. St.
113;

Barnett's Appeal, 46 Pa. St. 392;
s.c. 86 Am. Dec. 502;

Doe d. Gratrex v. Hompray, 6
Ad. & E. 206; s.c. 33 Eng. C.
L. 127;

White v. Barker, 1 Bing. N. C.
573; s.c. 27 Eng. C. L. 769;

Kenrick v. Beauchlerk, 3 Bos. &
P. 175, 178; s.c. 6 Rev. Rep.
746;

Anthony v. Rees, 2 Crompt. & J.
75;

Robinson v. Grey, 9 East 1;

Jones v. Say, 1 Eq. Cas. Abr.
383;

Barker v. Greenwood, 4 Mees. &
W. 429;

Neville v. Saunders, 1 Vern. 415;
Garth v. Baldwin, 2 Ves. 646.

³ Williams v. McConico, 36 Ala. 23;
Nelson v. Davis, 35 Ind. 474;

Morton v. Barrett, 22 Me. 257;
s.c. 39 Am. Dec. 575;

Posey v. Cook, 1 Hill (S. C.) L.
413;

McNish v. Guerard, 4 Strob. (S.
C.) Eq. 66.

⁴ Chamberlain v. Thompson, 10
Conn. 243; s.c. 26 Am. Dec.
390;

Wood v. Mather, 38 Barb. (N.
Y.) 473;

Vaux v. Parke, 7 Watts & S.
(Pa.) 19;

Doe d. Cadogan v. Ewart, 7 Ad.
& E. 636; s.c. 34 Eng. C. L.
337;

Murthwaite v. Jenkinson, 2 Barn.
& C. 357; s.c. 9 Eng. C. L. 162;

Spence v. Spence, 12 C. B. N. S.
(12 J. Scott N. S.) 199; s.c. 104
Eng. C. L. 199;

Smith v. Smith, 11 C. B. N. S.
(11 J. Scott N. S.) 121; s.c. 103
Eng. C. L. 121;

Curtis v. Price, 12 Ves. 89, 106;
s.c. 8 Rev. Rep. 303;

Bagshaw v. Spencer, 1 Ves. 142,
143.

⁵ Chapman v. Blissett, Talb. 145;
Wykham v. Wykham, 18 Ves.
395.

⁶ Collier v. McBeam, 34 Beav. 476;

Where the conveyance requires nothing to be done by the trustee beyond transferring the property to the beneficiary, or the like, it is called a passive trust, and is known also as a barren, dry, naked, or simple trust;¹ as where the trust is simply "to permit and suffer" the *cestui que trust* to occupy the estate, or to receive the rents and profits. Active or special trusts were never within the purview of the statute of uses; consequently if powers or duties are imposed upon a trustee which make it necessary that he should continue to hold the legal title in order to perform his duty or execute the power, the trust is such a special or active one as will remain unexecuted by the statute.² Where an active duty is imposed the trust will not be executed under the statute of uses until the duty is performed; but where the trust is merely passive, it will be executed at once under the statute.³ Where the trust is simply to "permit and suffer" the *cestui que trust* to occupy the estate, or to receive the rents, the trust will be executed in the beneficiary;⁴ and where several trusts are created by the

Kenrick v. Beauclerk, 3 Bos. & P. 175, 178; s.c. 6 Rev. Rep. 746;

Doe v. Claridge, 6 Maul. & S. 657;

Creaton v. Creaton, 3 Sm. & G. 386.

¹ Anderson's L. Dict. 1058.

See: Rife v. Geyer, 59 Pa. St. 393; s.c. 98 Am. Dec. 351;

Bacon's Appeal, 57 Pa. St. 504;

Barnett's Appeal, 46 Pa. St. 392, 398; s.c. 86 Am. Dec. 502;

Kay v. Scates, 37 Pa. St. 31; s.c. 78 Am. Dec. 399;

Goodrich v. City of Milwaukee, 24 Wis. 422, 429.

² Chapin v. First Universalist Society, 74 Mass. (8 Gray) 580;

Norton v. Leonard, 29 Mass. (12 Pick.) 152;

Newhall v. Wheeler, 7 Mass. 189;

Exeter v. Odiorne, 1 N. H. 232;

Wood v. Wood, 5 Paige Ch. (N. Y.) 596; s.c. 28 Am. Dec. 451;

Striker v. Mott, 2 Paige Ch. (N. Y.) 387; s.c. 22 Am. Dec. 646;

Rife v. Geyer, 59 Pa. St. 393; s.c. 98 Am. Dec. 351;

Barnett's Appeal, 46 Pa. St. 392; s.c. 86 Am. Dec. 502;

Mott v. Buxton, 7 Ves. 201.

Trust is an active or special one in all cases where it is necessary for the accomplishment of any object of the creator of a trust that the legal estate should remain in the trustee.

Rife v. Geyer, 59 Pa. St. 393; s.c. 98 Am. Dec. 351.

³ Sprague v. Sprague, 13 R. I. 703; Stanley v. Colt, 72 U. S. (5 Wall.) 168; bk. 18 L. ed. 502;

2 Pom. Eq. Jur., §§ 988, 992; 1 Id., § 153.

⁴ Witham v. Brooner, 63 Ill. 384; Parks v. Parks, 9 Paige Ch. (N. Y.) 107;

Ramsay v. Marsh, 2 McC. (S. C.) L. 252; s.c. 13 Am. Dec. 717;

Right d. Phillips v. Smith, 12 East 455; s.c. 11 Rev. Rep. 448;

Barker v. Greenwood, 4 Mees. & W. 429;

Warter v. Hutchinson, 5 Moore 143;

Boughton v. Langley, 2 Salk. 679;

Gregory v. Henderson, 4 Taunt. 773;

Doe d. Leicester v. Biggs, 2

same instrument, some of which would not and some of which would be executed under the statute, the trustees will take the legal estate, even in those cases where the trusts are limited to arise successively.¹

SEC. 1694. **Discretionary and directory.**—Trusts with respect to lands, or to funds created by will for distribution at a future period, are either discretionary or directory. They are discretionary where no directions are given as to the manner in which the land is to be managed or the fund shall be invested prior to its final appropriation in satisfaction of the trust. They are directory where the mode in which the land is to be used, or the manner in which the fund shall be invested, is pointed out.² In such cases if the land is not managed in the particular manner directed, or the fund is invested in a manner different from that pointed out, it will be a breach of the trust for which the trustee is liable.³

SEC. 1695. **Executed and executory.**—Trusts are again divided into executed and executory. An executed trust is one where the limitations are all definitely settled by the deed or instrument creating it, and there remains nothing further to be done in order to determine the duration of the trust, or the exact interest of the *cestui que use*. An executory trust is one where the beneficiary is not yet clothed with the equitable estate, but has a mere right to have some act done which will vest him with the equitable title.⁴ The distinction between

Taunt. 109 ; s.c. 11 Rev. Rep. 533.

¹ Brown v. Whiteway, 8 Harr. (Del.) 156 ;

Stockbridge v. Stockbridge, 99 Mass. 244 ;

Hawkins v. Luscombe, 2 Swan (Tenn.) 375 ;

Harton v. Harton, 7 Durnf. & E. (7 T. R.) 652 ; s.c. 4 Rev. Rep. 537.

² See : Deadrick v. Cantrell, 10 Yerg. 263 ; s.c. 31 Am. Dec. 576.

³ Ringgold v. Ringgold, 1 Har. & G. (Md.) 12 ; s.c. 18 Am. Dec. 250 ;

Deadrick v. Cantrell, 10 Yerg.

(Tenn.) 263 ; s.c. 31 Am. Dec. 576 ;

Keble v. Thompson, 3 Bro. Ch. 112 ;

Scurfield v. Howes, 3 Bro. Ch. 90 ; Oliver v. Court, 3 Exch. 312 ; s.c.

8 Price 127 ; 4 Cond. Ch. 93 ;

Bone v. Cooke, McClel. 168 ;

Brice v. Stokes, 11 Ves. 319, 326 ; s.c. 8 Rev. Rep. 164.

See : Post, § 1801.

⁴ Nicoll v. Ogden, 29 Ill. 323 ; s.c. 31 Am. Dec. 311 ;

Neves v. Scott, 50 U. S. (9 How.) 196 ; bk. 13 L. ed. 102.

See : Imlay v. Huntington, 20 Conn. 146 ;

executed and executory trusts is that in the former the party has given complete directions for settling his estate with perfect limitations, while in the latter the directions are incomplete, and are merely minutes of instructions for the settlement.¹

SEC. 1696. **Express trusts.**—Trusts are also divided into express and implied.² An express trust is one created in express terms by deed, will, or other writing.³ To constitute a direct and express trust there must be (1) a transfer to a competent person; (2) a fund or object transferred; (3) a *cestui que trust*, or purpose to which the

Riddle v. Cutter, 49 Iowa 547;
 Berry v. Williamson, 11 B. Mon. (Ky.) 245;
 Horne v. Lyeth, 4 Har. & J. (Md.) 341;
 Carroll v. Renick, 15 Miss. (7 Smed. & M.) 798;
 Cushing v. Blake, 30 N. J. Eq. (3 Stew.) 689;
 Garnsey v. Mundy, 24 N. J. Eq. (9 C. E. Gr.) 243;
 Mullany v. Mullany, 18 N. J. Eq. (3 C. E. Gr.) 16; s.c. 31 Am. Dec. 238;
 Wood v. Burnham, 6 Paige (N. Y.) 513;
 Tallman v. Wood, 26 Wend. (N. Y.) 9, aff'g 6 Paige Ch. (N. Y.) 113;
 Evans v. King, 3 Jones (N. C.) Eq. 387;
 Saunders v. Edwards, 2 Jones (N. C.) Eq. 134;
 Dennison v. Goehring, 7 Pa. St. 175; s.c. 47 Am. Dec. 505;
 Tillinghast v. Coggeshall, 7 R. I. 383, 393;
 Porter v. Doby, 2 Rich. (S. C.) Eq. 49;
 Bowen v. Chase, 94 U. S. 812; bk. 24 L. ed. 184;
 Garner v. Garner, 1 Deems 487;
 Austin v. Taylor, 1 Eden 361;
 Wright v. Pearson, 1 Eden 119;
 Egerton v. Brownlow, 4 H. L. Cas. 1, 210; s.c. 23 L. J. Ch. 348; 18 Jur. 71;
 Shelley v. Shelley, L. R. 6 Eq. 540;
 Sackville-West v. Holmesdale, L. R. 4 H. L. Cas. 543;
 Leonard v. Countess of Sussex,

2 Vern. 526;
 Boswell v. Dillon, Drury 291;
 1 Eq. Ld. Cas. 1, 36;
 1 Lewin on Trusts (8th ed.) 45;
 2 Pom. Eq. Jur., §§ 1000, 1001.
 The provision in a will directing two trustees and the survivor of them to convey the premises to an eleemosynary corporation for foundlings, whenever Congress should create one which the trustees approved, is a conditional limitation of the estate vested in the trustees. Their conveyance was made necessary to pass the title. The duty with which they were charged was an executory trust.
 Ould v. Washington Hospital, 95 U. S. 303; bk. 24 L. ed. 450.
¹ Neves v. Scott, 50 U. S. (9 How.) 196; bk. 13 L. ed. 102.
² The Code of Louisiana abolishes express trusts, but it does not reach or affect that trust which the law implies from the fraud of an individual who has, against conscience and right, possessed himself of another's property.
 Gains v. Chew, 48 U. S. (2 How.) 619; bk. 11 L. ed. 402.
³ 1 Story Eq. Jur. (13th ed.), § 64.
 Trust in land created by will is of same effect as trust created by deed.
 Ross v. Barclay, 18 Pa. St. 179; s.c. 55 Am. Dec. 616.

fund is to be applied.¹ And to constitute a writing a declaration of trust, it must be of such a nature that the party must be believed to have intended it as such. Loose and inadvertent declarations are insufficient for that purpose,² because the law will never imply a trust where one has been created expressly, even though the express trust is void for the want of some essential formality, except in those cases where a consideration is paid by the *cestui que trust*, under such circumstances as to give rise to a resulting trust.³

SEC. 1697. **Same—In land.**—Express trusts in land can be created by declarations in writing only,⁴ and cannot be created upon lands conveyed by descent by inventory of an estate that includes land as part of the estate, but states the title to be in another, notwithstanding the grantee was present when the inventory was made, and knew of it, but made no objection; because it is not a writing of the grantee, and amounts to no more than parol evidence.⁵ Property conveyed to a trustee for the benefit of the issue of a contemplated marriage, and to be sold on the direction of the grantor, inures to the benefit of such issue, although the grantor die without directing the sale.⁶ But an express trust does not arise

¹ *Commissioners v. Walker*, 7 Miss. (6 How.) 143; s.c. 38 Am. Dec. 433.

² *Cowan v. Wheeler*, 25 Me. 267; s.c. 43 Am. Dec. 283.

³ *Ward v. Armstrong*, 84 Ill. 151; *Gibson v. Foote*, 40 Miss. 788, 792;

Farrington v. Barr, 36 N. H. 86;

Graves v. Graves, 29 N. H. 129;

Van der Volgen v. Yates, 9 N. Y. 219, aff'g 3 Barb. Ch. (N. Y.) 242;

Dennison v. Goehring, 7 Pa. St. 175; s.c. 47 Am. Dec. 505;

Nightingale v. Hidden, 7 R. I. 115, 121;

Thomson v. Peake, 7 Rich. (S. C.) L. 353;

Haggard v. Benson, 3 Tenn. Ch. 268;

2 Pom. Eq. Jur., §§ 987, 1030;

1 Spence Eq. Jur. 496.

⁴ *Irwin v. Ivers*, 7 Ind. 308; s.c. 63 Am. Dec. 420;

Ratliff v. Ellis, 2 Iowa 59; s.c. 63 Am. Dec. 471.

⁵ *Ratliff v. Ellis*, 2 Iowa 59; s.c. 63 Am. Dec. 471.

Express trust upon land conveyed by decedent to one who becomes administrator cannot be created by charge for payment of taxes in administration account, when it is not shown that the taxes were levied on this land, although it appears that the amount of the charge is the same as the taxes would have been upon this land. The evidence is too uncertain to constitute a written acknowledgment of the administrator that the land was part of the decedent's estate.

Ratliff v. Ellis, 2 Iowa 59; s.c. 63 Am. Dec. 471.

⁶ *Steele v. Lowry*, 4 Ohio 72; s. c. 19 Am. Dec. 581.

in favor of heirs at law, and against the administrator who purchases, through a third person, lands sold under an order of the court, where there is no proof of any declaration of trust between the parties, nor of any declaration in writing under the statute of frauds.¹

SEC. 1698. **Implied trusts—Definition.**—Implied trusts are those which are raised or created by presumption or construction of law, and include all such trusts as are not express.² They are of two classes; the first class resting upon the presumed intention of the parties, and the second class standing independent of any such intention, and are enforced upon the conscience or by operation of the law.³ It has been said to be a general rule, that the law never implies, that a court of equity never presumes a trust, except in cases of absolute necessity; but Justice Story says that this is “stating the doctrine a little too strongly; and the more correct exposition of the rule is, that a trust is never presumed or implied, as intended by the parties, unless, taking all the circumstances together, that is the fair and reasonable interpretation of their acts and transactions.”⁴ Implied trusts include constructive,⁵ precatory,⁶ and resulting trusts.⁷ Implied trusts arise in all those cases where it would be contrary to the rules and principles of equity to allow a person to hold otherwise than as a trustee the property vested in him;⁸ but unless perfectly created, an implied trust will not be enforced by a court of equity. If a

¹ *Van Dyke v. Johns*, 1 Del. Ch. 93; s.c. 12 Am. Dec. 76.

² *Johnson v. Fleet*, 14 Wend. (N. Y.) 176, 181.

See: *Brooks v. Dent*, 1 Md. Ch. 523;

Thomson v. Peake, 7 Rich. (S. C.) L. 353;

Lloyd v. Spillet, 2 Atk. 150;

Cook v. Fountain, 3 Swanst. 585.

³ *Penman v. Slocum*, 41 N. Y. 53, 58;

Walden v. Skinner, Exr., 101 U. S. 577; bk. 25 L. ed. 953;

2 Story Eq. Jur. (13th ed.), § 1195.

⁴ 2 Story Eq. Jur. (13th ed.), § 1195. See: *Penman v. Slocum*, 41 N. Y. 53, 58;

Ryan v. Dox, 34 N. Y. 307; s.c. 90 Am. Dec. 696;

Campbell v. Walker, 5 Ves. 678; s.c. 5 Rev. Rep. 135.

⁵ See: *Post*, § 1702, *et seq.*

⁶ See: *Post*, § 1708, *et seq.*

⁷ See: *Post*, § 1711, *et seq.*

⁸ *Easterbrooks v. Tillinghast*, 71 Mass. (5 Gray) 17;

Turner v. Peck, 1 Barb. Ch. (N. Y.) 549;

Dexter v. Stewart, 7 John. Ch. (N. Y.) 52;

Kisler v. Kisler, 2 Watts (Pa.) 323; s.c. 27 Am. Dec. 308, 312;

Philips v. Crammond, 2 Wash. C. C. 441; s.c. Fed. Cas. No. 11092.

trust is perfectly created, so that the donor has nothing more to do, and the person seeking to enforce it has need of no further conveyance, and nothing is required of the court to give effect to it as an executed trust, it will be given effect, notwithstanding a want of consideration and of change in the possession of the property. But if the transaction is incomplete, the court will not complete it without first inquiring into its origin and consideration.¹ Loose and vague declarations of intention by one member of a family, in letters to his brothers, in regard in his holding land in trust for the other members, are not sufficient evidence to charge him with a trust by implication.²

SEC. 1699. **Same—How created.**—Implied trusts are created by construction of the law upon the acts or situations of the parties;³ but a trust is never presumed or implied as intended by the parties, unless, taking all the circumstances together, that is the fair and reasonable interpretation of their acts and transactions.⁴ Where there is an express trust the law never implies one.⁵ If a person purchases land with his own money, but the deed is taken in the name of another, a trust results by operation of law to the one purchasing;⁶ if

¹ *Badgley v. Votrain*, 63 Ill. 25; s.c. 18 Am. Rep. 541.

² *Steere v. Steere*, 5 John. Ch. (N. Y.) 1; s.c. 9 Am. Dec. 256.

³ *Dean v. Dean*, 6 Conn. 285; *Jenison v. Graves*, 2 Blackf. (Ind.) 440; *Johnson v. Fleet*, 14 Wend. (N. Y.) 176, 181; *Hagthorp v. Hook*, 3 Hayw. (N. C.) 57.

⁴ 2 Story Eq. Jur. (13th ed.), § 1195. See: *Cook v. Fountain*, 3 Swanst. 585.

⁵ *Dennison v. Goehring*, 7 Pa. St. 175; s.c. 47 Am. Dec. 505. See: *Farrington v. Barr*, 36 N. H. 86; *Anstice v. Brown*, 6 Paige Ch. (N. Y.) 448;

Squire v. Harder, 1 Paige Ch. (N. Y.) 494; s.c. 19 Am. Dec. 446.

⁶ *McLean v. Sullivan*, 13 Iowa 521, 525; *De Peyster v. Gould*, 3 N. J. Eq.

(3 H. W. Gr.) 474; s.c. 29 Am. Dec. 723;

Harder v. Harder, 2 Sandf. Ch. (N. Y.) 17; s.c. 3 N. Y. 122; *Turner v. Eford*, 5 Jones (N. C.) Eq. 106;

Chadwick v. Felt, 35 Pa. St. 305; *Friedland v. Johnson*, 2 Woods C. C. 675; s.c. Fed. Cas. No. 5117.

See: *Post*, § 1715.

Actual advance of money must be shown.—But to raise such trust by implication or operation of law, an actual payment, or actual loan of the money by the *cestui que trust*, at the time of the purchase, must be shown. *Steere v. Steere*, 5 John. Ch. (N. Y.) 1; s.c. 9 Am. Dec. 256. **Same—Parol proof.**—The fact may be proved by parol.

Brown v. Dwelley, 45 Me. 52; *Lindsey v. Platner*, 23 Miss. 576; *Kelly v. Johnson*, 28 Mo. 249;

part only of the consideration was paid by him, if it was an aliquot part of the whole, and he was to have an ascertained share, the trust results still, but *pro tanto* only.¹ Persons acquiring title by fraud are, by construction of law, trustees for the injured party.² Thus a trustee, a mortgagee, a tenant for life, or a purchaser, who gets an advantage by being in possession, and purchases an outstanding title or incumbrance, cannot use it for his own benefit, but must be considered as holding it in trust for him under whose title he entered. A court of equity will, however, lend its aid to secure or reimburse all advances properly made by a trustee or agent to fortify the title.³ A trust by legal implication does not arise in favor of the heirs at law and against an administrator who purchases, through a third person, lands of the estate, sold by the order of the court, where there is no proof of any declaration of trust between the parties, nor of any declaration in writing under the statute of frauds, there being no consideration to raise the use upon the legal estate created by the deed of bargain and sale.⁴ But where a person directs that land owned by him shall be disposed of in a certain way, for the benefit of a third person, without expressly creating a trust in his behalf, this will raise an implied trust in favor of such beneficiary.

Thus, where the testator directs his lands to be sold for the satisfaction of his debts, an implied trust is raised in favor of the creditors which will enable them

Lounsbury v. Purdy, 18 N. Y.

515, aff'g 16 Barb. (N. Y.) 376;

Boyd v. McLean, 1 John. Ch. (N. Y.) 582;

Stockard v. Stockard's Admr., 7 Humph. (Tenn.) 303, 313;

s.c. 46 Am. Dec. 79;

Smith v. Strahan, 16 Tex. 314; s.c. 67 Am. Dec. 622.

Money or property being placed in possession of one party to be paid or delivered to another, a trust is necessarily implied in favor of the latter, which he may enforce by an appropriate action.

Stockard v. Stockard's Admr., 7 Humph. (Tenn.) 303; s.c. 46

Am. Dec. 79.

¹ Franklin v. McEntyre, 23 Ill. 91;

Purdy v. Purdy, 3 Md. Cas. 546;

Botsford v. Burr, 2 John. Ch. (N. Y.) 405;

Shoemaker v. Smith, 11 Humph. (Tenn.) 81.

See: Jackson v. Bateman, 2 Wend. (N. Y.) 570;

Post, § 1722.

² Coleman v. Cocke, 6 Rand. (Va.) 618; s.c. 18 Am. Dec. 757.

See: Post, §§ 1711, 1721, 1722, 1724.

³ Morgan v. Boone, 4 T. B. Mon. (Ky.) 291; s.c. 16 Am. Dec. 153.

⁴ Van Dyke v. Johns, 1 Del. Ch. 93; s.c. 12 Am. Dec. 76.

to compel a performance of the trust by the executor. This implied trust was specially valuable in the days when real property was not liable for the debts of the owner.¹ This species of trust, however, while raised by construction of law, partakes more of the nature of an express trust.²

An implied trust is also raised by equitable conversion. Thus a contract for the sale of real property made on a valid consideration, evidenced by an instrument in writing, as required by the statute of frauds, or such a part performance as will take the case out of the statute,³ in equity raises an implied trust in favor of the vendee, in respect to the land to be conveyed, which trust will be enforced in a court of equity by a decree of specific performance.⁴

SEC. 1700. *Same*—Not within the statute of uses.—Implied trusts are not recognized by courts of law.⁵ They are creatures of equity, pure and simple, and the rules applicable to them are applied by courts of equity to all inequitable transactions, when the ends of justice cannot otherwise be attained.⁶ They are expressly exempted from the operation of the statute of frauds, and for that reason remain, as at common law, susceptible of proof by parol.⁷

¹ 1 Spence Eq. Jur. 509.

² 2 Pom. Eq. Jur., § 1010.

See: *Baker v. Red*, 4 Dana (Ky.) 158;

Lane v. Lane, 90 Mass. (8 Allen) 350;

Fay v. Taft, 66 Mass. (12 Cush.) 448;

Walker v. Whiting, 40 Mass. (23 Pick.) 313;

Hoxie v. Hoxie, 7 Paige Ch. (N. Y.) 187;

Watson v. Mayrant, 1 Rich. (S. C.) Eq. 449;

Withers v. Yeadon, 1 Rich. (S. C.) Eq. 324;

Blatch v. Milder, 1 Atk. 420.

³ *Ryan v. Dox*, 34 N. Y. 307, 312; s.c. 90 Am. Dec. 696;

Phillips v. Thompson, 1 John. Ch. (N. Y.) 131;

Hill v. Meyers, 43 Pa. St. 170;

Harris v. Barnett, 3 Gratt. (Va.)

339.

⁴ *Musham v. Musham*, 87 Ill. 80; *Connor v. Lewis*, 16 Me. 268; *Bowie v. Berry*, 3 Md. Ch. 359; *Felch v. Hooper*, 119 Mass. 52; *Coman v. Lakey*, 80 N. Y. 345; *Pelton v. Westchester Fire Ins. Co.*, 77 N. Y. 605;

Jackson v. Morse, 16 John. (N. Y.) 197; s.c. 8 Am. Dec. 306;

Knox v. Gye, L. R. 5 H. L. Cas. 656; s.c. 42 L. J. Ch. 234;

1 Spence Eq. Jur. 509.

⁵ See: *Post*, this chapter, section X., "Jurisdiction over Trusts."

⁶ *Nightingale v. Hidden*, 7 R. I. 115, 121;

Thomson v. Peake, 7 Rich. (S. C.) L. 353;

2 Pom. Eq. Jur., § 1030;

1 Prest. Est. 191;

1 Spence Eq. Jur. 496.

⁷ *Brown v. Dwelly*, 45 Me. 52;

SEC. 1701. **Same—Within statute of limitations.**—Trusts created or raised in a party by implication of law, as where he obtains property by fraud, or unlawful means, or in violation of a duty, come within the statute of limitations, although there is no remedy at law. In such cases the trust is not created by contract, and neither does the relation of trustee and *cestui que trust* exist.¹ The reason for this rule is the fact that courts of equity, equally with courts of law, are bound by the statute of limitations in all varieties of bailments, loans, pawns, dispositions, and the like, although express trusts, where there are convenient remedies in cases at law or by bill in equity.²

SEC. 1702. **Same—Constructive trusts—Introductory.**—A constructive trust is one imposed by construction of law, from reasons of equity and justice, and independently of the intentions of the parties,³ and arises in cases where a confidence has been reposed or credit given;⁴

Childs v. Jordan, 106 Mass. 321 ;
Lindsey v. Plattner, 23 Miss. 576 ;
Kelly v. Johnson, 28 Mo. 249 ;
Pritchard v. Brown, 4 N. H.

397 ; s.c. 17 Am. Dec. 431 ;
Foote v. Bryant, 47 N. Y. 544 ;
Lounsbury v. Purdy, 18 N. Y.

515 ;
Foote v. Colvin, 3 John. (N. Y.)

216 ; s.c. 3 Am. Dec. 478 ;
Jackson v. Sternbergh, 1 John.

Cas. (N. Y.) 153 ;
Boyd v. McLean, 1 John. Ch. (N.

Y.) 582 ;
Wallace v. Duffield, 2 Serg. & R.

(Pa.) 521 ; s.c. 7 Am. Dec. 660 ;
Smith v. Strahan, 16 Tex. 314 ;

s.c. 67 Am. Dec. 622 ;
1 Spence Eq. Jur. 497, 512.

See : *Post*, §§ 1716, 1720, 1726.

¹ *Armstrong v. Campbell*, 3 Yerg.

(Tenn.) 201 ; s.c. 24 Am. Dec.

556.

² *Nicholson v. Lauderdale*, 3

Humph. (Tenn.) 200, 202 ;

Reeves v. Dougherty, 7 Yerg.

(Tenn.) 222, 233 ; s.c. 27 Am.

Dec. 496 ;
Armstrong v. Campbell, 3 Yerg.

(Tenn.) 201 ; s.c. 24 Am. Dec.

Dec. 417 ;

Stewart v. Mellish, 2 Atk. 610 ;

Lockey v. Lockey, 1 Prec. in Ch.

518 ;
Hovenden v. Annesly, 2 Sch. &

Lef. 607 ; s.c. 9 Rev. Rep. 119.

³ *Anderson's L. Dict.* 1058.

⁴ Courts of equity will not assume

jurisdiction to establish trusts

in every case. Thus where

money is delivered to a person

to pay debts, and is converted

by him, it is not a trust fund,

authorizing the one who re-

posed the confidence, or his

representatives, to recover it as

such.

Doyle v. Murphy, 22 Ill. 502 ;

s.c. 74 Am. Dec. 165.

See : *Post*, this chapter, section

X., "Jurisdiction over Trusts."

Acquisition of property by larceny or

trespass does not create relation

of trustee and *cestui que trust* ;

and therefore such relation is

not created where a person

abstracts securities not en-

trusted to him, and substi-

tutes forged securities in their

places.

Doyle v. Murphy, 22 Ill. 502 ;

s.c. 74 Am. Dec. 165.

Breach of contract does not neces-

as where a person holding a fiduciary position, by fraud, either actual or constructive,¹ secures an advan-

sarily raise a trust, for the reason that there is a remedy at law.

Cowan v. Wheeler, 25 Me. 267; s.c. 43 Am. Dec. 283.

partnership property—Deed to partner.—And it has been said that no express or implied trust is created by transaction whereby one of two partners, who are embarrassed with debts, executed a deed to the other, absolute on its face with a consideration expressed, of both his individual property and interest in the partnership property, for the purpose of enabling the grantee to raise money by mortgaging the same to pay the firm debts.

Burt v. Wilson, 28 Cal. 632; s.c. 87 Am. Dec. 142.

¹ See: *Burt v. Wilson*, 28 Cal. 632; s.c. 87 Am. Dec. 142;

Brown v. Doane, 86 Ga. 32; s.c. 12 S. E. Rep. 179; 11 L. R. A. 381;

Miller v. Davidson, 4 Ill. (3 Gilm.) 518; s.c. 44 Am. Dec. 715;

Edwards v. Culberson, 111 N. C. 342; s.c. 16 S. E. Rep. 233; 18 L. R. A. 204;

Finlayson v. Finlayson, 17 Oreg. 347; s.c. 21 Pac. Rep. 57; 3 L. R. A. 801;

Coleman v. Cocke, 6 Rand. (Va.) 618; s.c. 18 Am. Dec. 757;

Drury v. Milwaukee & St. P. R. Co., 74 U. S. (7 Wall.) 299; bk. 19 L. ed. 40;

Harding v. Wheaton, 2 Mas. C. C. 378, 389; s.c. Fed. Cas. No. 6051;

Jenkins v. Eldredge, 3 Story C. C. 181, 290; s.c. Fed. Cas. No. 7266;

Young v. Peachy, 2 Atk. 254;

Walker v. Walker, 2 Atk. 98;

Hutchings v. Lee, 1 Atk. 447;

McCornick v. Gorgan, L. R. 4 Eng. & Ir. App. 82, 89;

Montacute v. Maxwell, 1 Pr. Wms. 620;

Reech v. Kennegal, 1 Ves. Sr. 125.

Trust arising from illegal transaction may be enforced in favor of innocent party.

Miller v. Davidson, 4 Ill. (3 Gilm.)

518; s.c. 44 Am. Dec. 715.

Fraud—A deed may be set aside for fraud or duress, and a trust may arise out of a transaction, which will be enforced in face of the express terms of a deed, but it must be a trust arising by operation of law. The parties to a deed cannot create a trust in favor of the grantor, except by an instrument in writing declaring the same.

Finlayson v. Finlayson, 17 Oreg. 347; s.c. 21 Pac. Rep. 57; 3 L. R. A. 801.

Same—A woman who purchases land with money fraudulently obtained from a man by a promise to marry him and to hold such land in lieu of her right to dower under the marriage may be held to be a trustee on her refusal to marry him, and the land charged with a lien for such money.

Edwards v. Culberson, 111 N. C. 342; s.c. 16 S. E. Rep. 233; 18 L. R. A. 204.

Same—Getting title without paying price.—Grantee holds land in trust for grantor to the extent of the purchase-money, where he has received an absolute conveyance and has failed to make any payment of the purchase price, and such trust descends to the representatives and heirs of the grantee, against whom a lien for the purchase-money will be enforced.

Burt v. Wilson, 28 Cal. 632; s.c. 87 Am. Dec. 142.

If, by a false and fraudulent oral promise which he intends at the time of making it afterwards to violate, the vendee of two contiguous parcels of land, which he has contracted for by separate and distinct contracts, induces the vendor to convey to him both parcels by one and the same absolute unconditional deed, he paying for one parcel but not for the other, equity by reason of his fraud will fasten upon him a constructive trust in behalf of the vendor as to the parcel not paid for, although the two parcels

tage to himself in opposition to the interest of his principal;¹ buys property in contravention of duty;² or

are not described in the deed as several tracts, but both together are treated as one tract.

Brown v. Doane, 86 Ga. 32; s.c. 12 S. E. Rep. 179; 11 L. R. A. 381.

¹ See: *Switzer v. Skiles*, 8 Ill. 529; s.c. 44 Am. Dec. 728;

Miller v. Antle, 2 Bush (Ky.) 407; s.c. 92 Am. Dec. 495;

Lewis v. Lewis, 9 Mo. 182; s.c. 43 Am. Dec. 540;

Corse v. Leggett, 25 Barb. (N. Y.) 389, 395;

Sterrick v. Dickinson, 9 Barb. (N. Y.) 516, 520;

Voorhees v. Amsterdam Presbyterian Church, 5 How Pr. (N. Y.) 58, 65; s.c. 8 Barb. (N. Y.) 135, 142;

Van Horne v. Fonda, 5 John. Ch. (N. Y.) 388;

Torrey v. Bank of Orleans, 9 Paige Ch. (N. Y.) 649;

Van Epps v. Van Epps, 9 Paige Ch. (N. Y.) 237, 241;

Sweet v. Jacocks, 6 Paige Ch. (N. Y.) 355; s.c. 31 Am. Dec. 252.

One who undertakes to act as agent for another is not permitted to acquire the property for his own benefit; and on taking a conveyance in his own name, will be adjudged to hold it in trust for his principal,

Sweet v. Jacocks, 6 Paige Ch. (N. Y.) 355; s.c. 31 Am. Dec. 252.

Where one obtains a patent for land from the United States, and is affected with any fraud or trust in relation to it, a court of equity will regard him as a trustee for those who may have been injured by the fraud practiced, or are entitled to the benefit of the trust.

Lewis v. Lewis, 9 Mo. 182; s.c. 43 Am. Dec. 540.

Purchaser of land at commissioner's sale holds title in trust where he has agreed with the owner, prior to the sale, that he will buy the land, and that if the owner will within a specified time pay his proportion of the price, he may retain a specified quantity of the land; and the purchaser as such trustee is bound to convey to

the original owner upon payment as agreed in pursuance of the agreement.

Miller v. Antle, 2 Bush (Ky.) 407; s.c. 92 Am. Dec. 495.

² *Voorhees v. Amsterdam Presbyterian Church*, 8 Barb. (N. Y.) 135, 142; s.c. 5 How. (N. Y.) Pr. 58, 65;

Sweet v. Jacocks, 6 Paige Ch. (N. Y.) 355; s.c. 31 Am. Dec. 252.

See: *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; s.c. 18 Am. Dec. 250;

Corse v. Leggett, 25 Barb. (N. Y.) 389, 395;

Sterrick v. Dickinson, 9 Barb. (N. Y.) 516, 520;

Cook v. Tullis, 85 U. S. (18 Wall.) 332; bk. 21 L. ed. 933;

Galloway v. Finley, 37 U. S. (12 Pet.) 264; bk. 9 L. ed. 1079;

Post, §§ 1703, 1704.

It is a settled principle of equity that where a person undertakes to act as an agent for another he cannot be permitted to deal in the matter of that agency upon his own account and for his own benefit. And if he takes a conveyance in his own name of an estate which he undertakes to obtain for another, he will in equity be considered as holding it in trust for his principal.

Parkist v. Alexander, 1 John. Ch. (N. Y.) 394;

Sweet v. Jacocks, 6 Paige Ch. (N. Y.) 355; s.c. 31 Am. Dec. 252;

Lees v. Nuttall, Tambl. 282; s.c. 2 Mul. & K. 819.

Property acquired by a wrongful sale or exchange of other property covered by a trust is itself subject to the same trust.

Cook v. Tullis, 85 U. S. (18 Wall.) 332; bk. 21 L. ed. 933.

Purchasing better title.—Where a purchaser of land buys in a better title from a third person, equity treats him as trustee for the vendor as to such a title, and he is entitled, as against his vendor, only to the amount of money paid for the better title.

Galloway v. Finley, 37 U. S. (12 Pet.) 264; bk. 9 L. ed. 1079.

makes an illegal disposition of the trust property to the injury of the *cestui que trust*. In the latter case the *cestui que trust* may follow the trust property into the hands of any one who received it with notice of the trust.¹ It matters not whether the original holding of such property was legal or illegal if it afterwards become illegal.²

SEC. 1703. **Same—Same—Trusts de son tort.**—Where a person by his own wrong secures an advantage to the injury of another he becomes a trustee *de son tort* for the person injured. Thus a person who of his own authority enters into the possession, or assumes the management, of property which belongs beneficially to another, becomes a trustee *de son tort*, and is subject to the same rules and remedies as other constructive trustees.³ More particularly is this so in a case where a person assumes to act as the agent or protector of the rights of infants, and in that character obtains a conveyance in his own name which was intended for their benefit; he will be considered as holding the legal title in trust for them.⁴ Such a trustee will not be permitted to acquire the title to the land at a tax sale for a delinquency which occurred while he had control, although the fiduciary relation may have ceased at the time of the sale.⁵

Where two persons sold personal property belonging to another, with his assent, and took bonds from the purchasers, in their own name, and collected a portion of the purchase-money, a court of equity will infer some conventional arrangement between the parties, in the nature of a trust, which it will enforce. *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; s.c. 18 Am. Dec. 250.

¹ 1 Perry on Trusts (4th ed.), § 166; 2 Pom. Eq. Jur. 1044; 1 Spence Eq. Jur. 511.

² See: *Buck v. Swazey*, 35 Me. 41; s.c. 56 Am. Dec. 681;

Caines v. Grant, 5 Binn. (Pa.) 119; *Randall v. Phillips*, 3 Mas. C. C. 378; s.c. Fed. Cas. No. 11555.

³ *Morris v. Joseph*, 1 W. Va. 256;

s.c. 91 Am. Dec. 386;

Hill on Trustees, 246, *et seq.*

See: *Sweet v. Jacocks*, 6 Paige Ch. (N. Y.) 355; s.c. 31 Am. Dec. 252.

⁴ *Sweet v. Jacocks*, 6 Paige Ch. (N. Y.) 355; s.c. 31 Am. Dec. 252.

⁵ *Battin v. Woods*, 27 W. Va. 68; *Morris v. Joseph*, 1 W. Va. 256; s.c. 91 Am. Dec. 386.

See: *Brittin v. Handy*, 20 Ark. 381; s.c. 73 Am. Dec. 497;

Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co., 16 Md. 456; s.c. 77 Am. Dec. 311;

Dickinson v. Codwise, 1 Sandf. Ch. (N. Y.) 226;

Michoud v. Girod, 45 U. S. (4 How.) 503; bk. 11 L. ed. 1077.

This is on the general principle that equity prohibits a purchase by parties placed in a situation

SEC. 1704. **Same—Same—Trust ex malefacio.**—A trust which arises from actual or legal fraud is *ex malefacio*.¹ Thus where a person is enabled to bid in property at less than its value, by falsely representing that he is acting for or in the interest of the defendant in execution, the law makes him a trustee *ex malefacio*,² and equity, notwithstanding the statute of frauds, will treat him as a trustee for the owner, and on repayment to him of the

of trust or confidence with respect to the subject of the purchase—that no party can be permitted to purchase, for his own benefit, an interest, where he has a duty to perform which is inconsistent with the character of purchaser.

Brittin v. Handy, 20 Ark. 381; s.c. 73 Am. Dec. 497;

Voorhees v. Presbyterian Church, 8 Barb. 135; s.c. 5 How. Pr. (N. Y.) 65;

Sweet v. Jacobs, 6 Paige Ch. (N. Y.) 355; s.c. 31 Am. Dec. 252;

Dickinson v. Codwise, 1 Sandf. Ch. (N. Y.) 226.

In *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456; s.c. 77 Am. Dec. 311, the court say: "In this state, as elsewhere, it is well settled that trustees cannot purchase at their own sales, either directly or indirectly, and if they do, such purchase will be set aside, on the proper and reasonable application of the parties interested. (*Richardson v. Jones*, 3 Gill & J. (Md.) 184; s.c. 22 Am. Dec. 293.) This doctrine, which is applicable to trustees, applies also to purchases by persons acting in any fiduciary capacity, which imposes upon them the obligation of obtaining the best terms for the vendor, or which has enabled them to acquire a knowledge of the property. The authorities supporting it are numerous and uncontradictory; they will be found brought together to a considerable number in the notes to the case of *Fox v. Mackreth*, 1 White & Tudor's Lead. Eq. Cas. 105."

¹ *Burks v. Burks*, 7 Baxt. (Tenn.) 356;

1 Pom. Eq. Jur., § 1044.

See: *Jenkins v. Frink*, 30 Cal. 586; s.c. 89 Am. Dec. 134;

Grumley v. Webb, 44 Mo. 444; s.c. 100 Am. Dec. 304;

Ryan v. Dox, 34 N. Y. 307; s.c. 90 Am. Dec. 696.

² *Grumley v. Webb*, 44 Mo. 444; s.c. 100 Am. Dec. 304;

Ryan v. Dox, 34 N. Y. 307; s.c. 90 Am. Dec. 696.

See: *Jenkins v. Frink*, 30 Cal. 586; s.c. 89 Am. Dec. 134.

Purchaser at sheriff's sale trustee when.—If property is about to be sold under legal proceedings, and one agrees to purchase for the owner's benefit, and by artifice prevents others from bidding at the sale by declaring that he was to buy for the owner, whereby the property was sold at a great sacrifice, he will, if he afterwards endeavors to keep the property himself, be declared a trustee for the person defrauded.

Ryan v. Dox, 34 N. Y. 307; s.c. 90 Am. Dec. 696.

Person becomes trustee where, after having contracted with others that one should purchase land about to be offered at sheriff's sale for the benefit of all, each to furnish his proportion of the money, and the buyer to convey to each, if no redemption is made, his proportion of the land, he on his own account purchased another judgment, which made him a redemptioner, and redeems and obtains a sheriff's deed, and he will hold the legal title acquired by the latter purchase for the benefit of all parties to said contract.

Jenkins v. Frink, 30 Cal. 586; s.c. 89 Am. Dec. 134.

purchase-money with interest will compel a conveyance of the property to the party equitably entitled thereto. This is on the principle that equity will at all times lend its aid to defeat fraud, notwithstanding the statute of frauds.¹ But a party who, without fraud, purchases land at sheriff's sale, with his own money, taking the title in his own name, cannot be treated as a trustee, although there was a verbal agreement to hold the land for the benefit of the execution debtor.²

SEC. 1705. Same — Same — Acquisition or disposition of property by trustee.—It is a well established rule of law that a trustee will not be allowed to purchase at his own sale, and that if he should so purchase, it will be void at the election of the *cestui que trust*. Until an avoidance or ratification, a constructive trust is raised in favor of the *cestui que trust*; ³ and the trust may attach to the

¹ Ryan v. Dox, 34 N. Y. 307; s.c. 90 Am. Dec. 696.

² Pearson v. East, 36 Ind. 27, 28; Minot v. Mitchell, 30 Ind. 228; s.c. 95 Am. Dec. 685; Gilbert v. Carter, 10 Ind. 16; s.c. 68 Am. Dec. 655;

Watson v. Erb, 33 Ohio St. 35, 49;

Newton v. Taylor, 32 Ohio St. 399, 410.

Purchaser at sheriff's sale does not become trustee for execution debtor by representations made by him to the plaintiff's attorney, to the effect that he intends to purchase for the debtor, where there is no contract to that effect with the debtor, and he furnishes no part of the consideration, and no fraud is shown, and the representations do not appear to have prevented competition, so as to render the sale invalid.

Gilbert v. Carter, 10 Ind. 16; s.c. 68 Am. Dec. 655.

³ Charles v. Dubose, 29 Ala. 367; Pindall v. Trevor, 30 Ark. 249; Davis v. Rock Creek, L. F. & M. Co., 55 Cal. 359; s.c. 36 Am. Rep. 40;

Tracy v. Craig, 55 Cal. 91, 359;

Tracy v. Colby, 55 Cal. 67;

Scott v. Umbarger, 41 Cal. 410;

Webster v. King, 33 Cal. 348;

Boyd v. Blankman, 29 Cal. 19,

20; s.c. 87 Am. Dec. 146;

Church v. Sterling, 16 Conn. 388;

Bellamy v. Bellamy, 6 Fla. 62;

Cookson v. Richardson, 69 Ill. 137;

Fairman v. Bavin, 29 Ill. 76;

Huff v. Earl, 3 Ind. 306;

Reickhoff v. Brecht, 51 Iowa 633; s.c. 2 N. W. Rep. 522;

Smith v. Stephenson, 45 Iowa 645;

Mitchell v. Berry, 1 Met. (Ky.) 602;

Matthews v. Light, 32 Me. 305;

Hoffman, etc., Co. v. Cumberland, etc., Co., 16 Md. 456, 507;

Jones v. Dexter, 130 Mass. 380; s.c. 39 Am. Rep. 459;

Jennison v. Hapgood, 24 Mass. (7 Pick.) 1, 8;

Baldwin v. Allison, 4 Minn. 25;

Rea v. Copelin, 47 Mo. 76;

Grumley v. Webb, 44 Mo. 444; s.c. 100 Am. Dec. 304;

Jamison v. Glasscock, 29 Mo. 191;

Blauvelt v. Ackerman, 20 N. J. Eq. (5 C. E. Gr.) 141;

Bennett v. Austin, 81 N. Y. 308;

Reitz v. Reitz, 89 N. Y. 538;

Hastings v. Drew, 76 N. Y. 9, aff'g 50 How. (N. Y.) Pr. 254;

Smith v. Frost, 70 N. Y. 65, aff'g 42 N. Y. Super. Ct. (J. & S.) 87;

property, although the purchase of it by the trustee was irregular.¹ Where the *cestui que trust* is of age and not under disability he may give his consent to the purchase by the trustee, in which case the purchase will be valid, in the absence of fraud or undue advantage. Such transactions are closely watched, however, and where the consideration is not adequate the courts are disposed to set the sale aside.² In such a case the grantee of the trustee, where he has actual or constructive notice of the trust,

- Hubbell *v.* Medbury, 53 N. Y. 98;
 Swinburne *v.* Swinburne, 28 N. Y. 568;
Gardner v. Ogden, 22 N. Y. 327; s.c. 78 Am. Dec. 192;
Giddings v. Eastman, 5 Paige Ch. (N. Y.) 561;
Brown v. Lynch, 1 Paige Ch. (N. Y.) 147, 167;
Blount v. Robeson, 4 Jones (N. C.) Eq. 73;
Newton v. Taylor, 312 Ohio St. 399;
Barrett v. Bamber, 81 Pa. St. 247;
Herr's Estate, 1 Grant Cas. (Pa.) 272;
McNish v. Pope, 8 Rich. (S. C.) Eq. 112;
Broyles v. Nowlin, 59 Tenn. 191;
Treadwell v. McKeon, 7 Baxt. (Tenn.) 201;
Collins v. Smith, 1 Head (Tenn.) 251;
Whitwell v. Warner, 20 Vt. 425;
Manning v. Hayden, 5 Sawy. C. C. 360; s.c. Fed. Cas. No. 9043;
Great Lexembourg R. Co. v. Magnay, 25 Beav. 586;
Fox v. Mackreth, 2 Bro. Ch. 400;
In re Hallett's Estate, Knatchbull *v.* Hallett, 13 Ch. Div. 696; s.c. 49 L. J. Ch. 415; 42 L. T. 421; 28 W. R. 732, rev'g 41 L. T. 186;
Barnes v. Addy, L. R. 9 Ch. 244; s.c. 43 L. J. Ch. 513; 30 L. T. 4; 22 W. R. 505;
Kimber v. Barber, L. R. 8 Ch. 56; s.c. 27 L. T. 526; 21 W. R. 65;
Heath v. Crealock, L. R. 18 Eq. 215; s.c. 43 L. J. Ch. 169; 29 L. T. 763;
Wedderburn v. Wedderburn, 4 My. & Cr. 41;
Fawcett v. Whitehouse, 1 Russ. & M. 132;
Powell v. Glover, 3 Pr. Wms. 252;
 1 Eq. Ld. Cas. 188.
Heth v. Richmond, F. & P. R. Co., 4 Gratt. (Va.) 482; s.c. 50 Am. Dec. 88.
 See: *Warwick v. Warwick*, 31 Gratt. (Va.) 76;
Dunlop v. Harrison's Exrs., 14 Gratt. (Va.) 254.
² *Kennedy v. Kennedy*, 2 Ala. 571;
Bryan v. Duncan, 11 Ga. 67;
Walker v. Carrington, 74 Ill. 446;
Krutz v. Fisher, 8 Kan. 90;
Mitchell v. Berry, 1 Met. (Ky.) 602;
Richardson v. Spencer, 18 B. Mon. (Ky.) 450;
Farnam v. Brooks, 26 Mass. (9 Pick.) 212;
Moore v. Mandlebaum, 8 Mich. 433;
Sallee v. Chandler, 26 Mo. 124;
Young v. Hughes, 32 N. J. Eq. (5 Stew.) 372;
Burrell v. Bull, 2 Sandf. Ch. (N. Y.) 15;
Villines v. Norfleet, 2 Dev. (N. C.) Eq. 167;
Newbold's Appeal, 80 Pa. St. 317;
Fisher's Appeal, 34 Pa. St. 29;
Marshall v. Stephens, 8 Humph. (Tenn.) 159; s.c. 47 Am. Dec. 601;
Marshall v. Joy, 17 Vt. 546;
Mahon v. McGraw, 26 Wis. 614;
Denton v. Donner, 23 Beav. 285;
Downes v. Grazebrook, 3 Meriv. 208;
Morse v. Royal, 12 Ves. 355; s.c. 8 Rev. Rep. 338;
Coles v. Trecothick, 9 Ves. 234; s.c. 7 Rev. Rep. 167;
Ex parte Lacey, 6 Ves. 625; s.c. 6 Rev. Rep. 9.

will take the property with a constructive trust in favor of the *cestui que trust*, notwithstanding the fact that he paid a valuable consideration therefor.¹

SEC. 1706. **Same—Same—Same—Fraud in.**—We have already seen² that fraud raises an implied trust in favor of the party defrauded. It is the invariable rule that where fraud has been committed in the disposition or acquisition of property, equity will raise a constructive trust in favor of the party defrauded, except in those cases where such trust will affect the interests of innocent third persons.³

¹ *Phelps v. Jackson*, 31 Ark. 272 ;
Boyd v. Brincken, 55 Cal. 427 ;
Sharp v. Goodwin, 51 Cal. 219 ;
Mercier v. Hemme, 50 Cal. 427 ;
Griffin v. Blanchard, 17 Cal. 70 ;
Planters' Bk. v. Prater, 64 Ga. 609 ;
Dotterer v. Pike, 60 Ga. 29 ;
McVey v. McQuality, 97 Ill. 93 ;
Musham v. Musham, 87 Ill. 80 ;
Stewart v. Chadwick, 8 Iowa 463 ;
Palmer v. Oakley, 2 Dougl. (Mich.) 433 ; s.c. 47 Am. Dec. 41 ;
Winona & St. Peter R. Co. v. St. Paul & Sioux City R. Co., 26 Minn. 179 ;
Paul v. Fulton, 25 Miss. 156 ;
Thompson v. Wheatley, 13 Miss. (5 Smed. & M.) 499 ;
Hopkinson v. Dumas, 42 N. H. 296, 304 ;
Lyford v. Thurston, 16 N. H. 399, 408 ;
Dey v. Dey, 26 N. J. Eq. (11 C. E. Gr.) 182 ;
Newton v. Porter, 69 N. Y. 133 ; s.c. 25 Am. Rep. 152 ;
Siemon v. Schurck, 29 N. Y. 598 ;
Swinburne v. Swinburne, 28 N. Y. 568 ;
Murray v. Ballou, 1 John. Ch. (N. Y.) 566 ;
Fillman v. Divers, 31 Pa. St. 429 ;
Shryock v. Waggoner, 28 Pa. St. 430 ;
Church v. Church, 25 Pa. St. 278 ;
Veile v. Blodgett, 49 Vt. 270 ;
Boone v. Chiles, 35 U. S. (10 Pet.) 177 ; bk. 9 L. ed. 388 ;
Russell v. Clark's Exrs., 11 U. S. (7 Cr.) 69 ; bk. 3 L. ed. 271.

² See : *Ante*, §§ 1702, 1703, 1704.

³ *Coles v. Allen*, 64 Ala. 98 ;

Tilford v. Torrey, 53 Ala. 120 ;
Shelton v. Lewis, 27 Ark. 190 ;
Jenkins v. Frink, 30 Cal. 586 ; s.c. 89 Am. Dec. 134 ;
Settembre v. Putman, 30 Cal. 490 ;
Church v. Sterling, 16 Conn. 388 ;
Williams v. Turner, 7 Ga. 348 ;
Dodge v. Cole, 97 Ill. 338 ; s.c. 37 Am. Rep. 111 ;
Moss v. Moss, 95 Ill. 449 ;
Derry v. Derry, 74 Ind. 560 ;
Tracy v. Kelley, 52 Ind. 535 ;
Pugh v. Pugh, 9 Ind. 132 ;
Reickhoff v. Brecht, 51 Iowa 633 ; s.c. 2 N. W. Rep. 522 ;
Winkfield v. Brinkman, 21 Kan. 682 ;
McLarren v. Brewer, 51 Me. 402 ;
Thomas v. Standiford, 49 Md. 181 ;
Jones v. Dexter, 130 Mass. 380 ; s.c. 39 Am. Rep. 459 ;
Homer v. Homer, 107 Mass. 82 ;
Shaw v. Spencer, 100 Mass. 382 ; s.c. 97 Am. Dec. 107 ; 1 Am. Rep. 115 ;
Bancroft v. Consen, 95 Mass. (13 Allen) 50 ;
Michigan Air-line Co. v. Mellen, 44 Mich. 321 ; s.c. 6 N. W. Rep. 845 ;
Murdock v. Hughes, 15 Miss. (7 Smed. & M.) 219 ;
White v. Drew, 42 Mo. 561 ;
Roy v. McPherson, 11 Neb. 197 ; s.c. 7 N. W. Rep. 873 ;
Johnson v. Dougherty, 18 N. J. Eq. (3 C. E. Gr.) 406 ;
Ferris v. Van Vechten, 73 N. Y. 113 ;
Schlaefter v. Corson, 52 Barb. (N. Y.) 510 ;
Foot v. Calvin, 3 John. (N. Y.) 216 ; s.c. 3 Am. Dec. 478 ;

SEC. 1707. **Same—Voluntary conveyance in fraud of creditors.**—Upon the same principle a voluntary conveyance for the purpose of defeating or delaying creditors of the grantor, raises a constructive trust in the property of the debtor in the hands of such voluntary grantees. Such fraudulent conveyance may always be proved by parol,¹ and when so proved, renders wholly inoperative the formal transactions which may have been adopted by the parties for such purpose.² Whether a voluntary convey-

Barrett v. Bamber, 81 Pa. St. 247;
Robb's Appeal, 41 Pa. St. 45;
Wallace v. Duffield, 2 Serg. & R.
(Pa.) 521; s.c. 7 Am. Dec. 660;
Watson v. Thompson, 12 R. I.
466;

Mathews v. Heyward, 2 S. C. 239;
Turner v. Pettigrew, 6 Humph.
(Tenn.) 438;

Thomas v. Walker, 6 Humph.
(Tenn.) 92;

Hubbard v. Burrell, 41 Wis. 365;
Barker v. Barker, 14 Wis. 131,
146;

Duncan v. Jaudon, 82 U. S. (15
Wall.) 165; bk. 21 L. ed. 142;

Oliver v. Piatt, 44 U. S. (3 How.)
333; bk. 11 L. ed. 622; s.c. *sub*
nom. Piatt v. Oliver, 2 McL. C.
C. 313; Fed. Cas. 11115;

Prevost v. Gratz, 1 Pet. C. C. 364;
s.c. Fed. Cas. No. 11406;

Smith v. Burnham, 3 Sumn. C.
C. 435; s.c. Fed. Cas. No.
13019;

Philips v. Crammond, 2 Wash.
C. C. 441; s.c. Fed. Cas. No.
11092;

Flanders v. Thompson, 3 Woods
C. C. 9; s.c. Fed. Cas. No.
4853;

Lane v. Dighton, Ambl. 413;
Ouseley v. Anstruther, 10 Beav.
453;

Deg v. Deg, 2 Pr. Wms. 412;
Keech v. Sandford, 1 Sel. Cas. 61;
Trench v. Harrison, 17 Sim. 111;
Lench v. Lench, 10 Ves. 511;
1 Eq. Ld. Cas. 48.

¹ See: *Post*, §§ 1716, 1720, 1726.

² Hills v. Eliot, 12 Mass. 26, 31; s.c.
7 Am. Dec. 26.

See: Crawford v. Kirksey, 55
Ala. 282; s.c. 28 Am. Rep. 704;
Freeman v. Burnham, 36 Conn.
469;

Salmon v. Bennett, 1 Conn. 525;
s.c. 7 Am. Dec. 237;

Gridley v. Watson, 53 Ill. 186;

Jones v. Reeder, 23 Ind. 111;

Kahn v. Gumberts, 9 Ind. 430;

Ellinger v. Crowl, 17 Md. 361;

Robinson v. Bliss, 121 Mass. 428,
430;

Rice v. Cunningham, 116 Mass.
466, 467;

Partridge v. Messer, 80 Mass. (14
Gray) 180;

Case v. Gerrish, 32 Mass. (15
Pick.) 49;

Harris v. Sumner, 19 Mass. (2
Pick.) 129, 137;

Fellows v. Smith, 40 Mich. 689;
Filley v. Register, 4 Minn. 391;

s.c. 77 Am. Dec. 522;

Cowen v. Alsop, 51 Miss. 158;

Pomeroy v. Bailey, 43 N. H. 118;
Haston v. Castner, 31 N. J. Eq.
(4 Stew.) 697;

Dewey v. Moyer, 72 N. Y. 70;

Bliss v. Matteson, 45 N. Y. 22;

Crumbaugh v. Kugler, 3 Ohio
St. 544;

Clark v. Douglass, 62 Pa. St. 408;
Mann v. Darlington, 15 Pa. St.
310;

Church v. Chapin, 35 Vt. 223;

Brackett v. Wait, 4 Vt. 389.

Fraud avoiding sale—Alabama doctrine—Crawford v. Kirksey.—The fraud which will avoid sales and conveyances, as being made to the prejudice of creditors, is either constructive or actual. Constructive fraud is when one, who is indebted, disposes of his property to another by gift, or on consideration not deemed valuable in law. The Supreme Court of Alabama say in Crawford v. Kirksey, 55 Ala. 282; s.c. 28 Am. Rep. 704, that "under our decisions, such disposition is constructively fraudulent, as against the existing debts of the

ance by the husband or father to a wife or child will be fraudulent and void as to creditors of such husband or

grantor, no matter how innocent or meritorious the motive with which it is made, or how inconsiderable a part of the grantor's property is thus disposed of. Debtors must be just before they are generous, has been the lifetime language of this court."

Citing : *Spencer v. Godwin*, 30 Ala. 355 ;

Miller v. Thompson, 3 Port. (Ala.) 196.

Same—Purchase from debtor.—But when property is purchased from the debtor, and a valuable consideration paid for it, a different rule prevails. The question of intent then becomes a material inquiry. If there be no fraudulent design or secret trust, such sales are upheld. But if there be a secret trust, or the sale or conveyance be made with intent to delay, hinder, or defraud creditors, either of these will set the conveyance aside, if assailed by a creditor, notwithstanding there may be a full consideration paid for the property. This is what the law calls actual fraud.

Code of Ala. 1876, §§ 2120, 2124, 2125.

Crawford v. Kirksey, 55 Ala. 282 ; s.c. 28 Am. Rep. 704.

Citing : *Reynolds v. Welch*, 47 Ala. 200 ;

Wiley v. Knight, 27 Ala. 336 ;

McGuire v. Miller, 15 Ala. 394 ;

Elliott v. Horn, 10 Ala. 348 ;

Patterson v. Campbell, 9 Ala. 933 ;

Cummings v. McCullough, 5 Ala. 324 ;

Carter v. Castleberry, 5 Ala. 277.

Same—Conveyance in payment of debt.—Another distinction has grown up, namely, between sales and conveyances made in payment of an antecedent debt, and those made on a new consideration, paid or promised. Each of these classes of conveyances has privileges and rights not enjoyed by the other. First, as to sales upon a new consideration, and not

in payment or security of an antecedent debt. If the seller be insolvent, or in failing circumstances, and the purchaser knows, or is in possession of information reasonably calculated to stimulate inquiry, and which if followed up would lead to the discovery that the purpose of the seller is to put his property beyond reach, or otherwise to delay, hinder, or defraud his creditors ; then a purchase under these circumstances, though full consideration is paid, is invalid as against creditors. But if the purchase be made without such knowledge, and without such information as reasonably to put him on inquiry, he acquired a good title, no matter how fraudulent the intent to the seller. There is this qualification, however. If the purchaser, before full payment, is chargeable with knowledge of the fraudulent intent of the seller, he is not permitted to make further payments to the seller, but must withhold the same for the paramount claims of his creditors. *Crawford v. Kirksey*, 55 Ala. 282 ; s.c. 28 Am. Rep. 704 ; *Hall v. Heydon*, 41 Ala. 242 ; *Tatum v. Hunter*, 14 Ala. 557 ; *Cummings v. McCullough*, 5 Ala. 324 ; *Green v. Tanner*, 49 Mass. (8 Met.) 411. Second. When the sale is in payment of an antecedent debt. Our statutes have not gone the length of declaring that an insolvent debtor, or one in failing circumstances, shall not give a preference in the payment of his debts. If there be no secret trust, or benefit or reservation, reserved to the grantor, an actual sale made by such debtor, at a fair and reasonable price, will be upheld, although it be known to both contracting parties that such sale will leave the debtor unable to pay his other debts. This is one of the inevitable consequences of allowing a failing debtor to give prefer-

father, in the absence of actual intent to defraud, will depend upon its reasonableness and the condition of the grantor in respect to his ability to pay his debts out of the property retained by him.¹

ences. The fraud which vitiates a sale by an insolvent debtor to a preferred creditor is unlike that of a sale for a new consideration paid. It is an attack upon the sale itself, as an actual transfer of the property and its title, or upon the sufficiency or *bona fides* of the consideration. Simulation, secret trust—these are the defects which usually avoid sales made or pretended to be made by a debtor in failing circumstances to a preferred creditor. Such was the taint in the contract which was declared void in *Twine's Case*. We do not, however, intend to deny that simulation and secret trust sometimes accompany sales made ostensibly for a present new consideration. All we mean to affirm is, that when an insolvent debtor goes through the form of a sale to a preferred creditor, but really intends thereby to defraud his creditors, simulation is usually resorted to, to cover up the secret trust by which he proposes to secure a benefit to himself. If there be a real debt, and real transfer of the title and use of property in its payment, at a fair price, and in good faith, pressing importunity on the part of the creditor to procure its execution will not avoid the deed, although the debtor be known to be insolvent, and the known effect of the conveyance is to leave the debtor without property to pay his other debts. To hold otherwise would be to declare that the vigilant creditor, who stipulates for security of his claim against a failing debtor, loses his claim by attempting to save it. We wish not to be misunderstood. The creditor must not go beyond the permissible purpose of securing his own demand. If he go beyond this, and secure a benefit to the

debtor, he will thereby violate both the letter and spirit of the statute, and his conveyance will be set aside for the fraud. *Crawford v. Kirksey*, 55 Ala. 282; s.c. 28 Am. Rep. 704. Citing: *King v. Kenan*, 38 Ala. 63; *Montgomery v. Kirksey*, 26 Ala. 172; *Johnson v. Thwatt*, 18 Ala. 741; *Stover v. Herrington*, 7 Ala. 142; s.c. 41 Am. Dec. 86; *Robinson v. Rapelye*, 2 Stew. (Ala.) 86; Code of Ala., §§ 2120, 2125. ¹ *Salmon v. Bennett*, 1 Conn. 525; s.c. 7 Am. Dec. 237; *Stewart v. Rogers*, 25 Iowa 395; s.c. 95 Am. Dec. 794; *Filley v. Register*, 4 Minn. 391; s.c. 77 Am. Dec. 522. See: *Abbe v. Neuton*, 19 Conn. 27; *Whittlesey v. McMahon*, 10 Conn. 137, 142; s.c. 26 Am. Dec. 382; *Gilpin v. Davis*, 2 Bibb (Ky.) 416; s.c. 5 Am. Dec. 622; *Taylor v. Eubanks*, 3 A. K. Marsh. (Ky.) 239; *Beal v. Warren*, 68 Mass. (2 Gray) 447, 456; *Jackson v. Brush*, 20 John. (N. Y.) 5; *Manhattan Company v. Osgood*, 15 John. (N. Y.) 162; *Verplank v. Sterry*, 12 John. (N. Y.) 536, 556; s.c. 7 Am. Dec. 348; *Bank of United States v. Housman*, 6 Paige Ch. (N. Y.) 526; *Smith v. Niel*, 1 Hawks. (N. C.) 341; *Trotter v. Howard*, 1 Hawks. (N. C.) 320; s.c. 9 Am. Dec. 640; *Teasdale v. Reaborn*, 2 Bay (S. C.) L. 546; *Hamilton v. Greenwood*, 1 Bay (S. C.) L. 173; s.c. 1 Am. Dec. 607; *Taylor v. Heriot*, 4 Desau. (S. C.) L. 227, 232; *Hinde v. Longworth*, 24 U. S. (11 Wheat.) 199, 211; bk. 6 L. ed. 454. Iowa rule—*Stewart v. Rogers*—Judge

SEC. 1708. **Same—Precatory trusts.**—Where words of entreaty, desire, wish, request, or recommendation are ad-

Dillon says in *Stewart v. Rogers*, 25 Iowa 395; s.c. 95 Am. Dec. 794: "In the absence of an existing actual intent to defraud, whether a voluntary conveyance to a child will be void as to the creditors of the father will depend upon its reasonableness, and the condition of the grantor as respects his ability to pay his debts out of the property retained by him. The authorities are not uniform, but such has been the view of this subject heretofore taken in this court."

See: *Hook v. Mowre*, 17 Iowa 195;

Lyman v. Cessford, 15 Iowa 229;

Culbertson v. Luckey, 13 Iowa 12;

Carson v. Foley, 1 Iowa 524;

Sexton v. Wheaton, 1 Am. Lead. Cas. 68, 72.

English doctrine.—In *Filley v. Register*, 4 Minn. 391; s.c. 77 Am. Dec. 522, Judge FLANDRAU says: "It would be an unnecessary task to undertake here a review of the cases upon this subject, when so many such reviews are furnished us by the elementary writers of the present day: See discussion of the subject in 1 Story's Eq. Jur. (13th ed.), §§ 351-365; 2 Kent's Com. 547-551, and notes; see also the cases of *Seward v. Jackson*, 8 Cow. (N. Y.) 406; and *Reade v. Livingston*, 3 John. Ch. (N. Y.) 481; s.c. 8 Am. Dec. 520. I will merely arrange a few of the many cases involving this question under the points which I consider they sustain, adding, as I said above, that some of them are upon the question of subsequent purchasers and creditors, and some upon existing demands when the voluntary conveyance was executed. Of the English cases which sustain the doctrine that no voluntary conveyance can stand against an existing creditor of the grantor are the following:

Wheeler v. Caryl, Ambl. 121;

White v. Samson, 3 Atk. 410;

Russell v. Hammond, 1 Atk. 188;

Gardiner v. Painter, Cas. temp.

King 65;

Doe d. Bothell v. Martyr, 1 Bos. & P. N. R. 332; s.c. 8 Rev. Rep. 821;

Nunn v. Wilsmore, 8 Durnf. & E. (8 T. R.) 528; s.c. 5 Rev. Rep. 434;

Doe d. Otley v. Manning, 9 East 59, 63; s.c. 9 Rev. Rep. 503;

Tonkins v. Ennis, 1 Eq. Cas. Abr. 334;

White v. Hussey, 1 Finch's Pres. Ch. 14;

Prodgers v. Laughran, 1 Sid. 133;

Hill v. The Bishop of Exeter, 2 Taunt. 82; s.c. 11 Rev. Rep. 527;

Buckle v. Mitchell, 18 Ves. 100; s.c. 11 Rev. Rep. 155;

Lord Townshend v. Windham, 2 Ves. Sr. 1-10;

Beaumont v. Thorpe, 1 Ves. Sr. 27.

"While it may fairly be collected from these English cases that the judges who decided them meant to hold that a voluntary conveyance could not stand against a prior existing debt under any circumstances, but as to such was void by presumption of law, yet it should not be overlooked that the circumstances and facts of many of the cases would have warranted the decisions upon the assumption that the deeds were only *prima facie* evidence of fraud, and a litigation of an issue joined upon that theory. The following are some of the English cases that hold that the deed is not void *per se*, but may be vindicated upon proof of the *bona fides* of the transaction."

Citing: *Walker v. Burrows*, 1 Atk. 93;

Doe d. Routledge, 1 Cowp. 705;

Cadogan v. Kennet, 1 Cowp. 432;

East India Comp. v. Clavell, Gibb Eq. 37;

Jenkins v. Kemishe, Hard. 398;

Garth v. Mois, 1 Keb. 486;

Lord Teynham v. Mullins, 1 Mod. 119;

Sir Ralph Bovy's Case, 1 Vent. 193;

Sagitary v. Hide, 2 Vern. 44;

Lush v. Wilkinson, 5 Ves. 384.

dressed by a testator to a devisee or legatee, courts of equity have gone great lengths in creating implied or constructive trusts from such words. Precatory words are treated as imperative, and creating a trust where the objects¹ of the precatory words are certain, and the subjects² contemplated are also certain;³ unless a clear discretion or choice to act or not to act be given, or the prior disposition of the property import absolute or uncontrollable beneficial ownership.⁴ But whenever the object or

¹ Certainty of subjects and objects is necessary to render words of recommendation, wish, desire, or entreaty sufficient to create trusts or enable the court to carry them into effect.

In re Terry's Will, 19 Beav. 580;

Griffiths v. Evan, 5 Beav. 241;

Knight v. Knight, 3 Beav. 148;

Harland v. Trigg, 1 Bro. C. C. 142;

Shaw v. Lawless, 5 Cl. & Fin. 129;

Gregory v. Smith, 9 Hare 708;

Moriarty v. Martin, 3 Ir. Ch. 31;

Reid v. Atkinson, 5 Ir. Eq. 373;

Bernard v. Minshull, Johns. Ch. (Eng.) 276;

Briggs v. Penny, 3 Macn. & G. 554;

Meredith v. Heneage, 1 Sim. 542;

Sale v. Moore, 1 Sim. 534;

Williams v. Williams, 1 Sim. N. S. 358;

Wright v. Atkyns, 19 Ves. 299;

s.c. *G. Cooper* 111; 13 Rev. Rep. 199; 17 Ves. 255; 11 Rev. Rep. 76.

Same—Lord Thurlow says in the case of *Harland v. Triggs*, 1 Bro. C. C. 142, that "two things must concur to constitute such devises, the terms and the object."

² *Sprange v. Barnard*, 2 Bro. C. C. 585;

Wynne v. Hawkins, 1 Bro. C. C. 179;

Shaw v. Lawless, 5 Cl. & Fin. 129;

Bland v. Bland, 2 Cox 349;

Constable v. Bull, 3 DeG. & S. 411;

Green v. Marsden, 1 Drew 646;

Eade v. Eade, 5 Madd. 118;

Lechmere v. Lavie, 2 My. & K. 197;

Finden v. Stephens, 2 Phillim. 142;

Pope v. Pope, 10 Sim. 1;

Harwood v. West, 1 Sim. & S. 387;

Wilson v. Mayor, 11 Ves. 205;

Pushman v. Tilliter, 3 Ves. 7.

³ To raise a precatory trust, words of recommendation or of hope used by the testator must be certain: first, as regards the objects to whom such terms are applied; and second, the subjects of property given must be certain. The words are then considered imperative and create the trust.

Lucas v. Lockhart, 18 Miss. (10 Smed. & M.) 466; s.c. 48 Am. Dec. 766.

⁴ *Gilbert v. Chapin*, 19 Conn. 342;

Handley v. Wrightson, 60 Md. 198, 206;

Warner v. Bates, 98 Mass. 274, 276-278;

Harrison v. Harrison, 2 Gratt. (Va.) 1; s.c. 44 Am. Dec. 365;

Knox v. Knox, 59 Wis. 172, 178-185; s.c. 18 N. W. Rep. 155;

Howard v. Carusi, 109 U. S. 735; bk. 27 L. ed. 1089;

Hood v. Oglander, 33 Beav. 523;

Reeves v. Baker, 18 Beav. 373;

Macnab v. Whitbread, 17 Beav. 299;

Knight v. Knight, 3 Beav. 173;

Smith v. Smith, 2 Jur. N. S. 967;

Hawk. Wills, 159.

The court say in *Harrison v. Harrison*, 2 Gratt. (Va.) 1; s.c. 44 Am. Dec. 365, that "a testator's desires in regard to the disposition of his property, to be collected from his will, ought not to be the less obeyed because he has confided the execution of them to another, unless it appears that he designs to subject his own wishes and expectations to the caprice or inclination of the person so en-

the property of the supposed trust is not certain or definite, or a clear discretion and choice to act is given, and whenever prior dispositions import uncontrollable ownership, the courts will not create a trust from precatory words.¹

SEC. 1709. **Same—Same—Words and expressions creating.**—No technical words are necessary to show an intent on the part of a testator to express a command and create a trust. Various expressions used by testators have been construed by the courts as imposing a binding duty upon the devisee or legatee to dispose of the property according to the desire of the testator, as ascertained from his will. Lord Cranworth has said that the true rule is to ascertain “whether the wish or desire or recommendation, expressed by the testator, is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion.”² Among others the following words and phrases have been held to create precatory trusts, to-wit: “Absolutely trusting:”³ “authorize and empower;”⁴ “be

trusted. This idea is quaintly, but comprehensively and forcibly, expressed by Lord ALVANLEY, master of the rolls, in *Malim v. Keighley*, 2 Ves. Jr. 335, where he says: “Wherever any person gives property, and points out the object, the property, and the way it shall go, that does create a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it.” If this were not so, I cannot doubt that the confidence of testators would often be abused, and their testamentary plans defeated.”

Lord LANGDALE says in *Knight v. Knight*, 3 Beav. 173, that, “as a general rule, it has been laid down, that where property has been given absolutely to any person, and the same person has, by the giver who has power to command, been recommend-

ed, or entreated, or wished, to dispose of that property in favor of another, the recommendation, entreaty, or wish shall be held to create a trust: 1. If the words are so used that, upon the whole, they ought to be construed as imperative; 2. If the subject of the recommendation or wish be certain; and, 3. If the objects or persons intended to have the benefit of the recommendation or wish be also certain.”

¹ 2 Story Eq. Jur. (13th ed.), §§ 1086-1090.

² *Williams v. Williams*, 1 Sim. N. S. 358.

See: *Bernard v. Minshull*, Johns. Ch. (Eng.) 276.

³ *Irvine v. Sullivan*, L. R. 8 Eq. 673.

⁴ *Brown v. Higgs*, 4 Ves. 708; s.c. 4 Rev. Rep. 323; 18 Ves. 192; 8 Ves. 361; 5 Ves. 495.

See: *Wilson v. Duguid*, 24 Ch. Div. 244; s.c. 53 L. J. Ch. 52.

well assured ;”¹ “belief ;”² “confidence ;”³ “desire ;”⁴ “entreat ;”⁵ “full confidence and hope ;”⁶ “have fullest confidence ;”⁷ “having confidence ;”⁸ “hope”⁹ and “hoping ;”¹⁰ “I allow my son to support off my plantation during her life ;”¹¹ “I desire that he should appropriate not exceeding” a specified number of dollars per year ;¹² “I trust the education and maintenance of my children during that time ;”¹³ “in consideration he has promised to give ;”¹⁴ “it is my wish ;”¹⁵ “most heartily beseech ;”¹⁶ “not doubting, in case he should have no child, but that he will dispose and give my said real estate to the female descendants of my sister in such part or parts as he shall think fit, in preference to any

¹ *Macey v. Shurmer*, 1 Atk. 389 ;
Ray v. Adams, 3 My. & K. 237.

² *Eade v. Eade*, 5 Madd. 118 ;
Cary v. Cary, 2 Sch. & Lef. 189 ;
Paul v. Compton, 8 Ves. 380 ; s.c.
 7 Rev. Rep. 81.

³ *Griffith v. Evans*, 5 Beav. 241 ;
Sheperd v. Nottidge, 2 John. &
 H. 766.

⁴ *Vernon v. Vernon*, 4 Amb. 4 ;
Harding v. Glyn, 1 Atk. 469 ;
Brest v. Offley, 1 Ch. Rep. 246 ;
Bonser v. Kinner, 2 Giff. 198 ;
Cruwys v. Colman, 9 Ves. 319 ;
 s.c. 7 Rev. Rep. 210 ;
Pushman v. Filliter, 3 Ves. 7.

⁵ *Prevost v. Clarke*, 2 Madd. 458 ;
Meredith v. Heneage, 1 Sim. 458 ;
Taylor v. George, 2 Ves. & B.
 378.

⁶ *Macnab v. Whitbread*, 17 Beav.
 299.

⁷ *Warner v. Bates*, 98 Mass. 274 ;
Shovelton v. Shovelton, 32 Beav.
 143 ;
Gully v. Crego, 24 Beav. 185 ;
Palmer v. Simonds, 2 Drew 221 ;
Webb v. Woods, 2 Sim. N. S. 267 ;
Wright v. Atkyns, 17 Ves. 255 ;
 s.c. 11 Rev. Rep. 76 ; 19 Ves.
 299 ; *G. Cooper* 111 ; 13 Rev.
 Rep. 199 ;
Re Price, 22 W. N. 216.

⁸ *Dresser v. Dresser*, 46 Me. 48 ;
Reid v. Blackstone, 14 Gratt. (Va.)
 363.

⁹ *Harland v. Trigg*, 1 Bro. C. C.
 142 ;
Paul v. Compton, 8 Ves. 375 ;
 s.c. 7 Rev. Rep. 81.

¹⁰ *In Harlan v. Trigg*, 1 Bro. C. C.

142, where the testator gave leaseholds to his brother forever, “hoping he will continue them in the family,” Lord Thurlow held that this did not create a trust, saying, “The rule requires that two things must concur to constitute these devises, the terms and the object. Hoping is in contradiction to a direct devise ; but whenever there are annexed to such words precise and direct objects, the law has connected the whole together, and held the words sufficient to raise a trust, but then the objects must be distinct ; where there is a choice, it must be in the power of the devisee to dispose of it either way. If he had sold these leaseholds, the family could not have taken them from the vendee, or if he had given them to any one part of the family, the others could have no remedy.”

¹¹ *Hunter v. Stembridge*, 12 Ga.
 192.

¹² *Erickson v. Willard*, 1 N. H. 217.

¹³ In a gift of the testator’s real and personal property to his wife during her widowhood.
Lucas v. Lockhart, 18 Miss. (10 Smed. & M.) 466 ; s.c. 48 Am. Dec. 766.

¹⁴ *Clifton v. Lombe*, Amb. 519.

¹⁵ *McRee v. Means*, 34 Ala. 349 ;
Brunson v. Hunter, 2 Hill (S. C.)
 Eq. 490.

¹⁶ *Meredith v. Heneage*, 1 Sim. 553.

descendant on his own female line;"¹ "of course he will give;"² "order and direct;"³ "recommend:"⁴ "to dispose of and divide among my children:"⁵ "to her discretion I entrust the education and maintenance of my children out of the profits of the estate:"⁶ "trust and confide;"⁷ "under the firm conviction;"⁸ "well knowing;"⁹ "will;"¹⁰ "will and declare;"¹¹ "wish and desire;"¹² "wish and request;"¹³ "with full confidence that they will,"¹⁴ and the like.

SEC. 1710. **Same—Same—American doctrine.**—A few of the earlier American cases have followed the early English cases set out in the preceding section, and held that words of desire, expectation, hope, or wish in the bequest appropriated to the benefit of a third person would create a trust in his favor which would be enforceable in courts of equity. This was on the ground that the construction

- ¹ *Malone v. O'Connor*, Lloyd & G. 465;
Eaton v. Watts, L. R. 4 Eq. 151;
 s.c. 16 L. T. N. S. 311;
Parsons v. Baker, 18 Ves. 476;
 s.c. 11 Rev. Rep. 237;
Taylor v. George, 2 Ves. & B. 278.
 See: *Lucas v. Lockhart*, 18 Miss. (10 Smed. & M.) 466; s.c. 48 Am. Dec. 766.
- ² *Robinson v. Smith*, 6 Madd. 194;
Lechmere v. Lavie, 2 My. & K. 197.
- ³ *White v. Briggs*, Phillim. 583.
- ⁴ *Hart v. Tribe*, 18 Beav. 215;
Kingston v. Lorton, 2 Hog. 166;
Cholmondeley v. Cholmondeley, 14 Sim. 590;
Sale v. Moore, 1 Sim. 534;
Harwood v. West, 1 Sim. & S. 387;
Tibbits v. Tibbits, 19 Ves. 656;
 s.c. 13 Rev. Rep. 277;
Malim v. Barker, 3 Ves. 150;
Meggison v. Moore, 2 Ves. Jr. 630;
Malim v. Keighley, 2 Ves. Jr. 333; s.c. 2 Rev. Rep. 229.
- ⁵ *Collins v. Carlisle*, 7 B. Mon. (Ky.) 14.
- ⁶ *Lucas v. Lockhart*, 18 Miss. (10 Smed. & M.) 466; s.c. 48 Am. Dec. 766.
 See: *Malone v. O'Connor*, Lloyd & G. 465;
Eaton v. Watts, L. R. 4 Eq. 151;
 s.c. 16 L. T. N. S. 311;
Parsons v. Baker, 18 Ves. 476;
 s.c. 11 Rev. Rep. 237;
Taylor v. George, 2 Ves. & B. 278.
- ⁷ *Wood v. Cox*, 1 Keene 317; s.c. 2 My. & C. 684;
Pilkington v. Boughey, 12 Sim. 114.
- ⁸ *Barnes v. Grant*, 26 L. J. Ch. N. S. 92.
- ⁹ *Noland v. Nelligan*, 1 Bro. C. C. 489;
Briggs v. Penny, 3 DeG. & S. 525;
 s.c. 3 Macn. & G. 546, 554;
Bradswell v. Bradswell, 9 Sim. 323.
- ¹⁰ *Eales v. England*, 1 Pr. Ch. 200;
Cloudsley v. Pelham, 1 Vern. 411.
- ¹¹ *Gray v. Gray*, 1 Ir. Ch. 218.
- ¹² *Cockrill v. Armstrong*, 13 Ark. 580;
Liddard v. Liddard, 28 Beav. 266.
- ¹³ *Cook v. Ellington*, 6 Jones (N. C.) Eq. 371;
Foley v. Perry, 2 My. & K. 138;
 s.c. 5 Sim. 138;
Godfrey v. Godfrey, 11 W. R. 554.
- ¹⁴ *Bull v. Bull*, 8 Conn. 47; s.c. 20 Am. Dec. 86.

of a will depends upon the intention of the testator as ascertained therefrom, and that when this intention is plain it should not fail because the means which the testator has employed are not as direct as they might have been.¹ Both the later American and English cases have departed from the doctrine of the earlier cases, and the courts are now inclined to hold that words in a will expressive of desire, confidence, and recommendation are not words of technical but of common parlance, and are not *prima facie* sufficient to convert a devise or bequest into a trust, and that the old Roman and English rules²

¹ *Harrison v. Harrison*, 2 Gratt. (Va.) 1; s.c. 44 Am. Dec. 365.
See: *Hunter v. Stembridge*, 12 Ga. 192;
Tolson v. Tolson, 10 Gill & J. (Md.) 159;
Loring v. Loring, 100 Mass. 340;
Chase v. Chase, 84 Mass. (2 Allen) 101;
Lucas v. Lockhart, 18 Miss. (10 Smed. & M.) 466; s.c. 48 Am. Dec. 766;
Erickson v. Willard, 1 N. H. 217;
Ward v. Peloubet, 10 N. J. Eq. (2 Stock.) 304, 305;
Carson v. Carson, 1 Ired. (N. C.) Eq. 329;
Little v. Bennett, 5 Jones (N. C.) Eq. 156.

² **Old English rule.**—The Supreme Court of Pennsylvania say in the case of *Pennock's Estate*, 20 Pa. St. 268, 269; s.c. 59 Am. Dec. 718, that "after the Norman Conquest, and under the strict principles of feuds, devises of land were not allowed. Hence the frequent resort to conveyances in trust, in order to be able to make provision for younger children, and for other purposes. These trusts were at first of no binding obligation, but depended for their execution entirely upon the honor of the grantee, and it was therefore very natural and appropriate that words of recommendation, desire, entreaty, and confidence should be used. Dishonesty would, of course, often occasion enormous grievances arising out of breaches of such confidence. It was very easy then for an

English chancellor to bring in the Roman law to correct such evils. It was really enforcing what was intended to be a trust, and changing the law to do it. It was equity stepping in to correct the deficiencies of common-law institutions, and modifying them into accordance with the changing customs and circumstances of the people. The rule, thus properly introduced, has of course outlived the circumstances which gave it birth, and which alone ought to maintain it. But the rule is fading away even in England. The disrelish with which it is received by the legal and judicial minds of that country may be seen in the doctrine of extreme certainty required as to the subject and object of the recommendation (*Harland v. Trigg*, 1 Bro. C. C. 142; *Tibbits v. Tibbits*, 19 Ves. 656, 664; s.c. 13 Rev. Rep. 277; *Wright v. Atkyns*, 1 Ves. & B. 313; s.c. Turn. & R. 157; *Ex parte Payne*, 2 You. & C. 636), and in the fact that it is degraded into the class of implied or constructive, and not express, trusts (*Hill v. Bishop of London*, 1 Atk. 619; *Jeremy's Eq. Jur.* 99; 1 *Lewin on Trusts* (4th ed.) 66; 2 *Roper on Leg.* 380, etc.; 2 *Story's Eq. Jur.* (13th ed.), § 1074), and that it is everywhere regarded as frustrating the will of the testator."

Meredith v. Heneage, 1 Sim. 551;
Sale v. Moore, 1 Sim. 540;
Wright v. Atkyns, 1 Ves. & B. 315; s.c. Turn. & R. 157;

on the subject do not control.¹ Mere words of desire, recommendation, and confidence in a will do not neces-

2 Story Eq. Jur., §§ 1069-1074.

Modern English rule.—Such words are not now regarded in England as creating a trust, unless on the whole they ought to be construed as imperative.

Macnamara v. Jones, 1 Bro. C. C. 481;

Meggison v. Moore, 2 Ves. Jr. 632;

2 Spence Eq. Jur. 65.

The rule is treated as a mere artificial one, that is to be strictly limited to the demands of authority. It looks upon the words as *prima facie* words of trust.

Podmore v. Gunning, 7 Sim. 665;

Berkley v. Ryder, 2 Ves. Sr. 533;

Worsley v. Granville, 2 Ves. 335.

Yet any words or expressions are eagerly seized hold of as indications of a contrary intent.

Knight v. Knight, 3 Beav. 172;

Harland v. Trigg, 1 Bro. C. C. 143;

Shaw v. Lawless, 5 Cl. & Fin. 147, 153;

White v. Briggs, 15 Sim. 33; Id. 300;

Meredith v. Heneage, 1 Sim. 550, 552.

Where it is apparent that the kindness or justice or discretion of the devisee is relied on, no trust arises.

Knight v. Knight, 3 Beav. 148; s.c. 3 Beav. 172, 176;

Curtis v. Rippon, 5 Madd. 434;

Pope v. Pope, 10 Sim. 1;

Bardswell v. Bardswell, 9 Sim. 319;

Malim v. Keighley, 2 Ves. Jr. 529, 530, 533; s.c. 2 Ves. Jr. 333; 2 Rev. Rep. 229;

Young v. Martin, 2 You. & C. N. S. 582, 590.

If it can be implied from the words that a discretion is left to withdraw any part of the subject of the devise from the object of the wish or request, or to apply it to the use of the devisee, no trust is created.

Flint v. Hughes, 6 Beav. 342;

Knight v. Knight, 3 Beav. 173, 174;

Sprange v. Barnard, 2 Bro. C. C. 585;

Wynne v. Hawkins, 1 Bro. C. C. 179;

Bland v. Bland, 2 Cox 354;

Eade v. Eade, 5 Madd. 121;

Lechmere v. Lavie, 2 Myl. & K. 201;

Pope v. Pope, 10 Sim. 5;

Horwood v. West, 1 Sim. & S. 389;

Pushman v. Filliter, 3 Ves. Jr. 7.

American doctrine—Pennock's estate.

—The court say in Pennock's Estate, 20 Pa. St. 268; s.c. 59 Am. Dec. 718: "We know of no American case wherein the antiquated English rule has been adopted, and that, as it is now regarded even in England, this case would not now be governed by it."

Citing: Flint v. Hughes, 6 Beav. 342;

Sprange v. Barnard, 2 Bro. C. C. 585;

Wynne v. Hawkins, 1 Bro. C. C. 179;

Bland v. Bland, 2 Cox 354;

Williams v. Williams, 5 Eng. L. & Eq. 49;

Eade v. Eade, 5 Madd. 118;

White v. Briggs, 15 Sim. 33;

Meredith v. Heneage, 1 Sim. 542;

Pushman v. Filliter, 3 Ves. Jr. 7;

Ex parte Payne, 2 You. & C. 636.

See, also: Coates' Appeal, 2 Pa. St. 129, 131.

¹ *Ellis v. Ellis*, 15 Ala. 296; s.c. 50 Am. Dec. 132;

Negroes Chase v. Plummer, 17 Md. 165, 166;

Hess v. Singler, 114 Mass. 56, 59;

Spooner v. Lovejoy, 108 Mass. 529, 534;

Whipple v. Adams, 42 Mass. (1 Met.) 445;

Van Duyne v. Van Duyne, 14 N. J. Eq. (1 McC.) 397;

Wood v. Seward, 4 Redf. (N. Y.) 275;

Second Reformed, etc., Church v. Disbrow, 52 Pa. St. 219, 224;

Kinter v. Jenks, 43 Pa. St. 445, 448;

Walker v. Hall, 34 Pa. St. 483, 487;

Pennock's Estate, 20 Pa. St. 256, 269; s.c. 59 Am. Dec. 718;

Burnson v. King, 2 Hill (S. C.) Eq. 483;

sarily create a trust in this country;¹ but words of desire, recommendation, and confidence in a will may amount to a declaration of trust, when it appears from other parts of the will that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice, or discretion.²

SEC. 1711. **Same—Resulting trusts—Introductory.**—A resulting trust arises by operation of law whenever a beneficial interest is not to accompany the legal title, as where land is purchased and the conveyance taken in the name of one person, the consideration being advanced by another;³ in which case the law presumes the intention of the parties from the natural equity that he who furnishes the means for the acquisition of the property should enjoy its benefits.⁴ Such trusts will be upheld

Skrine v. Walker, 3 Rich. (S. C.)
Eq. 262;

Van Amee v. Jackson, 35 Vt. 173;
Rhett v. Mason, 18 Gratt. (Va.)
541;

Crump v. Redd, 6 Gratt. (Va.)
372;

Shovelton v. Shovelton, 32 Beav.
143;

Bernard v. Minshull, Johns. Ch.
(Eng.) 285;

Scott v. Key, 11 Jur. N. S. 819;
Hood v. Oglander, 12 L. T. N. S.
626;

Briggs v. Penny, 3 Maon. & G.
546;

Williams v. Williams, 1 Sim. N.
S. 369;

Godfrey v. Godfrey, 11 W. R. 554.

¹ Thus where the testator willed to his wife his real estate "during her natural life," and his "personal estate of every description * * * absolutely, having full confidence that she will leave the surplus to be divided at her decease justly among my children." By this will the absolute ownership of the personal property of the testator is given to his widow, with an expression of mere expectation that she will use and dispose of it discreetly as a mother, and no trust is thereby created.

Pennock's Estate, 20 Pa. St. 256,
268; s.c. 59 Am. Dec. 718.

It is said in *Ellis v. Ellis*, 15 Ala. 296; s.c. 50 Am. Dec. 132, that a devise of a testator's entire estate to his wife, "recommending to her, at the same time, to make some small allowance, at her convenience, to each of my brothers and sisters, say to each one thousand dollars," does not create a trust in favor of the brothers and sisters.

² *Pennock's Estate*, 20 Pa. St. 256,
268; s.c. 59 Am. Dec. 718.

³ See; *Post*, § 1717.

⁴ *Lehman v. Lewis*, 62 Ala. 129;
Lee v. Browder, 51 Ala. 288;
DuVal v. Marshall, 30 Ark. 230;
Case v. Coddington, 38 Cal. 191;
Murphy v. Peabody, 63 Ga. 522;
Hampson v. Fall, 64 Ind. 382;
Peabody v. Tarbell, 56 Mass. (2
Cush.) 226, 227;
Brooks v. Shelton, 54 Miss. 353;
Botsford v. Burr, 2 John. Ch. (N.
Y.) 405;
Boskowitz v. Davis, 12 Nev. 446;
Burks v. Burks, 7 Baxt. (Tenn.)
353;
*Chapman v. County Commis-
sioners of Douglass*, 107 U. S.
357; bk. 27 L. ed. 378;
Jackson v. Jackson, 91 U. S. 125;
bk. 23 L. ed. 258;
Young v. Peachy, 2 Atk. 256;
Dyer v. Dyer, 2 Cox 92; s.c. 2
Rev. Rep. 14;

even though the title to the land is acquired through judicial sale;¹ they will also be upheld as against the objection of uncertainty.² It follows from what has been above said that where a part of the purchase-money is furnished by a party other than the one purchasing the land there will be a resulting trust to the extent of the money furnished,³ where the money is paid as a definite aliquot part of the entire consideration of the purchase, otherwise it seems that no trust will be raised by implication of law.⁴

SEC. 1712. Same—How created.—A resulting trust is a mere creature of equity founded upon presumptive intention and design to carry that intention into effect, not to defeat it, and does not arise where there is an express declaration of trust by the parties in writing,⁵ and under

Rider v. Rider, 10 Ves. 360 ;

Loyd v. Read, 1 Pr. Wms. 607 ;

1 *Perry on Trusts* (4th ed.), §§ 126, 143 ;

2 *Pom. Eq. Jur.*, § 1031 ; 1 *Id.*, § 155 ;

2 *Story Eq. Jur.* (13th ed.), § 1201.

¹ *Beegle v. Wentz*, 55 Pa. St. 369 ; s.c. 93 Am. Dec. 762.

Resulting trust is beyond contemplation of Texas statute respecting the rights of creditors, and is protected against one who acquires a judgment lien against it without notice, although a purchaser in good faith, for a valuable consideration, and without notice, would take the estate discharged of the trust.

Blankenship v. Douglas, 26 Tex. 225 ; s.c. 82 Am. Dec. 608.

² Thus where a creditor verbally agreed to reconvey to the debtor fifteen acres of land around the debtor's house, part of a tract of fifty-eight acres, if the debtor would waive his exemption, and permit the whole tract to be sold at sheriff's sale, under an execution levied upon it and to be bought in by the creditor. The law presumes that the land was meant to be laid off in a reasonable shape, and the parties can afterwards do it, or if one will not, the other can on notice.

Beegle v. Wentz, 55 Pa. St. 369 ; s.c. 93 Am. Dec. 762.

³ *Rhea v. Tucker*, 56 Ala. 450 ;

Case v. Coddington, 38 Cal. 191 ;

Dikeman v. Norrie, 36 Cal. 94 ;

Cramer v. Hoose, 93 Ill. 503 ;

Smith v. Smith, 85 Ill. 189 ;

Pierce v. Pierce, 7 B. Mon. (Ky.) 433 ;

Botsford v. Burr, 2 John. Ch. (N. Y.) 405 ;

Morey v. Herrick, 18 Pa. St. 123 ;

Smith v. Patton, 12 W. Va. 541.

See : *Post*, § 1722.

⁴ *White v. Carpenter*, 2 Paige Ch. (N. Y.) 217, 238, 239, 240, 241.

See : *Baker v. Vining*, 30 Me. 121 ; s.c. 1 Am. Dec. 617 ;

Green v. Drummond, 31 Md. 71 ; s.c. 1 Am. Rep. 14 ;

McGowan v. McGowan, 80 Mass. (14 Gray) 119 ; s.c. 74 Am. Dec. 668 ;

Cutler v. Tuttle, 19 N. J. Eq. (4 C. E. Gr.) 549, 562 ;

Freeman v. Kelly, 1 Hoff. Ch. (N. Y.) 90, 96 ;

Sayre v. Townsends, 15 Wend. (N. Y.) 647, 650 ;

Evans' Estate, 2 Ashm. (Pa.) 470, 482 ;

Smith v. Burnham, 3 Sum. C. C. 435, 462, 463 ; s.c. Fed. Cas. 13019.

⁵ As in the case of an alien purchasing land, and having the deed made to a citizen, in

the statute of frauds can arise only from some conveyance or deed.¹ Trusts result, by implication of law, in two cases only, to wit : (1) Where a purchaser of land has paid the purchase price with his own money, and taken the conveyance in the name of another, or where he has paid with the money of another, and taken the conveyance in his own name ;² and (2) where a trust has been declared of part of the estate, from which the law implies an intent to reserve the beneficial ownership of the residue.³ But such a trust will not attach to the person paying the purchase-money, if it was not the intention of either party that the estate should vest in him ;⁴ and no equitable presumption of trust arises where the grantee of property is related to the person from whom

which case no trust results in favor of such alien.

Leggett v. Dubois, 5 Paige Ch. (N. Y.) 114 ; s.c. 28 Am. Dec. 413.

A resulting trust to a grantor, contrary to the express terms of his conveyance, cannot be raised.

Squire v. Harder, 1 Paige Ch. (N. Y.) 494 ; s.c. 19 Am. Dec. 446.

¹ Jackson v. Morse, 16 John. (N. Y.) 197 ; s.c. 8 Am. Dec. 306.

² It must appear that the money belonged to the *cestui que trust*, or had been advanced as a loan or a gift to him.

Osborne v. Endicott, 6 Cal. 149 ; s.c. 45 Am. Dec. 498 ;

Oliver v. Dougherty, 3 G. Greene (Iowa) 371 ;

City Nat. Bank v. Hamilton, 34 N. J. Eq. (7 Stew.) 158 ;

Getman v. Getman, 1 Barb. Ch. (N. Y.) 499 ;

Pegues v. Pegues, 5 Ired. (N. C.) Eq. 418.

The payment must be part of the transaction, and relate to the time when the purchase was made.

Lehman v. Lewis, 62 Ala. 129 ; Perry v. McHenry, 13 Ill. 227 ;

Buck v. Swazey, 35 Me. 41 ; s.c. 56 Am. Dec. 681 ;

Barnard v. Jewett, 97 Mass. 87 ; Steere v. Steere, 5 John. Ch. (N. Y.) 1 ; s.c. 9 Am. Dec. 256 ;

Botsford v. Burr, 2 John. Ch. (N. Y.) 409 ;

Kellum v. Smith, 33 Pa. St. 158, 164 ;

Whiting v. Gould, 2 Wis. 552 ;

Olcott v. Bynum, 84 U. S. (17 Wall.) 44, 64 ; bk. 21 L. ed. 570.

Where the evidence of a payment by the real purchaser is parol it must be clear and undoubted.

See : Harper v. Phelps, 21 Conn. 257 ;

Whitmore v. Learned, 70 Me. 276 ;

Parker v. Snyder, 31 N. J. Eq. (4 Stew.) 169 ;

Barron v. Barron, 24 Vt. 375 ;

Groves v. Groves, 3 Younge & J. 163.

³ Kisler v. Kisler, 2 Watts (Pa.) 323 ; s.c. 27 Am. Dec. 308.

⁴ Byers v. Danley, 27 Ark. 77, 89 ; Elliott v. Armstrong, 2 Blackf. (Ind.) 199 ;

Page v. Page, 8 N. H. 187 ; Jackson ex d. Seelye v. Morse, 16

John. (N. Y.) 197, 199 ; Steere v. Steere, 5 John. Ch. (N. Y.) 18 ; s.c. 9 Am. Dec. 256 ;

Botsford v. Burr, 2 John. Ch. (N. Y.) 405 ;

White v. Carpenter, 2 Paige Ch. (N. Y.) 217 ;

Squire v. Harder, 1 Paige Ch. (N. Y.) 494 ;

McGuire v. McGowen, 4 Desau. (S. C.) L. 486, 487 ;

Philips v. Crammond, 2 Wash. C. C. 441 ; s.c. Fed. Cas. No. 11092.

See : Post, § 1714.

the consideration proceeds, in such a manner that the latter is under a moral or natural obligation to provide for the former; but *prima facie* the transaction will be regarded as an advancement for the benefit of the nominee.¹ This may be rebutted by evidence clearly showing that a trust was intended to be created in favor of the person who paid the purchase price.²

SEC. 1713. Same—Same—Exception to the rule.—There is an exception to the rule laid down in the preceding section in those cases where, if a trust were permitted to be raised or enforced, it would be in contravention of public policy or the provisions of a statute; as in the case of a conveyance in the name of another, made to hinder, delay, or defraud the creditors of the purchaser;³ or the purchase of land by an alien, and taking the conveyance thereof in the name of a third person, for the purpose of evading a law prohibiting him from taking and holding real property, will not raise a trust in such third person, because, as Chancellor WALWORTH says in *Leggett v. Dubois*,⁴ “equity will never raise a resulting trust in fraud of the law of the land.”⁵ The general rule is that an individual will not be allowed to accomplish through the medium of a third person that which the party could not do in his own person, and thereby raise a resulting trust.⁶

SEC. 1714. Same—Same—Where part of trust only declared, etc.—Where part only of the trust is declared, and the rest remains undisposed of, there is a resulting trust in

¹ See: *Post*, § 1715.

² *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26; s.c. 79 Am. Dec. 673.

³ *Miller v. Davis*, 50 Mo. 572; *Proseus v. McIntyre*, 5 Barb. (N. Y.) 424;

Closs v. Boppe, 23 N. J. Eq. (8 C. E. Gr.) 270;

Baldwin v. Campfield, 9 N. J. L. (4 Halst.) 891;

Dudley v. Bosworth, 10 Humph. (Tenn.) 9; s.c. 51 Am. Dec. 690;

⁴ *Perry on Trusts* (4th ed.), § 131; *2 Story Eq. Jur.* (13th ed.), § 1201b. A conveyance designed in fraud of

creditors will not be declared a resulting trust in favor of a party thereby seeking to be benefited.

Cutler v. Tuttle, 19 N. J. Eq. (4 C. E. Gr.) 549.

⁵ *Paige Ch.* (N. Y.) 114; s.c. 28 Am. Dec. 413.

⁶ See: *Taylor v. Benham*, 46 U. S. (5 How.) 233, 270; bk. 12 L. ed. 130;

Philips v. Crammond, 2 Wash. C. C. 441; s.c. Fed. Cas. No. 11092.

Alsworth v. Cordtz, 31 Miss. 32.

the hands of the party receiving the property. Thus where a testator devises to a person "upon trust," and no trust is declared, a personal trust results to the heirs at law, or personal representatives of the devisee.¹ A resulting trust also arises where the object or purpose of an express trust has failed wholly or in part, so that there is not a perfect disposition by the testator.² Thus where the trust is to appoint an estate in favor of a certain person, and the trustee fails to appoint, or the person dies before appointment, a trust will result to the grantor and his heirs.³ There is also a resulting trust in

¹ *Saylor v. Plaine*, 31 Md. 158; s.c. 1 Am. Rep. 34.

At common law the same is true where land is conveyed without consideration of any kind, and no distinct trust is expressed, there is a resulting trust to the grantor. *Gould v. Lynde*, 114 Mass. 366; *Farrington v. Barr*, 36 N. H. 86; *Van der Volgen v. Yates*, 9 N. Y. 219. Compare: *Titcomb v. Morrill*, 92 Mass. (10 Allen) 15. This rule of the common law, however, does not apply to modern conveyances in the common form, with recital of consideration, to the use of the grantee and his heirs.

Gould v. Lynde, 114 Mass. 366.

² *Trapnall v. Brown*, 19 Ark. 39; *Kennedy v. Nunan*, 52 Cal. 326; *Pouce v. McEloy*, 47 Cal. 154; *McCallister v. Willey*, 52 Ind. 382;

Loring v. Elliott, 82 Mass. (16 Gray) 568;

Esterbrooks v. Tillinghast, 71 Mass. (5 Gray) 17;

Hogan v. Jaques, 19 N. J. Eq. (4 C. E. Gr.) 123; s.c. 97 Am. Dec. 644;

King v. Rundle, 15 Barb. (N. Y.) 139, 150;

Cutter v. Doughty, 7 Hill (N. Y.) 307, rev'g 23 Wend. (N. Y.) 573;

McCarty v. Terry, 7 Lans. (N. Y.) 236;

Hawley v. James, 7 Paige Ch. (N. Y.) 213; s.c. 32 Am. Dec. 623;

Hogan v. Stayhorn, 65 N. C. 279; *King v. Mitchell*, 33 U. S. (8 Pet.) 326; bk. 8 L. ed. 962;

Cottinger v. Fletcher, 2 Atk. 155;

Lloyd v. Spillet, 2 Atk. 149;

Read v. Stedman, 26 Beav. 495;

Sewell v. Denny, 10 Beav. 315;

Davidson v. Foley, 2 Bro. Ch. 203;

Elcock v. Mapy, 3 H. L. Cas. 492;

Longley v. Longley, L. R. 13 Eq. Cas. 133; s.c. 1 Moak Eng. Rep. 621;

Lloyd v. Lloyd, L. R. 7 Eq. Cas. 458;

Watson v. Hayes, 5 My. & Cr. 125;

Halford v. Stains, 16 Sim. 488.

A devise made to a man on condition of his marrying a daughter of a certain person who never has a daughter, raises a resulting trust in the lands in the hands of the devisee for the heirs of the testator.

King v. Mitchell, 33 U. S. (8 Pet.) 326; bk. 8 L. ed. 962.

³ *Bennett v. Hudson*, 33 Ark. 762; *Russ v. Mebius*, 16 Cal. 350;

Dashiell v. Attorney-General, 6 Har. & J. (Md.) 1;

Olliffe v. Wells, 130 Mass. 221;

Nichols v. Allen, 130 Mass. 211; s.c. 39 Am. Rep. 445;

Shaw v. Spencer, 100 Mass. 382; s.c. 97 Am. Dec. 107; 1 Am. Rep. 115;

Sturtevant v. Jaques, 96 Mass. (14 Allen) 523;

Straat v. Uhrig, 56 Mo. 482;

Power v. Cassidy, 79 N. Y. 602;

Hawley v. James, 5 Paige Ch. (N. Y.) 318;

Lemmond v. Peoples, 6 Ired. (N. C.) Eq. 137;

Ashhurst v. Givens, 5 Watts & S. (Pa.) 327;

favor of the heirs at law of a devisor as to the land devised where the trust is illegal and void by the laws of the state.¹ In those cases, however, where a devise of real estate upon trust cannot be carried into effect according to the intention of the testator in the state where made, and is valid by the laws of the state where the property is situated, the courts of the state where the trustees are found may direct them to carry the will of the testator into effect, notwithstanding the fact that such a devise of real property, situated in that state, would not be valid.²

SEC. 1715. **Same—Same—By payment of purchase-money.**
—Where a person pays the purchase-money for land and takes the deed in the name of another, the general rule is that a resulting trust arises in favor of such purchaser.³

- Coars v. Holderness, 20 Beav. 147;
Kendall v. Granger, 5 Beav. 300;
Ackroyd v. Smithson, 1 Bro. Ch. 503;
Williams v. Kershaw, 5 Cl. & Fin. 111;
Attorney-General v. Windsor, 8 H. L. Cas. 369;
Richards v. Delbridge, L. R. 18 Eq. 11;
Pawson v. Brown, L. R. 13 Ch. 202;
Ashton v. Wood, L. R. 6 Eq. 419;
Williams v. Arkle, L. R. 7 H. L. 606; s.c. 45 L. J. Ch. 590; 33 L. T. 187; 14 Moak Eng. Rep. 1;
James v. Allen, 3 Meriv. 17;
Stubbs v. Sargon, 3 My. & Cr. 507;
Wood v. Cox, 2 My. & Cr. 507;
Carrick v. Errington, 2 Pr. Wms. 361;
Taylor v. Haygarth, 14 Sim. 8;
Davenport v. Coltman, 12 Sim. 588;
Pilkington v. Boughey, 12 Sim. 114;
Goodere v. Lloyd, 3 Sim. 538;
Dawson v. Clark, 18 Ves. 247; s.c. 15 Ves. 409; 11 Rev. Rep. 188;
Williams v. Coade, 10 Ves. 500;
Stansfield v. Habergam, 10 Ves. 273; s.c. 7 Rev. Rep. 409.
¹ Hawley v. James, 7 Paige Ch. (N. Y.) 213; s.c. 32 Am. Dec. 623.
² Hawley v. James, 7 Paige Ch. (N. Y.) 213; s.c. 32 Am. Dec. 623.
³ Osborne v. Endicott, 6 Cal. 149; s.c. 65 Am. Dec. 498;
Miller v. Blackburn, 14 Ind. 62, 65;
Irwin v. Iver, 7 Ind. 308; s.c. 63 Am. Dec. 420;
Sullivan v. McLennans, 2 Iowa 437; s.c. 65 Am. Dec. 780;
Hall v. Sprigg, 7 Mart. (La.) 243; s.c. 12 Am. Dec. 506;
Buck v. Swazey, 35 Me. 41; s.c. 56 Am. Dec. 681;
Baker v. Vining, 30 Me. 121; s.c. 50 Am. Dec. 617;
De Peyster v. Gould, 17 N. J. Eq. (2 C. E. Gr.) 474; s.c. 29 Am. Dec. 723;
Belford v. Crane, 16 N. J. Eq. (1 C. E. Gr.) 265; s.c. 84 Am. Dec. 155;
Jackson v. Morse, 16 John. (N. Y.) 197; s.c. 8 Am. Dec. 306;
Foote v. Colvin, 3 John. (N. Y.) 216; s.c. 3 Am. Dec. 478;
Jackson ex d. Williams v. Miller, 6 Wend. (N. Y.) 228; s.c. 21 Am. Dec. 316;
Strimpfler v. Roberts, 18 Pa. St. 283; s.c. 57 Am. Dec. 606;
Beck v. Ulrich, 13 Pa. St. 636; s.c. 53 Am. Dec. 507;
Folger v. Evic, 2 Yeates (Pa.) 119;
Cox v. Grant, 1 Yeates (Pa.) 164;

We have already seen¹ that this doctrine is founded upon the natural presumption that he who supplies the money intends the purchase to be for his own benefit, rather than that of another, and that the conveyance in the name of the latter is a matter of convenience or arrangement between the parties, for other collateral purposes ; but such presumption may be rebutted by evidence showing that this was not the intention of the parties.² In those cases where a person making a purchase of land in the name of another, and paying the consideration money himself, is under a natural or moral obligation to provide for the person in whose name the conveyance is taken, no presumption of a resulting trust arises, but the transaction will be regarded *prima facie* as an advancement for the benefit of the nominal purchaser.³ Thus a purchase by a parent in the name of a

Guphill v. Isbell, 1 Bailey (S. C.)
L. 230 ; s.c. 19 Am. Dec. 675 ;

Denton v. McKenzie, 1 Desau.
(S. C.) L. 289 ; s.c. 1 Am. Dec.
664 ;

Williams v. Hollingsworth, 1
Strob. (S. C.) Eq. 103 ; s.c. 47
Am. Dec. 527 ;

Dudley v. Bosworth, 10 Humph.
(Tenn.) 9 ; s.c. 51 Am. Dec.
690 ;

Smitheal v. Gray, 1 Humph.
(Tenn.) 491 ; s.c. 34 Am. Dec.
664 ;

Smith v. Strahan, 16 Tex. 314 ;
s.c. 67 Am. Dec. 622 ;

Neill v. Keese, 5 Tex. 23 ; s.c. 51
Am. Dec. 746 ;

Jenkins v. Pye, 37 U. S. (12 Pet.)
241 ; bk. 9 L. ed. 1071.

This rule applies to purchasers
from the commonwealth.

Srimpfler v. Roberts, 18 Pa. St.
283 ; s.c. 57 Am. Dec. 606.

Taking conveyance in name of another—Trust or advancement.—Whether conveyance taken in name of another than person paying consideration is an advancement to such other, or a resulting trust is created, depends upon the character of the transaction at its inception.

Dudley v. Bosworth, 10 Humph.
(Tenn.) 9 ; s.c. 51 Am. Dec.
690.

Same—Life interest.—A resulting

trust in favor of one who buys and pays for land taking title in the name of another, but retaining possession of the deed with intent to keep the use of the property during his own life, extends only to such life interest, and the equitable interest in the remainder will pass, with the legal title, to the grantees.

Cook v. Patrick, 135 Ill. 499 ; s.c.
26 N. E. Rep. 658 ; 11 L. R. A.
573.

Same—In Minnesota resulting trusts in favor of one who pays the consideration have been abolished by statute, the motives and purposes of the conveyance being unimportant.

Johnson v. Johnson, 16 Minn.
512, 514 ;

Wentworth v. Wentworth, 2
Minn. 277 ; s.c. 72 Am. Dec. 79.

This statute applies to the purchase of land from the state, as well as from individuals.

Gill v. Newell, 13 Minn. 462, 469 ;
Irvine v. Marshall, 7 Minn. 286,
298 ;

Wentworth v. Wentworth, 2
Minn. 277 ; s.c. 72 Am. Dec.
79.

¹ See : *Ante*, § 1712.

² Jenkins v. Pye, 37 U. S. (12 Pet.)
241 ; bk. 9 L. ed. 1070.

³ Mutual Fire Ins. Co. v. Deale, 18

child is deemed *prima facie* an advancement from which no trust results;¹ and the presumption that such a purchase is intended for a provision is stronger in the case of a wife than of a child.² But procuring the deed to land purchased to be taken in the name of a brother does not raise a presumption of advancement or provision, and creates a resulting trust in favor of the purchaser.³

A resulting trust does not always arise from advance of purchase-money. It does not follow that because money has been furnished by one party for the purchase of land that a trust thereby results which cannot be explained or defeated. While the advance may create such a trust, it must be subject to the rights of others, and cannot be allowed to intervene to defeat prior and superior equities.⁴ Thus a resulting trust does not exist in favor of one who pays part of price of land conveyed to another, unless such payment has been made for some specific part or distinct interest in the estate.⁵ And where the party who pays the consideration upon

Md. 26; s.c. 79 Am. Dec. 673;
Dudley v. Bosworth, 10 Humph.
(Tenn.) 9; s.c. 51 Am. Dec.
690;

Jackson v. Jackson, 91 U. S. 122;
bk. 23 L. ed. 258.

See: *Ante*, § 1712.

¹ You v. Finn, 34 Ala. 409;

Gee v. Gee, 32 Miss. 190;

Dickinson v. Davis, 43 N. H. 647;
s.c. 80 Am. Dec. 202;

Livingston v. Livingston, 2 John.
Ch. (N. Y.) 537, 540;

Partridge v. Havens, 10 Paige
Ch. (N. Y.) 618;

Smith v. Strahan, 16 Tex. 314;
s.c. 67 Am. Dec. 622;

Sidmouth v. Sidmouth, 2 Beav.
447;

Mumma v. Mumma, 2 Vern. 19.

It is different, however, in those cases where it expressly appears that the intention of the father was that it should not be an advancement.

Cartwright v. Wise, 14 Ill. 417;
Proseus v. McIntyre, 5 Barb. (N. Y.) 424;

Jackson v. Matsdorf, 11 John.
(N. Y.) 91; s.c. 6 Am. Dec.
355;

Douglass v. Brice, 4 Rich. (S. C.)

Eq. 322, 323.

² Dickinson v. Davis, 43 N. H. 647;
s.c. 80 Am. Dec. 202;

Seibold v. Christman, 7 Mo. App.
254;

Smith v. Strahan, 16 Tex. 314;
s.c. 67 Am. Dec. 622.

See: Stevens v. Stevens, 70 Me.
92;

Cormerais v. Wesselhoeft, 114
Mass. 550;

Irvine v. Greever, 32 Gratt. (Va.)
411, 412.

In New Jersey it is held in the case of Belford v. Crane, 16 N. J. Eq. (1 C. E. Gr.) 265; s.c. 84 Am. Dec. 155, that where land is purchased with money of husband, in name of wife, there is a resulting trust in his favor, and she will be declared a trustee for him for the benefit of his creditors.

³ Smitheal v. Gray, 1 Humph.
(Tenn.) 491; s.c. 34 Am. Dec.
664.

⁴ Sullivan v. McLenans, 2 Iowa
437; s.c. 65 Am. Dec. 780.

⁵ McGowan v. McGowan, 80 Mass.
(14 Gray) 119; s.c. 74 Am. Dec.
668.

See: *Post*, § 1722.

a purchase of land directs the deed to be made to one to whom he is indebted, as a security for such debt, he thereby renounces the benefit of the consideration, and no trust arises in his favor.¹ Trust results also to creditors of a fraudulent debtor on purchase of land in another's name by such debtor to defraud his creditors, and the debtor's interest is subject to sale on execution, and the execution purchaser may in equity compel the holder of the legal title to convey to him, to surrender possession, and to account for the rents and profits.²

SEC. 1716. **Same—Same—Same—Parol proof.**—The statute of frauds has no application to trusts resulting from the purchase of property and taking the title thereto in the name of another, the estate being raised by operation of law, and the trust may be proved by parol.³ In *Neill v. Keese*,⁴ the court say: "It is well settled that where one buys land in the name of another, and pays the purchase-money, the land will be held by the grantee in trust for him who pays the money. 'The clear result of all the cases, without a single exception,' says Story, 'is that the trust of the legal estate, whether freehold, copyhold, or leasehold; whether taken in the name of the purchaser and others jointly, or in the name of others without the purchaser; whether in one name or several; whether jointly or successively, results to the man who advanced the purchase-money. This is the general proposition supported by all the cases.'⁵ Whether after the death of the nominal purchaser parol evidence alone

¹ *Jackson v. Morse*, 16 John. (N. Y.) 197; s.c. 8 Am. Dec. 306.

² *Dunnica v. Coy*, 24 Mo. 167; s.c. 69 Am. Dec. 420.

As to effect of fraud, see: *Ante*, §§ 1703, 1704, 1706.

³ *Reynolds v. Sumner*, 126 Ill. 58; s.c. 18 N. E. Rep. 334; 1 L. R. A. 327;

Farmlee v. Sloan, 37 Ind. 469, 482;

Irwin v. Ivers, 7 Ind. 308; s.c. 63 Am. Dec. 420;

Baker v. Vining, 30 Me. 121; s.c. 50 Am. Dec. 617;

Plummer v. Jarman, 44 Md. 639;

Hill v. Hill, 38 Md. 185;

Green v. Drummond, 31 Md. 71,

779; s.c. 1 Am. Rep. 14; *Mutual Ins. Co. v. Deale*, 18 Md.

26; s.c. 79 Am. Dec. 673;

Hollida v. Shoop, 4 Md. 465; s.c. 59 Am. Dec. 88;

Strimpf v. Roberts, 18 Pa. St. 283; s.c. 57 Am. Dec. 606;

Williams v. Hollingsworth, 1 Strob. (S. C.) Eq. 103; s.c. 47 Am. Dec. 527;

Smitheal v. Gray, 1 Humph. (Tenn.) 491; s.c. 34 Am. Dec. 664;

Neill v. Keese, 5 Tex. 23; s.c. 51 Am. Dec. 759.

⁴ 5 Tex. 23; s.c. 51 Am. Dec. 759.
⁵ 2 Story's Eq. Jur. (13th ed.), § 1201, n. 2a.

is admissible to establish the trust against the express declaration of the deed has been a subject of controversy ; but it is now settled that such proof is admissible.¹ In *Lench v. Lench*,² the master of the rolls said : ‘ Whatever doubt may have been formerly entertained upon this subject, it is now settled that money may in this manner be followed into the land in which it is invested ; and a claim of this sort may be supported by parol evidence.’ The same doctrine was maintained by Chancellor KENT, in *Boyd v. McLean*,³ after a careful review of the authorities and an elaborate examination of the subject.” To establish a resulting trust in land by parol, there must be the clearest and most indisputable proof that the purchase was made by the party claiming such trust, that the purchase-money was furnished by him for that purpose,⁴ and that the money was furnished at or before the time of the purchase. Subsequent advances will not attach by relation as a resulting trust to the original purchase.⁵

SEC. 1717. *Same—Same—By purchase with funds of another.*—A resulting trust may arise from the purchase of lands with the funds of another which have been advanced for that purpose, or which are held in trust,⁶ even though

¹ *Foote v. Colvin*, 3 John. (N. Y.) 216 ; s.c. 3 Am. Dec. 478 ;

Botsford v. Burr, 2 John. Ch. (N. Y.) 404 ;

Boyd v. McLean, 1 John. Ch. (N. Y.) 582 ;

German v. Gabbald, 3 Binn. (Pa.) 302 ; s.c. 5 Am. Dec. 372 ;

Lench v. Lench, 10 Ves. 511.

² 10 Ves. 511.

³ 1 John. Ch. (N. Y.) 582.

⁴ *Hollida v. Shoop*, 4 Md. 465 ; s.c. 59 Am. Dec. 88.

⁵ *Keller v. Keller*, 45 Md. 269, 275 ; *Brawner v. Staup*, 21 Md. 328, 337 ;

Hollida v. Shoop, 4 Md. 465 ; s.c. 59 Am. Dec. 88.

See : *Post*, §§ 1717, 1720.

⁶ *Burden v. Sheridan*, 35 Iowa 125, 128 ;

Sunderland v. Sunderland, 19 Iowa 325, 328 ;

McLenan v. Sullivan, 13 Iowa 521 ;

Bryant v. Hendricks, 5 Iowa 256 ; *Sullivan v. McLenans*, 2 Iowa

437 ; s.c. 65 Am. Dec. 780 ;

Rose v. Hayden, 35 Kan. 106 ; s.c. 57 Am. Rep. 145 ; 10 Pac.

Rep. 554 ;

Hall v. Sprigg, 7 Mart. (La.) 223 ; s.c. 12 Am. Dec. 506 ;

Lisloff v. Hart, 25 Miss. 245 ; s.c. 57 Am. Dec. 203 ;

De Peyster v. Gould, 3 N. J. Eq. (2 H. W. Gr.) 474 ; s.c. 29 Am. Dec. 723 ;

Crocker v. Crocker, 31 N. Y. 507 ; s.c. 58 Am. Dec. 291 ;

Padgett v. Lawrence, 10 Paige Ch. (N. Y.) 70 ; s.c. 40 Am. Dec. 232 ;

Beck v. Uhrich, 13 Pa. St. 636 ; s.c. 53 Am. Dec. 507 ;

Guphill v. Isbell, 1 Bailey (S. C.) L. 230 ; s.c. 19 Am. Dec. 675 ;

Williams v. Hollingsworth, 1 Strobh. (S. C.) Eq. 103 ; s.c. 47

Am. Dec. 527 ;

the party purchasing stands in no fiduciary relation to the person whose money has been used ;¹ and such trust

Moffatt v. Shepard, 2 Pinn. (Wis.) 66 ; s.c. 1 Chand. (Wis.) 66 ; 52 Am. Dec. 141.

Thus where A purchases land with B's money, and takes the title in his own name, generally a trust results in favor of B ; but if A be the father of B, such purchase is generally regarded as an irrevocable advancement to the latter.

Lisloff v. Hart, 25 Miss. 245 ; s.c. 57 Am. Dec. 203.

See: *Ante*, § 1715.

Resulting trust is created in favor of principal in lands purchased by his agent, with money entrusted to him to be used for another purpose, where the deed is taken in the name of the agent, or in that of another acting for him ; and a purchaser of such land from the agent, with notice of the manner in which it was acquired, takes subject to such resulting trust.

Moffatt v. Shepard, 2 Pinn. 66 ; s.c. 1 Chand. 66 ; 52 Am. Dec. 141.

Death of nominal purchaser and descent of the mere naked title does not destroy or impair a resulting trust.

Dudley v. Bosworth, 10 Humph. (Tenn.) 9 ; s.c. 51 Am. Dec. 690.

Kansas doctrine—*Rose v. Hayden*.—

In *Rose v. Hayden*, 35 Kan. 106 ; s.c. 57 Am. Rep. 145 ; 10 Pac. Rep. 554, it was held that where an agent, orally employed to purchase land, buys it for himself and takes title in his own name, the principal on tendering the amount so paid and an amount sufficient to compensate the agent for his services, and a deed for him to execute, and demanding execution thereof, the agent refusing, may recover the land in ejectment.

Same—**Statute of frauds**.—In *Rose v. Hayden*, *supra*, the court sustained the contention of the

plaintiff, who claimed that with or without the statute of frauds a trust resulted by operation of law in favor of the plaintiff, and that the defendant simply held the legal title to the property in trust for him, citing the following cases :

Rhea v. Puryear, 26 Ark. 344 ;
Sandfoss v. Jones, 35 Cal. 481 ;
Church v. Sterling, 16 Conn. 388 ;
Chastain v. Smith, 30 Ga. 96 ;
Judd v. Mosely, 30 Iowa 423, 424 ;
Bannon v. Bean, 9 Iowa 395 ;
Bryant v. Hendricks, 5 Iowa 256 ;
Fisher v. Krutz, 9 Kan. 501 ;
Krutz v. Fisher, 8 Kan. 90 ;
Matthews v. Light, 32 Me. 305 ;
McDonough v. O'Neil, 113 Mass. 92 ;
Jackson v. Stevens, 108 Mass. 94 ;
Kendall v. Mann, 93 Mass. 15 ;
Snyder v. Wolford, 33 Minn. 175 ;
 s.c. 53 Am. Rep. 22 ;
Cameron v. Lewis, 56 Miss. 76 ;
Gillenwaters v. Miller, 49 Miss. 150 ;
Soggins v. Heard, 31 Miss. 426 ;
Winn v. Dillon, 27 Miss. 494 ;
Wood v. Rabe, 96 N. Y. 414 ; s.c. 48 Am. Rep. 640 ;
Bennett v. Austin, 81 N. Y. 308 ;
Sanford v. Norris, 4 Abb. App. Dec. (N. Y.) 144 ;
Parkist v. Alexander, 1 John. Ch. (N. Y.) 394 ;
Sweet v. Jacobs, 6 Paige Ch. (N. Y.) 355, 464 ; s.c. 31 Am. Dec. 252 ;
Burrell v. Bull, 2 Sandf. Ch. (N. Y.) 15 ;
Hargrave v. King, 5 Ired. (N. C.) Eq. 430 ;
Seichrist's Appeal, 66 Pa. St. 237 ;
Peebles v. Reading, 8 Serg. & R. (Pa.) 484 ;
Barziza v. Story, 39 Tex. 354 ;
Wellford v. Chancellor, 5 Gratt. (Va.) 39 ;
McMahon v. McGraw, 26 Wis. 614, 615 ;
Onson v. Cown, 22 Wis. 329 ;
Rothwell v. Dewees, 67 U. S. (12 Black) 613 ; bk. 17 L. ed. 309 ;
Massie v. Watts, 10 U. S. (6 Cr.) 148 ; bk. 3 L. ed. 181 ;

¹ *Beck v. Uhrich*, 13 Pa. St. 636 ; s.c. 53 Am. Dec. 507.

may be established by parol,¹ even after the death of the nominal purchaser.² This rule rests on the well established principle that no one will be permitted to purchase property in contravention of his duty,³ and where he does so he will be treated in equity as a trustee for his principal.⁴ While a trust results in favor of a

Jenkins v. Eldredge, 3 Story C. C. 181, 183, 288-290; s.c. Fed. Cas. No. 7266;

Baker v. Whiting, 3 Sum. C. C. 475, 476, 482; s.c. 2 Fed. Cas. No. 787;

McCormick v. Grogan, L. R. 4 Eng. & Ir. App. 97;

Dale v. Hamilton, Hare Ch. 369;

Cave v. Mackenzie, 46 L. J. Ch. 564; s.c. 37 L. T. 218;

Heard v. Pilley, L. R. 4 Ch. App. 548;

Taylor v. Salom, 4 Myl. & Cr. 134;

Lees v. Nuttall, 2 Myl. & K. 819; s.c. 1 Russ. & M. Ch. 53;

Bond v. Hopkins, 1 Sch. & Lef. 433.

¹ See: *Post*, §§ 1720, 1726.

² Williams v. Hollingsworth, 1 Strobb. (S. C.) Eq. 103; s.c. 47 Am. Dec. 527;

Neill v. Keese, 5 Tex. 23; s.c. 51 Am. Dec. 446.

Establishing trust by parol—Williams v. Hollingsworth.—In Williams v. Hollingsworth, *supra*, the court say that "it was formerly doubted whether such trust could be established by parol, after the death of the nominal purchaser; but such doubts have been removed by more recent decisions. *Lench v. Lench*, 10 Ves. 511, was a case of that character. Sir William Grant says: 'All must depend upon the proof of the fact;' and 'it is now settled that a claim of this sort may be supported by parol evidence.' He did not think the evidence sufficient in *Lench v. Lench*, and dismissed the bill. But in that case he cites, from the register's books, the case of *Wilson v. Foreman*, very imperfectly reported in *Dick*. 593. Money was settled for the purpose of being laid out in land. The husband obtained possession of

the money, under a power of attorney from the trustee. Soon afterwards he purchased an estate in Kent, and took a conveyance to a trustee. He also purchased an estate in Yorkshire, and took that conveyance to himself and his heirs. The claim of the wife was upon that estate in Yorkshire. Lord Thurlow directed a reference, to inquire whether the estate was purchased with part of the trust money, with an intention to settle the same pursuant to the marriage articles. Upon the evidence, the master so reported, and the lord chancellor directed new trustees to be appointed, and *Falling Foss* (the Yorkshire estate) to be conveyed to such new trustees, upon the trusts in the settlement."

³ Voorhees v. Presbyterian Church, 5 How. (N. Y.) Pr. 58, 65; s.c. 8 Barb. (N. Y.) 135, 142.

See: *Rose v. Hayden*, 35 Kan. 106, 110; s.c. 57 Am. Rep. 145; 10 Pac. Rep. 554;

Marshall v. Carson, 38 N. J. Eq. (11 Stew.) 250, 255; s.c. 48 Am. Rep. 319;

Carson v. Marshall, 37 N. J. Eq. (10 Stew.) 215;

Bennett v. Austin, 81 N. Y. 308; *Reitz v. Reitz*, 80 N. Y. 598, rev'g 14 Hun. (N. Y.) 536.

⁴ *Wells v. Robinson*, 13 Cal. 133; *Hall v. Sprigg*, 7 Mart. (La.) 243; s.c. 12 Am. Dec. 506;

Baldwin v. Allison, 4 Minn. 25; *Jamison v. Glascock*, 29 Mo. 191;

Sweet v. Jacocks, 6 Paige Ch. (N. Y.) 355; s.c. 31 Am. Dec. 252;

Manning v. Hayden, 5 Sawy. C. C. 360.

See: *Ante*, §§ 1703, 1704, 1706.

It is said in *Sweet v. Jacocks*, *supra*, that "it is a settled principle of equity that where a

principal when property is purchased by an agent in his own name, with the principal's funds,¹ such trust arises only in favor of the party paying the consideration, or some part thereof, at the time of the purchase, and a subsequent payment will not suffice.² A resulting trust in favor of a person furnishing the funds descends to his heirs, and does not inure to the benefit of one for whom the purchase might have been intended to be made.³

SEC. 1718. Same—Same—Same—Requisites.—Two circumstances are requisite in order to create a resultant trust in favor of one paying the consideration price of land purchased. In the first place, the execution of the deed in the name of the person making the purchase must be the result of some fraud,⁴ accident, or mistake. Where the conveyance is so taken with the knowledge and consent of the person paying the consideration, it must be clearly established that it was his intention that he should retain the beneficial interest in the estate.⁵ In the second

person undertakes to act as an agent for another he cannot be permitted to deal in the matter of that agency upon his own account and for his own benefit. And if he takes a conveyance in his own name of an estate which he undertakes to obtain for another, he will in equity be considered as holding it in trust for his principal."

Citing: *Parkist v. Alexander*, 1 John. Ch. (N. Y.) 394;

Lees v. Nuttall, 2 Myl. & K. 819; s.c. Tamil. 282.

¹ *Crocker v. Crocker*, 31 N. Y. 507; s.c. 88 Am. Dec. 291.

² *Cross's Appeal*, 97 Pa. St. 471; s.c. 12 Bost. Rep. 251;

Pinnock v. Clough, 16 Vt. 500; s.c. 42 Am. Dec. 521.

³ *Padgett v. Lawrence*, 10 Paige Ch. (N. Y.) 170; s.c. 40 Am. Dec. 232.

⁴ **Fraud raises resulting trust.**—It is a general rule of law that any person in possession of land by fraud is in equity a trustee for those beneficially interested.

Farnham v. Clements, 51 Me. 426;

Michigan Air-line R. Co. v. Mel-

len, 44 Mich. 321; s.c. 6 N. W. Rep. 485;

Gale v. Gale, 19 Barb. (N. Y.) 249, 251;

Brown v. Lynch, 1 Paige Ch. (N. Y.) 147;

Chesterfield v. Jansen, 2 Ves. 155.

Thus when a party obtains an advantage by fraud, he is regarded as the trustee of the party defrauded, and compelled to account.

Trapnall v. Brown, 19 Ark. 39, 48;

Brown v. Lynch, 1 Paige Ch. (N. Y.) 147;

Kellum v. Smith, 33 Pa. St. 158;

Griffith v. Godey, 113 U. S. 89; bk. 28 L. ed. 984;

White v. Cannon, 73 U. S. (6 Wall.) 443; bk. 18 L. ed. 923;

Wheeler v. Sage, 68 U. S. (1 Wall.) 518; bk. 17 L. ed. 646.

Same—Upon government.—A resulting trust cannot arise out of a fraud upon the government.

Jackson ex d. Williams v. Miller, 6 Wend. (N. Y.) 228; s.c. 21 Am. Dec. 816.

⁵ *Tilford v. Torrey*, 53 Ala. 120;

Lee v. Browder, 51 Ala. 288;

place, the consideration must be paid by the person claiming the resulting trust at the time of the transaction, on sale or conveyance,¹ a subsequent payment or advancement not being sufficient.² Where a party does not furnish the money at or before the time of the purchase and the title is not taken in the other person's name by fraud, accident, or mistake, there will be no resulting trust.³

DuVal *v.* Marshall, 30 Ark. 230 ;
 Roberts *v.* Ware, 40 Cal. 634 ;
 Case *v.* Coddling, 38 Cal. 191 ;
 Dean *v.* Dean, 6 Conn. 285 ;
 Moss *v.* Moss, 95 Ill. 449 ;
 Mathis *v.* Stufflebeam, 94 Ill. 481 ;
 Latham *v.* Henderson, 47 Ill. 185 ;
 Hampson *v.* Fall, 64 Ind. 382,
 383 ;
 McLenan *v.* Sullivan, 13 Iowa
 521 ;
 Kelley *v.* Jenness, 50 Me. 455 ;
 s.c. 79 Am. Dec. 623 ;
 Thomas *v.* Standiford, 49 Md. 181 ;
 Kendall *v.* Mann, 93 Mass. (11
 Allen) 15 ;
 Jackson *v.* Cleveland, 15 Mich.
 94, 102 ; s.c. 90 Am. Dec. 266 ;
 Brooks *v.* Shelton, 54 Miss. 353 ;
 Johnson *v.* Quarles, 46 Mo. 423 ;
 Baumgartner *v.* Guessfield, 38
 Mo. 36 ;
 Beskowitz *v.* Davis, 12 Nev. 446 ;
 Hopkinson *v.* Dumas, 42 N. H.
 296, 306 ;
 Medmer *v.* Medmer, 26 N. J. Eq.
 (11 C. E. Gr.) 269 ;
 Boyd *v.* McLean, 1 John. Ch. (N.
 Y.) 582 ;
 Sayre *v.* Townsends, 15 Wend.
 (N. Y.) 647 ;
 Cunningham *v.* Bell, 83 N. C.
 328 ;
 McGovern *v.* Knox, 21 Ohio St.
 547 ; s.c. 8 Am. Rep. 80 ;
 Nixon's Appeal, 63 Pa. St. 279 ;
 Billings *v.* Clinton, 6 S. C. 90 ;
 Smith *v.* Strahan, 16 Tex. 314 ;
 s.c. 67 Am. Dec. 622 ;
 Clark *v.* Clark, 43 Vt. 685 ;
 Smith *v.* Patton, 12 W. Va. 541 ;
 Logan *v.* Walker, 1 Wis. 527 ;
 Withers *v.* Withers, Ambl. 151 ;
 Dyer *v.* Dyer, 2 Cox 92 ;
 Lloyd *v.* Read, 1 Pr. Wms. 607 ;
 Rider *v.* Kidder, 10 Ves. 360 ;
 1 Eq. Ld. Cas. 314.

¹ See : *Ante*, § 1717.

² Perry *v.* McHenry, 33 Ill. 227 ;

Alexander *v.* Tams, 13 Ill. 221 ;
 Oliver *v.* Dougherty, 3 Iowa 371 ;
 Sullivan *v.* McLenans, 2 Iowa
 437, 442 ; s.c. 65 Am. Dec. 780 ;
 Buck *v.* Swazey, 35 Me. 41 ; s.c.
 56 Am. Dec. 681 ;
 Brawner *v.* Staup, 21 Md. 328,
 337 ;
 Perkins *v.* Nichols, 93 Mass. (11
 Allen) 542, 546 ;
 Davis *v.* Wetherell, 93 Mass. (11
 Allen) 19, 20 ;
 Kendall *v.* Mann, 93 Mass. (11
 Allen) 15, 17 ;
 Gee *v.* Gee, 32 Miss. 190 ;
 Baumgartner *v.* Guessfield, 38 Mo.
 36 ;
 Kelly *v.* Johnson, 28 Mo. 249 ;
 Hopkinson *v.* Dumas, 42 N. H.
 296, 301 ;
 Francetown *v.* Deering, 41 N.
 H. 438, 443 ;
 Brooks *v.* Fowle, 14 N. H. 248 ;
 Howell *v.* Howell, 15 N. J. Eq.
 (2 McC.) 75, 78 ;
 Pegues *v.* Pegues, 5 Ired. (N. C.)
 Eq. 418 ;
 Kellum *v.* Smith, 33 Pa. St. 158,
 164 ;
 Barnet *v.* Dougherty, 32 Pa. St.
 371 ;
 Whiting *v.* Gould, 2 Wis. 552.
³ House *v.* House, 57 Ala. 262 ;
 McCue *v.* Gallagher, 23 Cal. 51,
 53 ;
 McCullough *v.* Ford, 96 Ill. 439 ;
 Stephenson *v.* Thompson, 13 Ill.
 186 ;
 Ramsdell *v.* Emery, 46 Me. 311 ;
 Hunt *v.* Moore, 60 Mass. (6 Cush.)
 1 ;
 Kenneday *v.* Price, 57 Miss. 771 ;
 Gibson *v.* Foote, 40 Miss. 788, 792 ;
 Gee *v.* Gee, 32 Miss. 190 ;
 Hennessey *v.* Walsh, 55 N. H.
 515 ;
 Dow *v.* Jewell, 21 N. H. 470 ;
 Botsford *v.* Burr, 2 John. Ch. (N.
 Y.) 405 ;.

SEC. 1719. **Same—Same—Same—Reason for the rule.**—We have already seen¹ that where a man furnishes the money wherewith to purchase property, the natural presumption is that he meant the purchase to be for his own benefit ; and in this case the resulting trust rests upon the presumption that the person beneficially interested has been deprived of his interest in the land against his will ; but this presumption may be rebutted, as where the party furnishing the money is under a moral obligation to support the person in whose name the conveyance is taken.² This, however, is merely a presumption of law in rebuttal of the general presumption of trust raised by the payment of the consideration, and is open to the explanation of mistake, fraud, and the like, in which case a resultant trust will arise as heretofore specified.³

Jackman v. Ringland, 4 Watts & S. (Pa.) 149.

¹ See : *Ante*, §§ 1712, 1715.

² See : *Lochenour v. Lochenour*, 61 Ind. 595 ;

Sunderland v. Sunderland, 19 Iowa 325, 338 ;

Stevens v. Stevens, 70 Me. 92 ;

Baker v. Baker, 22 Minn. 262 ;

Flynt v. Hubbard, 57 Miss. 471 ;

Higdon v. Higdon, 57 Miss. 264 ;

Welton v. Divine, 20 Barb. (N. Y.) 9 ;

Livingston v. Livingston, 2 John. Ch. (N. Y.) 537 ;

Farrell v. Lloyd, 69 Pa. St. 239 ;

Shaw v. Read, 47 Pa. St. 96, 103 ;

Murphy v. Nathans, 46 Pa. St. 508 ;

Douglass v. Brice, 4 Rich. (S. C.) Eq. 322 ;

Smith v. Strahan, 16 Tex. 314 ;

s.c. 67 Am. Dec. 622 ;

Tucker v. Burrow, 2 Hem. & M. (Va.) 515 ;

Lorentz v. Lorentz, 14 W. Va. 761, 809 ;

Smith v. Patton, 12 W. Va. 541 ;

Williams v. Williams, 32 Beav. 370 ;

Ebrand v. Dancer, 2 Chan. Cas. 26 ;

Curran v. Jags, 1 Coll. 261 ;

Dyer v. Dyer, 2 Cox 92.

In re De Visme, 2 DeG., J. & S. 17 ;

Marshall v. Crutwell, L. R. 20 Eq. Cas. 328 ; s.c. 44 L. J. Ch. 504 ;

13 Moak Eng. Rep. 830 ;

Batstone v. Salter, L. R. 19 Eq. 250 ; s.c. 11 Moak Eng. Rep. 826 ;

Sayre v. Hughes, L. R. 5 Eq. Cas. 376 ;

Beckford v. Beckford, Loft. 490 ;

Lloyd v. Read, 1 Pr. Wms. 607 ;

Kingdon v. Bridges, 2 Vern. 67 ;

Finch v. Finch, 15 Ves. 43 ; s.c. 10 Rev. Rep. 12 ;

Rider v. Kidder, 10 Ves. 360 ;

2 Co. Litt. (19th ed.) 290b.

³ *Stevens v. Stevens*, 70 Me. 92 ;

Springer v. Berry, 47 Me. 330, 338 ;

Baker v. Vining, 30 Me. 121 ; s.c. 1 Am. Dec. 617 ;

Eddy v. Baldwin, 23 Mo. 588 ;

Rankin v. Harper, 23 Mo. 579 ;

Dickinson v. Davis, 43 N. H. 647 ; s.c. 80 Am. Dec. 202 ;

Sawyer's Appeal, 16 N. H. 459 ;

Jackson v. Matsdorf, 11 John. (N. Y.) 91 ; s.c. 6 Am. Dec. 355 ;

Livingston v. Livingston, 2 John. Ch. (N. Y.) 537, 539 ;

Guthrie v. Gardner, 19 Wend. (N. Y.) 414 ;

Smith v. Strahan, 16 Tex. 314 ;

s.c. 67 Am. Dec. 622 ;

Shepherd v. White, 10 Tex. 72 ;

Wallace v. Bowens, 28 Vt. 638 ;

Williams v. Williams, 32 Beav. 370 ;

Sidmouth v. Sidmouth, 2 Beav. 447 ;

Kilpin v. Kilpin, 1 My. & R. 520 ;

SEC. 1720. **Same—Same—Same—Parol proof of.**—In this instance also the transaction is not within the statute of frauds,¹ and parol evidence is admissible to show that the purchase was made with the funds of the principal, although the conveyance is taken in the name of the agent, even as against the express recitals in the deed ;²

- Lampleigh v. Lampleigh, 1 Pr. Wms. 111 ;
 Devoy v. Devoy, 3 Sm. & G. 403.
¹ See : *Ante*, § 1715.
² Snelling v. Utterback, 1 Bibb (Ky.) 609 ; s.c. 4 Am. Dec. 661 ;
 Hall v. Sprigg, 7 Mart. (La.) 243 ; s.c. 12 Am. Dec. 506 ;
 Jackson v. Morse, 16 John. (N. Y.) 197 ; s.c. 8 Am. Dec. 306 ;
Footte v. Colvin, 3 John. (N. Y.) 216 ; s.c. 3 Am. Dec. 478 ;
 Mann v. Mann, 1 John. Ch. (N. Y.) 231, 234 ;
 Gay v. Hunt, 1 Murph. (N. C.) L. 141 ; s.c. 3 Am. Dec. 681 ;
 More v. Herrick, 18 Pa. St. 129 ;
 Lloyd v. Carter, 17 Pa. St. 216, 220 ;
 Murphy v. Hubert, 7 Pa. St. 420, 442 ;
 German v. Gabbald, 3 Binn. (Pa.) 302 ; s.c. 5 Am. Dec. 372 ;
 Wallace v. Duffield, 2 Serg. & R. (Pa.) 521 ; s.c. 7 Am. Dec. 660 ;
 Robertson v. Robertson, 9 Watts (Pa.) 32, 34 ;
 Hale v. Henrie, 2 Watts (Pa.) 143, 146 ; s.c. 27 Am. Dec. 289 ;
 Ross v. Norvelle, 1 Wash. (Va.) 14 ; s.c. 1 Am. Dec. 422 ;
 Gregory v. Setter, 1 U. S. (1 Dall.) 193 ; bk. 1 L. ed. 96.
 See : Lee v. Browder, 51 Ala. 288 ;
 McCreary v. Casey, 50 Cal. 349 ;
 Murphy v. Peabody, 63 Ga. 522 ;
 Ward v. Armstrong, 84 Ill. 151 ;
 Coates v. Woodworth, 13 Ill. 654 ;
 Bryant v. Hendricks, 5 Iowa 256 ;
 Whitmore v. Learned, 70 Me. 276 ;
 Baker v. Vining, 30 Me. 121 ; s.c. 1 Am. Dec. 617 ;
 Thomas v. Standiford, 49 Md. 181 ;
 Livermore v. Aldrich, 59 Mass. (5 Cush.) 431 ;
 Hennessey v. Walsh, 55 N. H. 315 ;
 Parker v. Snyder, 31 N. J. Eq. (4 Stew.) 164 ;
 Boyd v. McLean, 1 John. Ch. (N. Y.) 582 ;
 Jackson v. Feller, 2 Wend. (N. Y.) 465 ;
 Byers v. Wackman, 16 Ohio St. 440 ;
 Strimpfler v. Roberts, 18 Pa. St. 283 ; s.c. 57 Am. Dec. 606 ;
 Drum v. Simpson, 6 Binn. (Pa.) 478 ; s.c. 6 Am. Dec. 490 ;
 Billings v. Clinton, 6 S. C. 90 ;
 Hyden v. Hyden, 6 Baxt. (Tenn.) 406 ;
 Agricultural, Mechanical, etc., Assoc. v. Brewster, 51 Tex. 257 ;
 Miller v. Blose, 30 Gratt. (Va.) 744 ;
 Smith v. Patton, 12 W. Va. 541 ;
 Willis v. Willis, 2 Atk. 71 ;
 Heard v. Pilley, L. R. 4 Ch. 548 ;
 Gascoigne v. Thwing, 1 Vern. 366.
 In *New York* Chancellor Kent has held in *Mann v. Mann*, 1 John. Ch. (N. Y.) 231, 234, on full examination of authorities, that parol evidence is inadmissible to supply or contradict, enlarge or vary, a written instrument, except in the case of a latent ambiguity arising *de hors* the instrument, as to the person or subject, or to rebut a resulting trust.
 See : *Re Estate of Garraud*, 35 Cal. 336, 340 ;
Dunham v. Averill, 45 Conn. 61, 70 ; s.c. 29 Am. Rep. 642 ;
Avery v. Chappel, 6 Conn. 270 ; s.c. 16 Am. Dec. 53, 56 ;
Fitzpatrick v. Fitzpatrick, 36 Iowa 674 ; s.c. 14 Am. Rep. 538, 542 ;
Love v. Buchanan, 40 Miss. 758, 760 ;
Reynolds v. Robinson, 82 N. Y. 103, 107 ; s.c. 37 Am. Rep. 555 ;
Enders v. Enders, 2 Barb. (N. Y.) 362, 368 ;
Meads v. Lansingh, 1 Hopk. Ch. (N. Y.) 124, 134 ;
Myres v. Myres, 23 How. Pr. (N. Y.) 410, 411 ;

but the parol evidence must be very full, clear, decisive, and satisfactory.¹ The presumption of trust arising from the payment of the purchase price may also be rebutted by parol evidence showing that the party furnishing the money intended that the person in whose name the conveyance was taken should have the benefit of the purchase as a gift, with the restriction that such parol evidence cannot contradict the terms of the deed.²

SEC. 1721. **Same—Same—By agreement to purchase for another.**—We have already seen that any one in possession of lands through fraud is regarded as holding them as the trustee of the party defrauded;³ hence where

Bunner v. Storm, 1 Sandf. Ch. (N. Y.) 357, 362.

In Pennsylvania it is held in *Murphy v. Hubert*, 7 Pa. St. 420, 422, that under the Pennsylvania statute of frauds an equitable estate cannot be conveyed without writing, or possession taken in part performance, but it may be created by verbal agreement of the grantee in an absolute deed; and this doctrine, on the authority of *German v. Gabbald*, 3 Binn. (Pa.) 302; s.c. 5 Am. Dec. 372; *Wallace v. Duffield*, 2 Serg. & R. (Pa.) 521; s.c. 7 Am. Dec. 660; and *Gregory v. Setter*, 1 U. S. (1 Dall.) 193; bk. 1 L. ed. 96, is also laid down in *Lloyd v. Carter*, 17 Pa. St. 216, 220.

¹ *Snelling v. Utterback*, 1 Bibb (Ky.) 609; s.c. 4 Am. Dec. 661. See: *Hunter v. Bilyen*, 30 Ill. 228, 246;

Philpott v. Elliott, 4 Md. Ch. 273; *Beard v. Linthicum*, 1 Md. Ch. 345;

Lyman v. United Ins. Co., 2 John. Ch. (N. Y.) 630;

Brady v. Parker, 4 Ired. (N. C.) Eq. 430;

Harrison v. Howard, 1 Ired. (N. C.) Eq. 407;

Bailey v. Bailey, 8 Humph. (Tenn.) 230.

In *Snelling v. Utterback*, *supra*, the court say that "where the conveyance is taken to one, and no declaration in writing that

the purchase was made in trust for another, and the trust is denied by the answer of him who is charged as trustee, it was formerly holden that no evidence *aliunde* was admissible to show that the purchase was made with trust money whereby to raise a trust in favor of the *cestui que trust* (*Newton v. Preston*, Prec. Ch. 103; *Kirby v. Webb*, Prec. Ch. 84; *Kendar v. Milward*, 2 Vern. 440). And though modern decisions have in some measure mitigated the rigor of this rule and permitted parol evidence to establish the trust, yet such evidence must be very clear and satisfactory, or it will be held insufficient."

See: *Ambler* 409;

Sugden on Vendors, 415-419.

² *Adams v. Guerard*, 29 Ga. 651; s.c. 76 Am. Dec. 624;

Perkins v. Nichols, 98 Mass. (11 Allen) 542, 545;

Hopkins v. Dumas, 42 N. H. 303;

White v. Carpenter, 2 Paige Ch. (N. Y.) 217, 238;

Edwards v. Edwards, 39 Pa. St. 378;

Carter v. Montgomery, 2 Tenn. Ch. 216;

Shepherd v. White, 11 Tex. 346;

Lane v. Dighton, Amb. 409;

Benbow v. Townsend, 1 My. & K. 506.

³ See: *Arte*, § 1718.

a person agrees verbally to bid in land for another at a sheriff's sale, he will be bound and decreed to hold such land in trust, although the conveyance is in his name,¹ and the plea of the statute of frauds will not avail him, particularly when he has tendered an account, in which he charged the other with the amount of the purchase-money.² But a resulting trust does not arise on a purchase of land for another's benefit where the purchaser uses his own name and credit, and the undertaking to act for the other's benefit is by parol.³ Neither is a resulting trust created in favor of a son of the vendee of land by a mere declaration of the vendee, at the time of making the purchase, that "he was going to buy the land for the son," if there is no further proof of an agreement to do so, nor any evidence that the son furnished the money to pay for it.⁴

SEC. 1722. Same—Same—By payment of part of purchase price.—We have already seen⁵ that where the purchase-money is all paid by one person and the title to the property is taken in another, that there is a resulting trust in favor of the party furnishing the money;⁶ and where the purchase is made with joint funds of two or

¹ *Dryden v. Hanway*, 31 Md. 254; s.c. 100 Am. Dec. 61;

Denton v. McKenzie, 1 Desau. (S. C.) Eq. 289; s.c. 1 Am. Dec. 664.

In a case where D purchased a house and lot in his own name, but not having the money to pay therefor, H, who was his brother-in-law, advanced the money, and for his security was reported to the orphan's court, by the executors who made the sale, as the purchaser, and took the conveyance in his own name, upon payment of the purchase-money. On a bill filed by D, to have the deed to H declared to be only a mortgage as between himself and H, held, that the facts fully established a resulting trust, which a court of equity would reconvey, and that the deed to H must be treated as a mortgage between the parties.

Dryden v. Hanway, 31 Md. 254; s.c. 100 Am. Dec. 61.

Resulting trust is created in creditor for debtor as to a part of the debtor's land which the creditor verbally agreed to reconvey to the debtor, if he would waive his exemption and permit the whole tract to be sold at sheriff's sale, under an execution levied upon it, and to be brought in by the creditor.

Beegle v. Wentz, 55 Pa. St. 369; s.c. 93 Am. Dec. 762.

² *Denton v. McKenzie*, 1 Desau. (S. C.) Eq. 289; s.c. 1 Am. Dec. 664.

³ *Fowke v. Slaughter*, 3 A. K. Marsh. (Ky.) 56; s.c. 13 Am. Dec. 133.

⁴ *Lloyd v. Lynch*, 38 Pa. St. 419; s.c. 70 Am. Dec. 137.

⁵ See: *Ante*, § 1715.

⁶ *Olcott v. Bynum*, 84 U. S. (17 Wall.) 44; bk. 21 L. ed. 570.

more persons and the conveyance is taken to one only of the parties interested in the purchase-money, a trust arises in favor of his associate or associates to the extent of the funds advanced by him or them,¹ where such funds constitute a definite portion of the whole purchase price, and is paid for some aliquot part of the property, as one-fourth, one-third, or a moiety.² But no resulting trust arises when the amount belonging to one or the

¹ *Osborne v. Endicott*, 6 Cal. 149 ; s.c. 65 Am. Dec. 498 ; *Reynolds v. Sumner*, 126 Ill. 58 ; s.c. 18 N. E. Rep. 334 ; 1 L. R. A. 327 ;

Buck v. Swazey, 35 Me. 41 ; s.c. 56 Am. Dec. 681 ;

Baker v. Vining, 30 Me. 121 ; s.c. 50 Am. Dec. 617 ;

Dow v. Jewell, 18 N. H. 340 ; s.c. 45 Am. Dec. 371 ;

Padgett v. Lawrence, 10 Paige Ch. (N. Y.) 170 ; s.c. 40 Am. Dec. 232 ;

Weeks v. Haas, 3 Watts & S. (Pa.) 520 ; s.c. 39 Am. Dec. 39, 46 ;

Smith v. Strahan, 16 Tex. 314 ; s.c. 67 Am. Dec. 622 ;

Pinnock v. Clough, 16 Vt. 500 ; s.c. 42 Am. Dec. 521.

Where purchase is made with joint funds, and conveyance is made to one only of the parties interested in the purchase-money, he holds the property in trust for his associate, to the extent of the funds by him advanced.

Buck v. Swazey, 35 Me. 41 ; s.c. 56 Am. Dec. 681.

Where a person having land warrants in his hands under an agreement to enter them for the joint benefit of the owner and himself entered public lands and took the title in his own name, a resulting trust arises in favor of the other in proportion to his interest in the warrants.

Reynolds v. Sumner, 126 Ill. 58 ; s.c. 18 N. E. Rep. 334 ; 1 L. R. A. 327.

Allegations in bill, that A laid out the money of A, B, and C, in the purchase of land for their common use, benefit, and advantage, under an agreement that A and B were to be

owners in fee and tenants in common, each of a moiety, and that C was to have wood from the land during her life, and that a deed was taken by A, are sufficient allegations of such a purchase as to raise a resulting trust.

Dow v. Jewell, 18 N. H. 340 ; s.c. 45 Am. Dec. 371.

² *Baker v. Vining*, 30 Me. 121 ; s.c. 50 Am. Dec. 617 ;

Olcott v. Bynum, 84 U. S. (17 Wall.) 44 ; bk. 21 L. ed. 570.

See: *Shea v. Tucker*, 56 Ala. 450 ;

McCreary v. Casey, 50 Cal. 349 ;

Case v. Coddington, 38 Cal. 191 ;

Bayles v. Baxter, 22 Cal. 578 ;

Hidden v. Johnson, 21 Cal. 92 ;

Cramer v. Hoose, 93 Ill. 503 ;

Smith v. Smith, 85 Ill. 189 ;

Franklin v. McIntyre, 23 Ill. 91 ;

Pierce v. Pierce, 7 B. Mon. (Ky.) 438 ;

Purdy v. Purdy, 3 Md. Ch. 547 ;

McGowan v. McGowan, 80 Mass. (14 Gray) 119 ; s.c. 74 Am. Dec. 668 ;

Botsford v. Burr, 2 John. (N. Y.) Ch. 405 ;

Sayre v. Townsends, 15 Wend. (N. Y.) 647 ;

Wallace v. Duffield, 2 Serg. & R. (Pa.) 521 ; s.c. 7 Am. Dec. 660 ;

Williams v. Hollingsworth, 1 Strob. (S. C.) Eq. 103 ; s.c. 47 Am. Dec. 527 ;

Miller v. Birdsong, 7 Baxt. (Tenn.) 531 ;

Shoemaker v. Smith, 11 Humph. (Tenn.) 81 ;

Smith v. Strahan, 16 Tex. 314 ; s.c. 67 Am. Dec. 622 ;

Barren v. Barren, 24 Vt. 375 ;

Smith v. Patton, 12 W. Va. 541 ;

Harper v. Phelps, 21 Comyn 257 ;

Wray v. Steele, 2 Ves. & B. 388 ; s.c. 13 Rev. Rep. 124.

other of the parties is unknown or unascertained.¹ To raise such a trust, however, it is necessary that the funds must be advanced and invested at the time of the purchase; it cannot be created by after advances or funds subsequently furnished.²

SEC. 1723. Same—Statutory provisions.—Statutes have been passed in Indiana,³ Kansas,⁴ Massachusetts,⁵ Michigan,⁶ Minnesota,⁷ New York,⁸ substantially abolishing such resulting trusts as arise in the conveyance to one person where the consideration therefor has been furnished and paid by another, except in favor of the judgment creditors of the latter, or where the deed has been taken in the name of such party through accident, fraud, or mistake.

SEC. 1724. Same—When arises.—A resulting trust arises in favor of a party who pays the whole or any definite portion of the purchase-money at the time when the purchase is made. We have already seen⁹ that to raise such a trust the money must be advanced before, and used at the time of, the purchase; any subsequent furnishing or application of funds in satisfaction of the unpaid purchase-money not being sufficient for that purpose.¹⁰

¹ *Baker v. Vining*, 30 Me. 121; s.c. 50 Am. Dec. 617.

² *Buck v. Swazey*, 35 Me. 41; s.c. 56 Am. Dec. 681;

Hollida v. Shoop, 4 Md. 465; s.c. 59 Am. Dec. 88;

Olcott v. Bynum, 84 U. S. (17 Wall.) 44; bk. 21 L. ed. 570.

After purchase with party's own money or credit, a subsequent tender or reimbursement by another may be evidence of some other contract, or the ground of some other relief, but cannot by retrospect effect produce a resulting trust.

Hollida v. Shoop, 4 Md. 465; s.c. 59 Am. Dec. 88.

³ *Derry v. Derry*, 74 Ind. 560;

Hon v. Hon, 70 Ind. 135;

Catherwood v. Catherwood, 65 Ind. 576.

⁴ *Kennedy v. Taylor*, 20 Kan. 558;

Mitchell v. Skinner, 17 Kan. 563;

Kan. Comp. L. 989, §§ 6, 7, & 8.

⁵ *Graves v. Graves*, 44 Mass. (3 Met.) 167.

⁶ *Munch v. Shabel*, 37 Mich. 166;

Weare v. Linnell, 29 Mich. 224.

⁷ *Rogers v. McCauley*, 22 Minn. 384;

Baker v. Baker, 22 Minn. 262;

Johnson v. Johnson, 16 Minn. 514;

Durfee v. Pavitt, 14 Minn. 422, 424;

Gill v. Newell, 13 Minn. 462, 469;

Irvine v. Marshall, 7 Minn. 286, 298;

Wentworth v. Wentworth, 2 Minn. 277; s.c. 72 Am. Dec. 97.

⁸ *Underwood v. Sutcliffe*, 77 N. Y. 51;

Traphagen v. Burt, 67 N. Y. 30.

See: *Reitz v. Reitz*, 80 N. Y. 538;

Seimon v. Schurck, 29 N. Y. 598;

4 N. Y. Rev. Stat. (8th ed.) 2437, §§ 51, 52, 53.

⁹ See: *Ante*, § 1722.

¹⁰ See: *Foster v. Trustees*, 3 Ala. 302;

SEC. 1725. Same—Consideration requisite.—We have already seen that the payment of the purchase price, or any aliquot part thereof, will raise a resulting trust in land where the title is taken in the name of another. Any other valuable consideration will have the same effect as the actual payment of the purchase-money.¹ Thus the agreement of a party to form a settlement, and commence improvements on a tract of wild, uncultivated lands, is a consideration moving from such party, equivalent to the payment of a pecuniary consideration; and where, in consequence of such agreement, a tract of land is conveyed to a third person, for the benefit of the party making the agreement, such consideration is sufficient as the basis of a resulting trust.²

SEC. 1726. Same—How established—Parol evidence.—We have already seen³ that resulting trusts from purchase of land may be established⁴ or contradicted⁵ by parol evidence,⁶ even in direct contradiction of a deed, patent,

Perry v. McHenry, 13 Ill. 227;
Alexander v. Tams, 13 Ill. 221;
Barnard v. Jewett, 97 Mass. 87;
Bernard v. Bougard, Harr.
 (Mich.) 130;

Wright v. King, Harr. (Mich.)
 12;

Mahorner v. Harrison, 21 Miss.
 (13 Smed. & M.) 53;

Cutler v. Tuttle, 19 N. J. Eq. (4
 C. E. Gr.) 549;

Freeman v. Kelly, 1 Hoffm. Ch.
 (N. Y.) 90;

Steere v. Steere, 5 John. Ch. (N.
 Y.) 1; s.c. 9 Am. Dec. 256;

Botsford v. Burr, 2 John. Ch. (N.
 Y.) 405;

Rogers v. Murray, 3 Paige Ch. (N.
 Y.) 390;

Barnet v. Dougherty, 32 Pa. St.
 371;

Gee v. Gee, 2 Sneed (Tenn.) 395;

Pinnock v. Clough, 16 Vt. 500;
 s.c. 42 Am. Dec. 521.

¹ *Williams v. Brown*, 14 Ill. 200;
Malin v. Malin, 1 Wend. (N. Y.)
 625.

² *Malin v. Malin*, 1 Wend. (N. Y.)
 625.

³ See: *Ante*, §§ 1716, 1720.

⁴ *Baker v. Vining*, 30 Me. 121; s.c.
 50 Am. Dec. 617.

⁵ *Baker v. Vining*, 30 Me. 121; s.c.

50 Am. Dec. 617;

Jackson v. Feller, 2 Wend. (N.
 Y.) 465;

Edwards v. Edwards, 39 Pa. St.
 378;

Lloyd v. Lynch, 38 Pa. St. 419;
 s.c. 70 Am. Dec. 137;

Dudley v. Bosworth, 10 Humph.
 (Tenn.) 9; s.c. 51 Am. Dec. 690;

Finch v. Finch, 15 Ves. 43; s.c.
 10 Rev. Rep. 12.

**Presumption of resulting trust may
 be rebutted by circumstances,**
 but the burden of proof rests
 upon the nominal purchaser.

Dudley v. Bosworth, 10 Humph.
 9; s.c. 51 Am. Dec. 690.

**Same—Any kind of evidence, even
 parol, is competent to rebut pre-
 sumption of a resulting trust,**
 and to show a purchaser's in-
 tention that the estate should
 belong to the person in whose
 name the conveyance was
 taken.

Jackson v. Feller, 2 Wend. (N.
 Y.) 465;

Edwards v. Edwards, 39 Pa. St. 378;
Lloyd v. Lynch, 38 Pa. St. 419;

s.c. 70 Am. Dec. 137;
Finch v. Finch, 15 Ves. 43.

⁶ *Strimpfler v. Roberts*, 18 Pa. St.
 283; s.c. 57 Am. Dec. 606.

or warrant.¹ But to establish a resulting trust by parol, there must be the clearest and most indisputable proof that the purchase was made for the party claiming such trust, and the purchase-money paid by him.² The burden of proof is on the person who undertakes to establish a resultant trust by parol. Where he claims an estate in land, not only without a deed, but in opposition to the written title, ordinarily such trusts should not be favored.³

Lapse of time is not bar to enforcement of a resulting trust where the trustee has acknowledged the trust and there has been no adverse possession, and no laches on the part of the beneficiary in bringing his bill for relief as soon as the trust is denied.⁴

Purchasers of a resulting trust estate are not innocent purchasers for value, where the consideration is that they will pay the debts of the grantor and support him and his wife; purchasers upon such a condition must look to the title, and the equities to which it is subject.⁵

SEC. 1727. **Passive trusts.**—Passive trusts are those which require nothing to be done by the trustee beyond holding and transferring the property to the beneficiary, and in which he simply acts as a reservoir of the legal estate.⁶ Such trusts are also called barren, dry, naked, or

Parol evidence.—Where used in rebuttal of the presumption of a resulting trust, must not contradict the terms of the instrument creating the estate.

Strimpfler v. Roberts, 18 Pa. St. 283; s.c. 57 Am. Dec. 606.

Same.—But parol testimony as to the declarations of a deceased person that another person was jointly interested with him in the purchase of certain land, the deed to which was taken in the name of such deceased person alone, is not competent to raise a resulting trust in such other person, without proof of the payment of the part of the purchase-money by him.

Neill v. Keese, 5 Tex. 23; s.c. 51 Am. Dec. 746.

¹ *Strimpfler v. Roberts*, 18 Pa. St. 283; s.c. 57 Am. Dec. 606.

² *Hollida v. Shoop*, 4 Md. 465; s.c. 59 Am. Dec. 88.

³ *Strimpfler v. Roberts*, 18 Pa. St. 283; s.c. 57 Am. Dec. 606.

⁴ *Dow v. Jewell*, 18 N. H. 340; s.c. 45 Am. Dec. 371.

⁵ *Dow v. Jewell*, 18 N. H. 340; s.c. 45 Am. Dec. 371.

⁶ In such cases the terms and character of the conveyance and limitations imposed by the statute cannot transfer the legal estate to the *cestui que use*, because that would be a use upon a use, which we have already seen is prohibited.

See: *Badgett v. Keating*, 31 Ark. 400;

Lines v. Darden, 5 Fla. 51, 78;

Sutton v. Aiken, 62 Ga. 733;

Boyd v. England, 56 Ga. 598;

Ware v. Richardson, 3 Md. 505; s.c. 56 Am. Dec. 762;

simple trusts.¹ A passive trust gives to the *cestui que trust* a right to the possession, control, and disposal of the property, and the legal estate becomes executed in him, except in those cases where it is necessary to remain in the trustee to enable him to perform the duties devolved upon him by the donor, in which case the *cestui que trust* will only have a right in equity to enforce the trust.² A deed to a trustee who is to stand seized of the premises upon the trust and confidence that they shall be sold by him for such a sum as shall be directed by the *cestui que trust*, and the proceeds applied, after deducting costs and expenses of the sale, to the use and benefit of the latter, is a mere passive trust.³ In Pennsylvania several species of trusts are treated as passive, which, by the general doctrine, are undoubtedly active; certain trusts which require active duties by the trustees are held to be passive, and the whole estate to vest in the beneficiary; for example, a trust to receive rents and

Hayes v. Tabor, 41 N. H. 521;
 Bolles v. State Trust Co., 27 N. J. Eq. (12 C. E. Gr.) 308;
 Price v. Sisson, 13 N. J. Eq. (2 Beas.) 168, 173;
 Boone v. Citizens' Savings Bank, 84 N. Y. 83; s.c. 9 Abb. N. C. (N. Y.) 146;
 Martin v. Funk, 75 N. Y. 134; s.c. 31 Am. Rep. 446;
 Weber v. Weber, 58 How. (N. Y.) Pr. 255;
 Rogers Locomotive, etc., Works v. Kelly, 19 Hun (N. Y.) 399;
 Welch v. Allen, 21 Wend. (N. Y.) 147;
 Steacy v. Rice, 27 Pa. St. 75; s.c. 67 Am. Dec. 447;
 Kuhn v. Newman, 26 Pa. St. 227;
 Moore v. Shultz, 13 Pa. St. 98; s.c. 53 Am. Dec. 446;
 Ramsey v. Marsh, 2 McC. (S. C.) 252; s.c. 13 Am. Dec. 717;
 Williman v. Holmes, 4 Rich. (S. C.) Eq. 475, 495;
 Webster v. Cooper, 55 U. S. (14 How.) 488; bk. 14 L. ed. 510, 511;
 Doe d. Lloyd v. Passingham, 6 Barn. & C. 305; s.c. 13 Eng. C. L. 146;
 Harton v. Harton, 7 Durnf. & E. (7 T. R.) 652, 653; s.c. 4 Rev.

Rep. 537, 538;
 Doe d. Terry v. Collier, 11 East 377; s.c. 10 Rev. Rep. 529;
 Wagstaff v. Smith, 9 Ves. 520; 1 Prest. Abst. 140;
Ante, § 1651.
¹ See: Rife v. Geyer, 59 Pa. St. 393; s.c. 98 Am. Dec. 351;
 Bacon's Appeal, 57 Pa. St. 504;
 Barnett's Appeal, 46 Pa. St. 392, 398; s.c. 86 Am. Dec. 502;
 Kay v. Scates, 37 Pa. St. 31; s.c. 78 Am. Dec. 399;
 Goodrich v. Milwaukee, 24 Wis. 422, 429.
² Dodson v. Ball, 60 Pa. St. 492, 496; s.c. 100 Am. Dec. 586;
 Rife v. Geyer, 59 Pa. St. 393; s.c. 98 Am. Dec. 351.
 See: William's Appeal, 83 Pa. St. 388;
 Huber's Appeal, 80 Pa. St. 348, 355;
 Wescott v. Edmunds, 68 Pa. St. 34, 36.
³ McGoon v. Scales, 76 U. S. (9 Wall.) 23; bk. 19 L. ed. 545.
 Land held under a passive trust is liable to be subjected to judicial sale for the debts of the *cestui que trust*.
 McGoon v. Scales, 76 U. S. (9 Wall.) 23; bk. 19 L. ed. 545.
 See: *Post*, § 1791.

profits, and pay them over, is clearly active, while a trust to "permit and suffer" the beneficiary is passive by the English law;¹ but this distinction seems to be denied in Pennsylvania.²

SECTION V.—TRUSTEE—APPOINTMENT, RESIGNATION, AND REMOVAL.

SEC. 1728. Who may be trustee.

SEC. 1729. Appointment and change.

SEC. 1730. Resignation of trustee.

SEC. 1731. Removal of trustee.

SEC. 1732. Survivorship of trust.

SECTION 1728. Who may be trustee.—Any person may be appointed a trustee who is capable of confidence and of holding real and personal property.³ Thus aliens may become trustees to the extent of their capacity to take and hold the legal title to the trust property, but no farther;⁴ a private corporation, where it has legal

¹ Wagstaff v. Smith, 9 Ves. 520.

² Rife v. Geyer, 59 Pa. St. 393, 395; s.c. 98 Am. Dec. 351.

The Pennsylvania rule is different from that found in other states, and for that reason the Pennsylvania cases cannot always be taken as safe authority upon the subject of active and passive trusts, and the extent to which they are executed under the statute of uses, outside of that commonwealth. One of the points of peculiarity in the Pennsylvania rule is that some species of trusts are treated as executed by the statute as though they were wholly passive, so that the entire estate, legal and equitable, vests at once in the beneficiary, which, by the general law of England and of this country, are not thus executed, on the ground that they are in reality active trusts; as, for example, where land is given in trust to convey it to the *cestui que trust*.

Yarnall's Appeal, 70 Pa. St. 335;

Rife v. Geyer, 59 Pa. St. 393; s.c. 98 Am. Dec. 351;

Bacon's Appeal, 57 Pa. St. 504;

Nice's Appeal, 50 Pa. St. 143;

Barnett's Appeal, 46 Pa. St. 392; s.c. 86 Am. Dec. 502.

An express trust in Pennsylvania, for the separate use of a woman, even where active duties are given to the trustee, so that the trust is really active, cannot be created, unless she is already married, or unless it is made in contemplation of her marriage.

Ogden's Appeal, 70 Pa. St. 501; Ash v. Bowen, 10 Phila. (Pa.) 96; Pickering v. Coates, 10 Phila. (Pa.) 65.

In Wisconsin, passive trusts are abolished, and the deed or instrument creating such a trust takes effect as a conveyance of the legal title directly to the *cestui que trust*. The trustee acquires no estate or interest.

Goodrich v. Milwaukee, 24 Wis. 422;

McGoon v. Scales, 76 U. S. (9 Wall.) 23; bk. 19 L. ed. 545.

³ Commissioners of Sinking Fund v. Walker, 7 Miss. (6 How.) 143; s.c. 38 Am. Dec. 433;

Potter v. Chapin, 6 Paige Ch. (N. Y.) 639, 649;

Pickering v. Shotwell, 10 Pa. St. 23, 27;

2 Foub. Eq. 139 n;

Sand. on Uses, 349.

⁴ See: Jackson ex d. Gansevoort v. Lunn, 3 John. Cas. (N. Y.) 109;

capacity to take and hold real or personal estate, may take and hold upon trust, the same as a private person may do ;¹ the elders and trustees of a church may hold the

Jackson ex d. Culverhouse v. Beach, 1 John. Cas. (N. Y.) 399 ;

Jackson ex d. Smith v. Adams, 7 Wend. (N. Y.) 367 ;

DuHourmelin v. Sheldon, 4 Mylne & C. 525 ; s.c. 1 Beav. 79 ; 3 Jur. 69.

Alienage.—In some of the states there are laws prohibiting aliens from holding real property ; but in all states an alien can take and hold against all the world except the state, and against the state until office found.

Smith v. Zaner, 4 Ala. 99 ;

Halstead v. Commissioners of Lake, 56 Ind. 363 ;

Scanlan v. Wright, 30 Mass. (13 Pick.) 523 ; s.c. 25 Am. Dec. 344 ;

Fox v. Southhack, 12 Mass. 143 ;

People v. Snyder, 41 N. Y. 397, aff'g 51 Barb. (N. Y.) 589 ;

Munro v. Merchant, 28 N. Y. 9, rev'g 26 Barb. (N. Y.) 383 ;

Wadsworth v. Wadsworth, 13 N. Y. 376, aff'g 16 Barb. (N. Y.) 601 ;

Larreau v. Davignon, 5 Abb. Pr. (N. Y.) N. S. 367 ;

People v. Conklin, 2 Hill (N. Y.) 67, 68 ;

Jackson ex d. Gansevoort v. Lunn, 3 John. Cas. (N. Y.) 109 ;

Bradstreet v. Supervisors of Oneida, 13 Wend. (N. Y.) 546 ;

Jones v. McMasters, 61 U. S. (20 How.) 8 ; bk. 15 L. ed. 805 ;

Gouverneur v. Robertson, 24 U. S. (11 Wheat.) 332 ; bk. 6 L. ed. 488 ;

Orr v. Hodgson, 17 U. S. (4 Wheat.) 453 ; bk. 4 L. ed. 613 ;

Fairfax v. Hunter, 11 U. S. (7 Cr.) 603 ; bk. 3 L. ed. 453.

See : *Priest v. Cummings*, 20 Wend. (N. Y.) 338, rev'g 16 Wend. (N. Y.) 617.

¹ *Minnesota Loan & Trust Co. v. Beebe*, 40 Minn. 7 ; s.c. 41 N. W. Rep. 232 ; 2 L. R. A. 418 ;

Commissioners of Sinking Fund v. Walker, 7 Miss. (6 How.)

143 ; s.c. 38 Am. Dec. 433 ;

Vidal v. Girard's Exrs., 43 U. S.

(2 How.) 127 ; bk. 11 L. ed. 205.

Where the trust is repugnant to or inconsistent with the proper purposes for which the corporation was created, that may furnish a reason why it may not be compelled to execute the trust ; but it will furnish no grounds to declare the trust void, but will require a new trustee to be substituted to enforce and perfect the trust.

Vidal v. Girard's Exrs., 43 U. S. (2 How.) 127 ; bk. 11 L. ed. 205.

There is no positive objection, in point of law, to a corporation taking property upon a trust not strictly within the scope of the direct purposes of its institution, but collateral to them, even for the benefit of a stranger or of another corporation.

Vidal v. Girard's Exrs., 43 U. S. (2 How.) 127 ; bk. 11 L. ed. 205.

If a corporation to which property is devised in trust is incapable of acting as trustee, the trust does not thereby fail, but the proper court may appoint a new trustee.

Skinner v. Harrison Township, 116 Ind. 139 ; s.c. 18 N. E. Rep. 529 ; 2 L. R. A. 137.

Incorporated historical society—May be trustee.—There is some ground for holding that an incorporated historical society may be trustee of a trust for a library and an academy or museum of works of art and science : if it cannot, a court of equity would appoint another trustee.

Jones v. Habersham, 107 U. S. 174 ; bk. 27 L. ed. 401.

Actuary of trust company as trustee.

—That a trustee, at the date of the deed to him, and when the sale was made, was the actuary of the trust company whose debt it was given to secure, does not invalidate a sale made under it to the company, which

possession of its property for the use of the persons who, by the constitution, usages, and laws of that body, are entitled to that use ;¹ a husband can be trustee for his wife,² and can be compelled to account in the same manner as a stranger ;³ the incumbents of a designated office and their successors in office ;⁴ a municipal corporation ;⁵ a married woman may be a trustee in all cases where her own interests or those of her husband are not concerned ;⁶ and where a married woman has been duly

was in conformity to the deed and was free from fraud.

Clark v. Eaton ("Comr. of Freedman's Trust Co."), 100 U. S. 149 ; bk. 25 L. ed. 573.

¹ Trustees' possession is a fiduciary possession, and they are liable to be dispossessed by the election of others in their places.

Watson v. Jones, 80 U. S. (13 Wall.) 679 ; bk. 20 L. ed. 666.

² Conway v. Hale, 4 Hayw. (Tenn.) 1 ; s.c. 9 Am. Dec. 748.

³ Walker v. Beal, 76 U. S. (9 Wall.) 743 ; bk. 19 L. ed. 814.

⁴ Commissioners of Sinking Fund v. Walker, 7 Miss. (6 How.) 143 ; s.c. 38 Am. Dec. 433.

⁵ Vidal v. Girard's Exrs., 43 U. S. (2 How.) 127 ; bk. 11 L. ed. 205.

Municipal corporations as trustees.—Right to act.—Where trusts to a municipal corporation are valid in point of law, the heir of the testator cannot contest the right of the corporation to execute the trust : this must be done by the state in its sovereign capacity, by *quo warranto*.

Vidal v. Girard's Exrs., 43 U. S. (2 How.) 127 ; bk. 11 L. ed. 205.

Same—Change of name, etc.—The change in the name of a city, the enlargement of its area, the increase in the number of its corporators, or the amendment of its charter, cannot affect its title or right to hold property devised by will on valid legal trusts, or its authority to execute the trusts, or its authority to execute the trusts of the will.

Girard v. Philadelphia, 74 U. S.

(7 Wall.) 1 ; bk. 19 L. ed. 53.

Same—Cutting down powers.—Any attempt to narrow down the powers given to a municipal corporation, so as to exclude it from taking property upon trusts for purposes confessedly charitable and beneficial to the city or the public, would be to introduce a doctrine inconsistent with sound principles, and defeat instead of promoting the true policy of the state.

Vidal v. Girard's Exrs., 43 U. S. (2 How.) 127 ; bk. 11 L. ed. 205.

Same—The persons described by their official designation, and their successors, and not the corporations with which they are connected, are intended to be made trustees by a will giving property in trust to the mayor of a city and the presidents of two incorporated societies, and their successors forever.

Cottman v. Grace, 112 N. Y. 299 ; s.c. 19 N. E. Rep. 839 ; 3 L. R. A. 145.

⁶ Schluter v. Bowery Savings Bank, 117 N. Y. 125 ; s.c. 22 N. E. Rep. 572 ; 5 L. R. A. 541 ;

Gridley v. Wynant, 64 U. S. (23 How.) 500 ; bk. 16 L. ed. 441.

See : Springer v. Berry, 47 Me. 330, 338 ;

Alexander v. Warrance, 17 Mo. 228 ;

Jencks v. Alexander, 11 Paige Ch. (N. Y.) 619 ;

Lake v. De Lambert, 4 Ves. 595 ;

Godolphin v. Godolphin, 1 Ves. 23 ;

1 Co. Litt. (19th ed.) 112a.

Compare : Smith v. Strahan, 16 Tex. 314 ; s.c. 67 Am. Dec. 622 ;

Rankin v. Harper, 23 Mo. 579.

constituted a trustee in the state where the trust fund remains, she is not divested of her title to the fund by removal to another state, by the laws of which she could not be appointed a trustee.¹ In England the sovereign,² and in this country the state, may sustain the relation of trustee;³ and a voluntary association, even, may become a trustee for certain purposes and objects.⁴

SEC. 1729. **Appointment and change.**—In those cases where there is a failure of suitable trustees to perform a trust, either from accident or from the refusal of the named trustees to qualify, or from their original or supervenient incapacity to act, or from any other cause, courts of equity will not allow the trust to fail by reason thereof, but will appoint new trustees.⁵ Thus where a person named in a will as trustee dies before the testator, the title to the lands embraced in the trust descends to the heir at law, charged with the trust; and where the heir at law is the *cestui que trust*, and the trust is an active one, needing the interposition of an independent trustee, the court will appoint one in the place of the one named in the will.⁶ And when on death of the trustee before that of the testator or creator of the trust, where a trustee has died, and no successor has been appointed, a court of equity may decree and enforce the execution of the trust through its own officers and agents, without the interven-

¹ Schluter v. Bowery Savings Bank, 117 N. Y. 125; s.c. 22 N. E. Rep. 572; 5 L. R. A. 541.

² 3 Bl. Com. 438.

See: Reeve v. Attorney-General, 2 Atk. 223;
Casboard v. Ward, 6 Price 44.

³ Pinson v. Ivey, 1 Yerg. (Tenn.) 296, 332.

See: Mooers v. White, 6 John. Ch. (N. Y.) 360;
Borland v. Dean, 4 Mas. C. C. 174; s.c. 3 Fed. Cas. 905.

⁴ Cromie v. Louisville, etc., Soc., 3 Bush (Ky.) 365;

Coggeshall, etc., Trustees of New Rochelle v. Pelton, 7 John. Ch. (N. Y.) 292; s.c. 11 Am. Dec. 471;

Shotwell v. Mott, 2 Sandf. Ch.

(N. Y.) 46;

Coal Co. v. Fry, 5 Phila. (Pa.) 129.

Compare: State v. Warren, 28 Md. 338;

Chapin v. Chicopee Universalist Soc., 74 Mass. (8 Gray) 580;

Owens v. Missionary Soc. of M. E. Church, 14 N. Y. 380.

⁵ Irvine v. Dunham, 111 U. S. 327; bk. 28 L. ed. 444;

Jones v. Habersham, 107 U. S. 174; bk. 27 L. ed. 401;

Adams v. Adams, 88 U. S. (21 Wall.) 185; bk. 22 L. ed. 504;

Girard v. Philadelphia, 74 U. S. (7 Wall.) 1; bk. 19 L. ed. 53.

⁶ Woodruff v. Woodruff, 44 N. J. Eq. (17 Stew.) 349; s.c. 16 Atl. Rep. 4; 1 L. R. A. 380.

tion of a new trustee.¹ In all cases where a bill is filed to compel a trustee to account for property received by him, and for other relief, if the appointment of a new trustee and the payment of the trust funds to him are necessary, such relief may be granted without any specific prayer therefor in the bill.²

SEC. 1730. *Resignation of trustee.*—Persons appointed to hold property as trustees, and to exercise the powers and perform the duties imposed by such trust, are not compelled to accept, and may refuse to qualify; but where a trustee voluntarily accepts and enters upon the execution of the trust, he cannot, thereafter, relinquish the same without the consent of the *cestui que trust*, or the direction of the court.³ A failure to accept and qualify under a trust is to be regarded as an election not to serve, and this presumption may be enforced by a subsequent disclaimer made at any time when responsibility as such trustee is sought to be affixed;⁴ but a disclaimer, to be available, must be made in such a way that it can be deemed to have been made at the time of the creation of the trust,⁵ because where the estate has actually vested in the trustee he cannot divest himself of it by a mere disclaimer.⁶ A voluntary resignation of a trustee can therefore be effectual for no purpose, unless it be made with the assent of the *cestui que trust* or under the di-

¹ *Batesville Institute v. Kauffman*, 85 U. S. (18 Wall.) 151; bk. 21 L. ed. 775.

² *Mitchell v. Moore*, 95 U. S. 587; bk. 24 L. ed. 492.

³ *Shepherd v. McEvers*, 4 John. Ch. (N. Y.) 136; s.c. 8 Am. Dec. 561.

See: *Thatcher v. Candee*, 4 Abb. App. (N. Y.) 390; s.c. 33 How. (N. Y.) Pr. 145, 149; 3 Keyes (N. Y.) 157, 160;

Ridgeley v. Johnson, 11 Barb. (N. Y.) 527;

Robertson v. Bullions, 9 Barb. (N. Y.) 64, 117. aff'd 11 N. Y. 243;

Gilchrist v. Stevenson, 9 Barb. (N. Y.) 9, 15;

Cruget v. Halliday, 11 Paige Ch. (N. Y.) 314, 319, rev'g 3 Edw. Ch. (N. Y.) 569;

Reed v. Allerton, 3 Robt. (N. Y.)

551, 567;

Attorney-General v. Christ's Hospital, 3 Bro. C. C. 165.

⁴ *Hughes v. Brown*, 88 Tenn. 578; s.c. 13 S. W. Rep. 286; 8 L. R. A. 480.

⁵ *Shepherd v. McEvers*, 4 John. Ch. (N. Y.) 136; s.c. 8 Am. Dec. 561;

Earle v. Earle, 16 Jones & S. (N. Y.) 25.

⁶ *Earle v. Earle*, 16 Jones & S. (N. Y.) 25;

Cruget v. Halliday, 11 Paige Ch. (N. Y.) 314, 319.

See: *Shepherd v. McEvers*, 4 John. Ch. (N. Y.) 136; s.c. 8 Am. Dec. 561;

Chaplin v. Givens, 1 Rice (S. C.) Eq. 133;

Read v. Truelove, 1 Amb. 417;

Stacey v. Elph, 1 Myl. & K. 195.

rection of the court ;¹ but when so made no notice of such resignation is required to be given to the heirs of one for whom the trust is held, the heirs of whom on his death are entitled to the property absolutely ; because there are no heirs until the death of the *cestui que trust*.²

SEC. 1731. **Removal of trustee.**—A court of equity has general power to remove trustees and appoint new ones whenever the interests of the *cestui que trust* shall demand.³ This will be done where the acts or omissions of the trustee are such as to show a want of reasonable fidelity ;⁴ or where the trust funds are to be invested by the trustee and he fails to do so ;⁵ or where he has abused his trust,⁶ or has done anything else which

¹ *Cruger v. Halliday*, 3 Edw. Ch. (N. Y.) 565, 569 ; s.c. 11 Paige Ch. (N. Y.) 314, 319 ;

Shepherd v. McEvers, 4 John. Ch. (N. Y.) 136 ; s.c. 8 Am. Dec. 561.

² *Leake v. Watson*, 58 Conn. 332 ; s.c. 20 Atl. Rep. 343 ; 8 L. R. A. 666.

³ *Williamson v. Suydam*, 73 U. S. (6 Wall.) 723 ; bk. 18 L. ed. 967. See : *Post*, §§ 1763, 1764.

Mutual ill-will or hostile feeling may justify removing a trustee, where he has a discretionary power over the rights of the *cestui que trust*, and has duties which necessarily bring the parties into personal intercourse ; it is not sufficient cause where no intercourse is required, and the duties are merely formal and ministerial, and no neglect of duty or misconduct is established against him.

McPherson v. Cox, 96 U. S. 404 ; bk. 24 L. ed. 746.

Where a deed of land with buildings on it was made to trustees to be used as a Baptist church, the legal ownership of the property was in them, and they are not removable without cause, at the will of the *cestui que use*.

Bouldin v. Alexander, 82 U. S. (15 Wall.) 131 ; bk. 21 L. ed. 69.

⁴ *Cavender v. Cavender*, 114 U. S. 464 ; bk. 29 L. ed. 212.

⁵ *Cavender v. Cavender*, 114 U. S. 464 ; bk. 29 L. ed. 212.

⁶ The Supreme Court of the United States say that "where a trustee has abused his trust, the *cestui que trust* has the option to take the original or the substituted property. Parties are sometimes remitted to a court of law, but this is never done where the remedy is not as effectual and complete there as the chancellor can make it. Equity sometimes takes jurisdiction on account of the parties, and sometimes on account of the relief to be administered."

Union Pac. R. Co. v. Durant, 95 U. S. 576 ; bk. 24 L. ed. 391 ;

Bowen v. Chase, 94 U. S. 812 ; bk. 24 L. ed. 184 ;

Adams v. Adams, 88 U. S. (21 Wall.) 185 ; bk. 22 L. ed. 504 ;

Cook v. Tullis, 85 U. S. (18 Wall.) 332 ; bk. 21 L. ed. 933 ;

Hume v. Beale, 84 U. S. (17 Wall.) 336 ; bk. 21 L. ed. 602 ;

Duncan v. Jaudon, 82 U. S. (15 Wall.) 165 ; bk. 21 L. ed. 142 ;

Villa v. Rodriguez, 79 U. S. (12 Wall.) 323 ; bk. 20 L. ed. 406 ;

May v. Le Claire, 78 U. S. (11 Wall.) 217, 236 ; bk. 20 L. ed. 50 ;

Irvine v. Marshall, 61 U. S. (20 How.) 558, 564 ; bk. 15 L. ed. 994 ;

Oliver v. Piatt, 44 U. S. (3 How.) 333 ; bk. 11 L. ed. 622 ;

makes it prejudicial to the *cestui que trust* for him to remain in charge of the trust property.¹ At common law the legal estate held in trust descended to the heirs of the trustee to be administered by them;² and still does, in the absence of a statute specially providing that the appointment of a new trustee shall operate upon the legal title, and pass to him from the former trustee.³ The appointment of a new trustee does not affect a transfer of the legal title, unless the court in making the appointment directs a conveyance of the legal title to the new trustee.⁴

SEC. 1732. **Survivorship of trust.**—Where there are more than one trustee they take and hold the legal estate in joint tenancy, and a power conferred on them is a power coupled with an interest, which survives on the death of one of them, and may be executed by the survivor;⁵ and

- Gaines *v.* Chew, 43 U. S. (2 How.) 619, 649; bk. 11 L. ed. 402;
 Partee *v.* Thomas, 11 Fed. Rep. 769, 773.
¹ Satterfield *v.* John, 53 Ala. 121;
 Bailey *v.* Bailey, 2 Del. Ch. 95;
 Collier *v.* Blake, 14 Kan. 250;
 Scott *v.* Rand, 118 Mass. 515;
 Sparhawk *v.* Sparhawk, 114 Mass. 356;
 Bowditch *v.* Banuelos, 67 Mass. (1 Gray) 220;
 Preston *v.* Wilcox, 38 Mich. 578;
 Green *v.* Blackwell, 31 N. J. Eq. (4 Stew.) 37;
 People *v.* Norton, 9 N. Y. 176;
 Farmers' Loan & Trust Co. *v.* Hughes, 11 Hun (N. Y.) 130;
 Shepherd *v.* McEvers, 4 John. Ch. (N. Y.) 136; s.c. 8 Am. Dec. 561;
 Suarez *v.* Pumpelly, 2 Sandf. Ch. (N. Y.) 336, 337;
 North Carolina R. Co. *v.* Wilson, 81 N. C. 223;
 Bloomer's Appeal, 83 Pa. St. 45;
 McPherson *v.* Cox, 96 U. S. 404; bk. 24 L. ed. 746;
 Ketchum *v.* Mobile & O R. Co., 2 Woods C. C. 532; s.c. Fed. Cas. No. 7737.
² Russell *v.* Peyton, 4 Ill. App. 473;
 Warden *v.* Richards, 77 Mass. (11 Gray) 277;
 Clark *v.* Taintor, 61 Mass. (7 Cush.) 567, 569;
 Berrien *v.* McLane, 1 Hoffm. Ch. (N. Y.) 420, 421;
 Dunning *v.* Ocean Nat. Bk. of New York, 6 Lans. (N. Y.) 396, aff'd 61 N. Y. 497;
 Gray *v.* Henderson, 71 Pa. St. 368;
 Evans *v.* Chew, 71 Pa. St. 47;
 Boone *v.* Chiles, 35 U. S. (10 Pet.) 177, 213; bk. 9 L. ed. 388;
 3 Kent Com. (13th ed.) 311;
 1 Lewin on Trusts (8th ed.), 303.
³ King *v.* Bill, 28 Conn. 593, 598;
 Parker *v.* Converse, 71 Mass. (5 Gray) 336;
 Bennett *v.* Williams, 5 Ohio 461;
 Taylor *v.* Boyd, 3 Ohio 337; s.c. 17 Am. Dec. 603;
 McNish *v.* Guerard, 4 Strobb. (S. C.) Eq. 66.
⁴ Webster *v.* Vandeventer, 72 Mass. (6 Gray) 428;
 Wallis *v.* Wilson, 34 Miss. 357;
 Berrien *v.* McLane, 1 Hoffm. Ch. (N. Y.) 421;
 Shepherd *v.* Commissioners of Ross Co., 7 Ohio 272;
 Young *v.* Young, 4 Cr. C. C. 499; s.c. Fed. Cas. No. 18177;
 O'Keefe *v.* Calthorpe, 1 Atk. 17;
Ex parte Greenhouse, 1 Madd. 109.
⁵ Loring *v.* Marsh, 73 U. S. (6 Wall.) 337; bk. 18 L. ed. 802;

this is true even though it may be in no way beneficial to the trustee.¹ This rule, however, is not without limitations when applied to executed trusts ; and whether an executory trust survives depends upon the amount of personal confidence reposed in the deceased trustee as one of the persons.² Where the power in an executory trust is granted to the trustee in general terms it survives ;³ but where it is granted to the trustees specifically named, there will be no survivorship. Consequently where there is a removal of a trustee by a court of equity for cause, as above specified, the new trustee will have power to exercise the powers conferred upon the trustee generally, but he will not be entitled to exercise those involving a personal confidence reposed on the part of the testator in the trustee specifically named.⁴

SECTION VI.—TRUSTEES—DUTIES AND POWERS OF.

SEC. 1733. Duties of trustee.

SEC. 1734. Same—To furnish support.

SEC. 1735. Same—To invest funds.

SEC. 1736. Powers of trustee.

SEC. 1737. Same—Delegation of personal trust.

SEC. 1738. Same—Other powers.

SECTION 1733. Duties of trustee.—It is a duty of trustees

- Peter v. Beverly, 35 U. S. (10 Pet.) 532 ; bk. 9 L. ed. 522.
¹ Peter v. Beverly, 35 U. S. (10 Pet.) 532 ; bk. 9 L. ed. 522.
² Saunders v. Schmaelzie, 49 Cal. 59 ;
 Stewart v. Pettus, 10 Mo. 755 ;
 Burrill v. Sheil, 2 Barb. (N. Y.) 457 ;
 Jackson v. Schaubert, 7 Cow. (N. Y.) 187, 194 ;
 Franklin v. Osgood, 14 John. (N. Y.) 527, 553 ;
 Peter v. Beverly, 35 U. S. (10 Pet.) 532 ; bk. 9 L. ed. 522 ;
 Lane v. Debenham, 11 Hare 188 ;
 Warburton v. Sands, 14 Sim. 622 ;
 Cole v. Wade, 16 Ves. 28.
³ Wells v. Lewis, 4 Met. (Ky.) 269, 271 ;
 Gray v. Lynch, 8 Gill (Md.) 403 ;
 Tainter v. Clark, 54 Mass. (13 Met.) 220 ;
 Bloomer v. Waldron, 3 Hill (N. Y.) 361, 365 ;
 Jackson v. Given, 16 John. (N. Y.) 167 ;
 Franklin v. Osgood, 14 John. (N. Y.) 527, 553 ;
 Berger v. Duff, 4 John. Ch. (N. Y.) 368 ;
 Zebach v. Smith, 3 Binn. (Pa.) 69 ;
 s.c. 5 Am. Dec. 352 ;
 Peter v. Beverly, 35 U. S. (10 Pet.) 532, 564 ; bk. 9 L. ed. 522 ;
 Cole v. Wade, 16 Ves. 27, 28 ;
 s.c. 10 Rev. Rep. 129 ;
 1 Co. Litt. (19th ed.) 113a ;
 1 Lewin on Trusts (8th ed.), 239 ;
 2 Story Eq. Jur. (13th ed.), § 1062.
⁴ Burrill v. Sheil, 2 Barb. (N. Y.) 457 ;
 Hibbard v. Lamb, 1 Ambl. 309 ;
 Doyley v. Att'y-Gen., 2 Eq. Cas. Abr. 195 ;
 Cole v. Wade, 16 Ves. 27, 44 ; s.c. 10 Rev. Rep. 129 ;
 1 Lewin on Trusts (8th ed.) 239.

to take the same care of property entrusted to them as they would if it were their own;¹ but a greater measure of care will not be exacted by a court of equity.² The trustee must defend the trust property, whether of real or personal estate, at law or in equity, in case suit is brought against it.³ He must also exercise due diligence in reducing choses in action to possession. What is due diligence will depend largely upon the circumstances of the case, and the trustee discharges his full duty if he exercises a reasonable discretion.⁴ In such matters the trustee must use the same caution and judgment in the case of the trust property that he would if the property were his own.⁵

¹ Lord NORTHINGTON said in *Harden v. Parsons*, 1 Eden 148, that "no man can require or with reason expect that a trustee should manage another's property with the same care and discretion that he would his own," but this has never found favor with the profession.

* *Morley v. Morley*, 2 Ch. Cas. 2; *Re Speight*, 22 Ch. Div. 739; s.c. D. P. 9 App. Cas. 19; *Budge v. Gummow*, L. R. 7 Ch. App. 720; s.c. 3 Moak Eng. Rep. 591; *Massey v. Banner*, 1 J. & W. 247; *Attorney-General v. Dixie*, 13 Ves. 534;

Jones v. Lewis, 2 Ves. 241.

³ *Gooding v. Gibbes*, 58 U. S. (17 How.) 274; bk. 15 L. ed. 148.

Misapprehension as to the right cannot change the beneficial character of the expenses, when indispensable to its security.

Gooding v. Gibbes, 58 U. S. (17 How.) 274; bk. 15 L. ed. 148.

⁴ *William's Appeal*, 22 Pa. St. 330; *Hester v. Wilkinson*, 6 Humph. (Tenn.) 215.

In the case of *Mayer v. Mordecai*, 1 S. C. N. S. 383; s.c. 7 Am. Rep. 26, by a deed made in May, 1860, three bonds secured by mortgages of real estate were assigned to B in trust to invest the proceeds, as soon as received, "in such manner as the said B may think proper, on consultation with" the

cestui que trust, and then to permit them to receive the income. The *cestui que trust* removed, shortly afterward, from South Carolina, where the trust was created, to New York, and remained there during the war with the Confederate states. In 1862 and 1863 B collected the bonds in Confederate treasury notes, then much depreciated, and invested the proceeds in bonds of the Confederate states, without consultation with the *cestui que trust*, with whom it was, at that time, impracticable to communicate. Held, that B committed a breach of trust, and that he was liable to account to the *cestui que trust* for the sums received. Held, further, that the obligors in the bonds were not liable to account in the *cestui que trust*, for that they were discharged by their payments to B.

⁵ *Campbell v. Miller*, 38 Ga. 304; s.c. 95 Am. Dec. 389;

Gould v. Chappell, 42 Md. 466; *King v. Talbot*, 40 N. Y. 76, aff'g 50 Barb. (N. Y.) 453;

Carpenter v. Carpenter, 12 R. I. 544; s.c. 34 Am. Rep. 716;

Taylor v. Benham, 46 U. S. (5 How.) 233; bk. 12 L. ed. 130.

Though compensated for his services, a trustee is bound to take no greater care of the trust funds than a prudent man would of his own; and if he deposits

Where a trustee is appointed for the purpose of holding property and distributing it according to the trust under which he holds, if he has notice that it is doubtful whether the trust fund should be distributed, it is his duty to apply to the court for its direction before he executes the trust by paying over the funds ;¹ but a trustee cannot request instructions of the court as to what may be his duty upon the happening of future contingencies.²

SEC. 1734. **Same—To furnish support.**—Where a person makes a declaration of trust in favor of another person or persons in consideration of the conveyance of land, this will constitute a valid and irrevocable trust in favor of such other person or persons ;³ and it will be the duty of such trustee to exercise a supervision over the care and comfort of an incompetent person for whose support the trust is created, and to appropriate the net rents of the property, or the interest on its price, if sold, and to apply the proceeds, so far as necessary to that purpose, wherever, within reasonable limits, such person may be cared for and supported.⁴ In such a trust, if no place is specified, the beneficiary may, as a general rule, live

the trust funds in a private bank, where he keeps his own money, and where other prudent and discreet men make deposits, if there is no mingling of the trust funds with funds of the trustee, and no reason to suspect the solvency of the bankers, and the trustee acts under the advice of counsel, he will not be charged with the loss in case the bank fails.

Barney v. Saunders, 57 U. S. (16 How.) 535 ; bk. 14 L. ed. 1047.

¹ *Williams v. Gibbes*, 61 U. S. (20 How.) 535 ; bk. 15 L. ed. 1013.

² *Bullard v. Chandler*, 149 Mass. 532 ; s.c. 21 N. E. Rep. 951 ; 5 L. R. A. 104.

³ *McArthur v. Gordon*, 126 N. Y. 597 ; s.c. 27 N. E. Rep. 1033 ; 12 L. R. A. 667.

See : *Conway v. Kinsworthy*, 21 Ark. 9 ;

Price v. Reeves, 38 Cal. 457 ;

Rabun v. Rabun, 15 La. An. 471 ;

Giddings v. Palmer, 107 Mass. 269, 270 ;

Homer v. Homer, 107 Mass. 82 ;
Price v. Minot, 107 Mass. 49, 61 ;

Baylies v. Payson, 87 Mass. (5 Allen) 473, 488 ;

Pingree v. Coffin, 78 Mass. (12 Gray) 288 ;

Paul v. Fulton, 25 Miss. 156 ;

Waddingham v. Loker, 44 Mo. 132 ;

Currie v. White, 45 N. Y. 822, rev'g 6 Abb. (N. Y.) Pr. N. S. 352 ;

Reed v. Lukens, 44 Pa. St. 200 ; s.c. 84 Am. Dec. 425 ;

Cressman's Appeal, 42 Pa. St. 147 ; s.c. 82 Am. Dec. 498 ;

Rees v. Livingston, 41 Pa. St. 113 ;

Pownal v. Taylor, 10 Leigh (Va.) 172, 183 ; s.c. 34 Am. Dec. 725 ;

Seymour v. Freer, 75 U. S. (8 Wall.) 202 ; bk. 19 L. ed. 306 ;

Legard v. Hodges, 1 Ves. Jr. 477, 478 ; s.c. 2 Rev. Rep. 146.

⁴ *McArthur v. Gordon*, 126 N. Y. 597 ; s.c. 27 N. E. Rep. 1033 ; 12 L. R. A. 667.

wherever he chooses, provided his choice does not involve needless expenses.¹

SEC. 1735. Same—To invest funds.—Trustees take the legal title² by implication of law where they are required to hold funds for a long period in order to pay specific legacies, including annuities, to a large number of persons for life; and in such case their duties require them to keep the estate, real and personal, so invested as to be not only safe but productive.³

SEC. 1736. Powers of trustee.—The powers of trustees are such as are reasonably necessary for the discharge of their trusts, and the performance of their duty there-

¹ *Powell v. Jewett*, 69 Me. 293;
Proctor v. Proctor, 141 Mass.
 165; s.c. 6 N. E. Rep. 849; 2
 New Eng. Rep. 333;
Pettee v. Case, 84 Mass. (2 Allen)
 546;
Conkey v. Everett, 77 Mass. (11
 Gray) 95;
Wildor v. Whittemore, 15 Mass.
 262;
Stillwell v. Pease, 4 N. J. Eq. (3
 H. W. Gr.) 74.

The above rule is subject to exception in cases where there is great inadequacy of consideration, or family arrangements are made involving the support of some of its members by others who have been accustomed to live together, or the circumstances of the case and the language of the instrument indicate an intention that support shall be furnished in a particular place, or by particular persons. In such cases the courts have sometimes construed similar contracts as meaning that support could be required only at the place or by the persons indicated, even though that was not made an express requirement of the agreement.

See: *McKillip v. McKillip*, 8
 Barb. (N. Y.) 552;
Pool v. Pool, 1 Hill (N. Y.) 580.

² See: *Post*, § 1767.

³ *Hale v. Hale*, 146 Ill. 227; s.c. 33
 N. E. Rep. 858; 20 L. R. A. 247.

See: *Post*, § 1773.

A marriage settlement provided that the trustees, after the death of the husband, should stand possessed of money in trust, and mentioned several places where it could be invested "with the consent of the wife." The court held the trustees bound to make the investment in such of those funds as the wife directs.

English v. Foxall, 27 U. S. (2
 Pet.) 595; bk. 7 L. ed. 531.

Investment in stock and bonds.—While trust funds may sometimes be properly invested in railroad stock, yet a trustee under a deed of trust containing no specific directions concerning investments will be compelled to make good the losses sustained in investing in such stock after he has already invested between one-fifth and one-fourth of the entire trust fund in stock of the same road, where the road runs through a new and comparatively unsettled country, has required a great outlay of money, is heavily indebted, and its continued prosperity cannot be predicted, although he acted in good faith and upon the advice of persons whom he considered qualified to give advice upon the subject.
Dickinson Appellants, 152 Mass.
 185; s.c. 25 N. E. Rep. 99; 9
 L. R. A. 279.

under, as hereinbefore pointed out. Where there are two or more trustees, they may direct one of their number to transact their business, and the acts of the one thus authorized are the acts of all.¹ Trustees have no power to employ the trust fund for their own benefit,² and a person purchasing trust property or taking trust funds knowing of the trust does so at his peril;³ it is otherwise, however, where there is no notice, either actual or constructive, and the misapplied assets cannot be followed.⁴

SEC. 1737. **Same — Delegation of personal trust.** — We have already seen that trusts are of two kinds, general and special.⁵ The former is given to the trustees generally and may be exercised by any trustee;⁶ the latter is a trust of confidence given to a particular individual, and can be exercised by him alone;⁷ consequently wherever a power is given, whether it be over real or personal property, and whether the execution of it will confer a legal or only an equitable right, if the power reposes a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot delegate that power to another.⁸

SEC. 1738. **Same—Other powers.**—We have already seen that it is the duty of the trustee to manage the property with the same skill and care as a reasonably prudent man would exercise over his own property and affairs.⁹ This will include the power to make such improvements

¹ *Howard Fire Ins. Co. v. Chase*, 72 U. S. (5 Wall.) 509; bk. 18 L. ed. 524.

² *Myers v. Myers*, 2 McC. (S. C.) Eq. 214; s.c. 16 Am. Dec. 648; *Graff v. Castleman*, 5 Rand. (Va.) 295; s.c. 16 Am. Dec. 741.

³ *Graff v. Castleman*, 5 Rand. (Va.) 295; s.c. 16 Am. Dec. 741.

⁴ *Neely v. Rood*, 54 Mich. 134; s.c. 19 N. W. Rep. 920; 52 Am. Rep. 802.

See: *Mead v. Orrery*, 3 Atk. 235; *Nugent v. Gifford*, 1 Atk. 463; *Whale v. Booth*, 4 Durnf. & E. (4 T. R.) 625; *Taner v. Ivie*, 2 Ves. 466.

⁵ See: *Ante*, §§ 1693, 1696, 1733.

⁶ See: *Ante*, § 1733.

⁷ *Id.*

⁸ *Saunders v. Webber*, 39 Cal. 287; *Singleton v. Scott*, 11 Iowa 589; *Berger v. Duff*, 4 John. Ch. (N. Y.) 368; *Hawley v. James*, 5 Paige Ch. (N. Y.) 318, 487; *Pearson v. Jamison*, 1 McL. C. C. 197; s.c. Fed. Cas. No. 10879; *Alexander v. Alexander*, 2 Ves. 642.

See: *Hill on Trusts*, 489; *Story on Agency* (9th ed.), § 12.

⁹ See: *Ante*, § 1733, *et seq.*

as may reasonably be necessary;¹ to insure the property to its full value;² to sue for property which it is his duty to hold in trust for a certain person or persons during life, and which then goes to their heir or heirs.³ The

¹ See : *Post*, § 1779.

Improvements on trust land—Liability of trustee.—A trustee who causes improvements to be made on the land of his ward by holding out the expectation of a lease, where such lease can legally be made, is liable personally.

Findley v. Wilson, 3 Litt. (Ky.) 390; s.c. 14 Am. Dec. 72.

Where there is a devise to an infant, with directions that another occupy the land during the infant's nonage, for the support of the family, but not to use the land in any other way, will not authorize the trustee to charge the land with improvements made thereon.

Findley v. Wilson, 3 Litt. (Ky.) 390; s.c. 14 Am. Dec. 72.

² *Howard Fire Ins. Co. v. Chase*, 72 U. S. (5 Wall.) 509; bk. 18 L. ed. 524.

Insurance by trustee—Want of personal interest in the property insured does not affect the right to procure such insurance. Justice DAVIS, speaking for the Supreme Court of the United States, says in the case of *Howard Fire Ins. Co. v. Chase*, *supra*, that "a trustee having no personal interest in the property may procure insurance on it, is a doctrine too well settled to need a citation of authorities to confirm it. As early as 1802, the judges of the Exchequer Chamber, in the case of *Lucena v. Craufurd*, 3 Bos. & P. 75; s.c. 2 Bos. & P. (N. R.) 269; 1 Taunt. 325; 6 Rev. Rep. 623, held, that an agent, trustee, or consignee could insure, and that it was not necessary that the assured should have a beneficial interest in the property insured, and the rule established by this case has ever since been followed by the courts of this country and England."

Citing: *Putnam v. Mercantile Insurance Company*, 46 Mass.

(5 Met.) 386;

Goodall v. New England Fire Ins. Co., 25 N. H. (5 Post.) 168; *Swift v. Mutual Ins. Co.*, 18 Vt. 304, 313; .

Columbia Ins. Co. v. Lawrence, 35 U. S. (10 Pet.) 510; bk. 9 L. ed. 512; s.c. 27 U. S. (2 Pet.) 25; bk. 7 L. ed. 335;

Craufurd v. Hunter, 8 Durnf. & E. (8 T. R.) 13; s.c. 4 Rev. Rep. 576;

Angel on L. & F. Ins., §§ 56, 57, 73;

2 Greenl. Ev., § 379;

Parsons on Merc. L., c. 18, § 3.

The court further say: "A trustee, therefore, having the right, is justified in insuring the property, even to its full value, although there is no obligation on him, in the absence of express directions, to insure at all."

Page v. Western Ins. Co., 19 La. 49;

Angel on F. & L. Ins., § 73;

1 *Lewin on Trusts* (8th ed.), 383;

1 *Phil. Ins.* 163.

³ *Leake v. Watson*, 58 Conn. 332; s.c. 20 Atl. Rep. 343; 8 L. R. A. 666;

Oelrichs v. Williams (*Oelrichs v. Spain*), 82 U. S. (15 Wall.) 211; bk. 21 L. ed. 42.

Suit on injunction bond.—In *Oelrichs v. Williams*, *supra*, it was held that a trustee of a fund to whom an injunction bond is given may recover upon the bond at law to the full extent of the damages touching the entire fund. In rendering the decision of the court Justice SWAYNE said: "It has been insisted by the counsel for the appellants that there is complete remedy at law, and that the bill must, therefore, be dismissed. Such must be the consequence if the objection is well taken. In the jurisprudence of the United States this objection is regarded as jurisdictional, and may be enforced

trustee may also submit a claim to arbitration;¹ and where a trustee is given power to sell or exchange or dispose of the land, this includes the power to make partition of such lands,² but a power to sell simply does not authorize an exchange of the trust property,³ or the partitioning thereof.⁴ Where a deed of trust gives a power

by the court *sua sponte*, though not raised by the pleadings nor suggested by counsel. (*Parker v. Winnipiseogee, Lake C. & W. Mfg. Co.*, 67 U. S. (2 Black) 545, 551; bk. 17 L. ed. 333; *Dade v. Irwin*, 43 U. S. (2 How.) 383; bk. 11 L. ed. 308; *Fowle v. Lawrason*, 30 U. S. (5 Pet.) 495; bk. 8 L. ed. 204; *Graves v. Boston Marine Ins. Co.*, 6 U. S. (2 Cranch) 419; bk. 2 L. ed. 324.) The 16th section of the Judiciary Act of 1789 provides, 'that suits in equity shall not be sustained in any case where plain, adequate, and complete remedy can be had at law,' but this is merely declaratory of the pre-existing rule, and does not apply where the remedy is not 'plain, adequate, and complete;' or in other words, 'where it is not as practical and efficient to the ends of justice and to its prompt administration as the remedy in equity.' (*Boyce v. Grundy*, 28 U. S. (3 Pet.) 210, 215; bk. 7 L. ed. 655.) Where the remedy at law is of this character, the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial of the issues of fact by a jury (*Hipp v. Babin*, 60 U. S. (19 How.) 271, 278; bk. 15 L. ed. 633). But this principle has no application to the case before us. Upon looking into the record it is clear to our minds, not only that the remedy at law would not be as effectual as the remedy in equity, but we do not see that there is any effectual remedy at all at law. If the injunction bonds were sued upon at law and the judgments recovered, a proceeding in equity would

still be necessary to settle the respective rights of the several obligees to the proceeds. The direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation. Besides, there is an element of trust in the case, which, wherever it exists, always confers jurisdiction in equity."

Suit against banks for deposit.—A trustee cannot sue a bank for a bank deposit of which he held the legal title, where by his own act he has applied the money in payment of his own indebtedness to the bank, although the agreement may be avoided at the election of the *cestui que trust*.

Sayre v. Weil, 94 Ala. 466; s.c. 10 So. Rep. 546; 15 L. R. A. 544.

¹ *Phelps v. Harris*, 101 U. S. 370; bk. 25 L. ed. 855;

Davies v. Ridge, 3 Esp.* 101; s.c. 6 Rev. Rep. 817;

Cald. on Arb. 24.

Submitting to arbitration.—An assignee of a bankrupt has power to submit to arbitration in England by complying with the provisions of the bankrupt laws on that subject.

Kyd on Awards, 41;

Morse on Arb. 30;

Wats. on Arb. 48.

² *Phelps v. Harris*, 101 U. S. 370; bk. 25 L. ed. 855;

Abel v. Heathcote, 4 Bro. Ch. 278; s.c. 2 Ves. Jr. 98; 2 Rev. Rep. 171;

In re Frith, L. R. 3 Ch. Div. 618, 621; s.c. 45 L. J. Ch. 780; 18 Moak Eng. Rep. 724.

³ *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; s.c. 18 Am. Dec. 250.

⁴ *McQueen v. Farquhar*, 11 Ves. 467; s.c. 8 Rev. Rep. 212.

* See: *Ante*, (*) footnote, page 257.

to the trustee, "or his legal representatives," to sell the property conveyed by a trust deed, in default of the payment of the debts for which it has been conveyed as security, the power to sell cannot be exercised by the administrator of such trustee, but only by his successor in the trust.¹

SECTION VII.—WHO MAY BE BENEFICIARIES.

SEC. 1739. Introductory.

SEC. 1740. Trusts for benefit of third persons.

SEC. 1741. Trusts for benefit of married women.

SEC. 1742. Same—Pennsylvania rule.

SECTION 1739. Introductory.—A trust may be conveyed to any object either public or private;² and all persons, voluntary associations of persons,³ or corporations, capable of taking a conveyance of lands, may acquire the equitable and beneficial interest in them, and become *cestuis que trust*.⁴ It is not necessary that the *cestui*

Power to sell not authorize partition.

—Lord ELDON says in *McQueen v. Farquhar*, *supra*, that, "until the question shall receive further decision, it can scarcely be considered clear that a power to exchange will authorize a partition," but he proceeds to show that the decision in *Abel v. Heathcote* must have been based on the power to exchange, and not on any additional words. After referring to the case of *Attorney-General v. Hamilton*, 1 Madd. 214, which was not decisive of the point, SUGDEN closes his discussion by saying: "But as Lord ROSSLYN has observed, this objection may be obviated where there is a power of sale. The undivided part of the estate may be sold, the trustees may receive the money and then lay it out in the purchase of the divided part, and although the sale is merely fictitious in order to effect the partition, it should seem that the transaction cannot be impeached."

See: 2 Sugden on Powers (7th

ed.) 479-482.

¹ *Warnecke v. Lembea*, 71 Ill. 91; s.c. 12 Am. Rep. 85.

See: *Mason v. Ainsworth*, 58 Ill. 163;

Strother v. Law, 54 Ill. 413;

Hamilton v. Lubukee, 51 Ill. 415;

Pardee v. Lindley, 31 Ill. 174; s.c. 83 Am. Dec. 219;

Niles v. Ransford, 1 Mich. 338; s.c. 51 Am. Dec. 95.

² *Commissioners v. Walker*, 7 Miss. (6 How.) 143; s.c. 38 Am. Dec. 433.

³ *Methodist Church v. Remington*, 1 Watts (Pa.) 218; s.c. 26 Am. Dec. 61.

⁴ *Trotter v. Blocker*, 6 Port. (Ala.) 269;

Amherst Academy v. Cows, 23 Mass. (6 Pick.) 427; s.c. 17 Am. Dec. 387;

Phillips Acad. v. King, 12 Mass. 546;

Ashhurst v. Given, 5 Watts & S. (Pa.) 329.

See: *Trustees of Bridgewater Acad. v. Gilbert*, 19 Mass. (2 Pick.) 579; s.c. 13 Am. Dec. 457;

Trustees of Farmington Academy v. Allen, 14 Mass. 172; s.c. 7 Am. Dec. 201;

que trust should be named in the instrument, or even be in being at the time when the trust is created ;¹ but such beneficiary must be certain.² If the beneficiary is not in being at the time of the creation of the trust, it will take effect in him as soon as he is ascertained or comes into being.³ Thus a trust may be created in favor of a creditor,⁴ a corporation,⁵ a married woman,⁶ a partnership,⁷ or in favor of third persons.⁸

SEC. 1740. **Trusts for benefit of third persons.**—A trust may be created for the benefit of a third person, as a creditor, without his knowledge at the time ; and he may afterwards affirm the trust, and compel its execution.⁹ In such case the vested interest of a *cestui que trust* cannot be impaired or destroyed by the voluntary act of the

Trustees of Limerick Acad. v. Davis, 11 Mass. 113 ; s.c. 6 Am. 162 ;

Boutell v. Cowdin, 9 Mass. 254 ;
First Religious Society in Whites-
town v. Stone, 7 John. (N. Y.)
112.

¹ Frazier v. Frazier, 2 Hill (S. C.)
Eq. 304, 305.

² First Presbyterian Society of Chili
v. Bowen, 21 Hun (N. Y.) 389.

³ See : Miller v. Chittenden, 2 Iowa
315 ;

Bryant v. Russell, 40 Mass. (23
Pick.) 508, 520.

⁴ Shepherd v. McEvers, 4 John. Ch.
(N. Y.) 136 ; s.c. 8 Am. Dec.
561.

⁵ Commissioners v. Walker, 7 Miss.
(6 How.) 143 ; s.c. 38 Am. Dec.
433.

⁶ Bowen v. Chase, 94 U. S. 812 ; bk.
24 L. ed. 184.

See : *Post*, § 1741.

⁷ In equity, where real estate is
purchased with the funds of a
partnership, it belongs to such
partnership, and the partners
are deemed *cestuis que trust*
thereof.

Buchan v. Sumner, 2 Barb. Ch.
(N. Y.) 165 ; s.c. 47 Am. Dec.
305 ;

Coles v. Coles, 15 John. (N. Y.)
159 ; s.c. 8 Am. Dec. 231 ;

Wood v. Dummer, 3 Mas. C. C.
308, 312 ; s.c. Fed. Cas. No.
17944 ;

Young v. Keighley, 15 Ves. 557.

See : Divine v. Mitchum, 4 B.
Mon. (Ky.) 488 ; s.c. 41 Am.
Dec. 241 ;

Dyer v. Clark, 46 Mass. (5 Met.)
562 ; s.c. 39 Am. Dec. 697 ;

Hiscock v. Phelps, 49 N. Y. 97,
103 ;

Sage v. Sherman, 2 N. Y. 417,
428 ;

Buckley v. Buckley, 11 Barb. (N.
Y.) 43, 74 ;

Baird v. Baird's Heirs, 1 Dev. &
B. (N. C.) Eq. 524 ; s.c. 31 Am.
Dec. 399 ;

Sumner v. Hampson, 8 Ohio 328 ;
s.c. 32 Am. Dec. 722 ;

Wheatly v. Calhoun, 12 Leigh
(Va.) 264 ; s.c. 37 Am. Dec.
654.

⁸ Shepherd v. McEvers, 4 John.
Ch. (N. Y.) 136 ; s.c. 8 Am.
Dec. 561 ;

Bavington v. Clarke, 2 Pen. &
W. (Pa.) 115 ; s.c. 21 Am. Dec.
432.

See : *Post*, § 1740.

⁹ Shepherd v. McEvers, 4 John. Ch.
(N. Y.) 136 ; s.c. 8 Am. Dec.
561 ;

Bavington v. Clarke, 2 Pen. &
W. (Pa.) 115 ; s.c. 21 Am. Dec.
432.

Under a deed made to one man,
the land may nevertheless be
held, in whole or in part, in
trust for another.

Bavington v. Clarke, 2 Pen. &
W. (Pa.) 115 ; s.c. 21 Am. Dec.
432.

trustee; but the trust will follow the land in the hands of the person to whom it has been conveyed by the trustee with knowledge of the trust.¹ The person for whose benefit a trust is created may compel the performance thereof, in equity, although he may be no party to the contract. Accordingly, where the first of several judgment creditors entered into a written agreement with those subsequent to the second, that if they would allow the first to purchase at sheriff's sale a certain portion of the judgment debtor's realty, without let or hindrance, he would discharge the remainder of the realty from his judgment, and would pay the second judgment creditor, the latter, although no party to the agreement, was held to be entitled to enforce the contract in equity.²

SEC. 1741. Trusts for benefit of married women.—A trust may be created for the benefit of a married woman, giving her the separate use and control of lands free from the control of her husband.³ The law favors such trusts, and where an estate is given in trust for a married woman for her sole and separate use, or the like, or to permit and suffer her to receive rents to her separate use, the trustee takes the legal estate, and the trust is not, as in other cases, executed in the beneficiary;⁴ because to merge the trust in the legal estate, or, to speak more properly, to convert it into a legal estate, would have the effect of placing the property in the husband's control by virtue of his marital rights, and would thus defeat the very purpose of the trust.⁵

¹ *Shepherd v. McEvers*, 4 John. Ch. (N. Y.) 136; s.c. 8 Am. Dec. 561; *Cumberland v. Codrington*, 3 John. Ch. (N. Y.) 261; s.c. 8 Am. Dec. 492.

² *Rodney v. Shankland*, 1 Del. Ch. 35; s.c. 12 Am. Dec. 70. See: *Weston v. Barker*, 12 John. (N. Y.) 276; s.c. 7 Am. Dec. 319.

³ *Bowen v. Chase*, 94 U. S. 812; bk. 24 L. ed. 184; s.c. 98 U. S. 254; bk. 25 L. ed. 47.

⁴ See: *Richardson v. Stodder*. 100 Mass. 528;

Ayer v. Ayer, 33 Mass. (16 Pick.)

327, 330;

Rogers v. Ludlow, 3 Sandf. Ch. (N. Y.) 104;

Franciscus v. Reigart, 4 Watts (Pa.) 98, 109;

Escheator v. Smith, 4 McC. (S. C.) Eq. 452;

Williman v. Holmes, 4 Rich. (S. C.) Eq. 475;

Bass v. Scott, 2 Leigh (Va.) 356; *Harton v. Harton*, 7 Durnf. & E.

(7 T.R.) 652; s.c. 4 Rev. Rep. 537; *Robinson v. Grey*, 9 East 1;

Neville v. Saunders, 1 Vern. 415.

⁵ *Bowen v. Chase*, 94 U. S. 812; bk. 24 L. ed. 184.

SEC. 1742. **Same—Pennsylvania rule.**—We have already seen that the rule in Pennsylvania in relation to trusts is in certain respects different from that found in other states, and for that reason the Pennsylvania cases cannot always be relied upon as authority upon questions of active and passive trusts, and the extent to which they are executed under the statute of uses.¹ In Pennsylvania the rule above given as to trusts in favor of married women does not obtain, and an express trust for the separate use of a married woman, even where active duties are given to the trustee, cannot be created unless she is already really married, or the trust is in contemplation of her prospective marriage.²

SECTION VIII.—VALIDITY AND CONSTRUCTION OF TRUSTS.

- SEC. 1743. Introductory—Spendthrift trusts.
 SEC. 1744. Aliens—Trusts by and for.
 SEC. 1745. Statutory regulations—New York statute.
 SEC. 1746. Trust to accumulate income.
 SEC. 1747. Immoral trusts—Atheistical books.
 SEC. 1748. Trusts violating rule against perpetuities.
 SEC. 1749. Trusts void for uncertainty.

See : *Richardson v. Stodder*, 100 Mass. 528 ;
Ayer v. Ayer, 33 Mass. (16 Pick.) 327, 330 ;
Rogers v. Ludlow, 3 Sandf. Ch. (N. Y.) 104 ;
Rife v. Geyer, 59 Pa. St. 393 ; s.c. 98 Am. Dec. 351 ;
Franciscus v. Reigart, 4 Watts (Pa.) 98, 109 ;
Escheator v. Smith, 4 McC. (S. C.) Eq. 452 ;
Williman v. Holmes, 4 Rich. (S. C.) Eq. 475 ;
Rice v. Burnett, 1 Spears (S. C.) Eq. 579, 580 ; s.c. 42 Am. Dec. 336 ;
Bass v. Scott, 2 Leigh (Va.) 356 ;
Harton v. Harton, 7 Durnf. & E. (7 T. R.) 652 ; s.c. 4 Rev. Rep. 537 ;
Robinson v. Gray, 9 East 1 ;
Neville v. Saunders, 1 Vern. 415 ;
 Cornish on Uses, p. 59, § 6.
¹ See : *Ante*, p. 1656, footnote 2.
² *Ogden's Appeal*, 70 Pa. St. 501.
 See : *Yarnall's Appeal*, 70 Pa. St.

335, 339 ;
Springer v. Arundell, 64 Pa. St. 218 ; s.c. 7 Phila. (Pa.) 224 ;
Wells v. McCall, 64 Pa. St. 207 ;
McBride v. Smyth, 54 Pa. St. 245, 250 ;
Kay v. Scates, 37 Pa. St. 31 ; s.c. 78 Am. Dec. 399 ;
Lancaster v. Dolan, 1 Rawle (Pa.) 231 ; s.c. 18 Am. Dec. 625 ;
Hammersley v. Smith, 4 Whart. (Pa.) 129 ;
Smith v. Starr, 3 Whart. (Pa.) 62, 63 ; s.c. 31 Am. Dec. 498 ;
Cridland's Estate, 7 Phila. (Pa.) 58.
 In Pennsylvania a trust will not be sustained on the ground that it is for the sole and separate use of a woman, if she was unmarried when the will took effect, and there was at the time no marriage in immediate contemplation.
Kay v. Scates, 37 Pa. St. 31 ; s.c. 78 Am. Dec. 399.

- SEC. 1750. Public charities.
 SEC. 1751. Trusts to religious uses.
 SEC. 1752. Bequests to burying-grounds, etc.
 SEC. 1753. Construction of trusts—Introductory.
 SEC. 1754. Same—Rules of construction.
 SEC. 1755. Same—Rule in Shelly's Case.
 SEC. 1756. Same—When executed by statute.

SECTION 1743. **Introductory—Spendthrift trusts.**—Two opposite principles underlie the doctrine of trusts,—private dominion and public policy. Each has predominated as the judicial mind has inclined to the one or to the other. The right to control the disposal of property is fundamental; and yet this right must be regulated so as not to conflict with high public interests.¹ Conse-

¹ *Dodson v. Ball*, 60 Pa. St. 492; s.c. 100 Am. Dec. 586.

In *Pennsylvania*, with *Lancaster v. Dolan*, 1 Rawle (Pa.) 231; s.c. 18 Am. Dec. 625, the current of decision sets in strongly in favor of the right to private dominion. This case was followed by many others, among which are the following:

Eyrick v. Hetrick, 13 Pa. St. 488, 491;

Rogers v. Smith, 4 Pa. St. 93;

Fisher v. Taylor, 2 Rawle (Pa.) 33;

Holdship v. Patterson, 7 Watts (Pa.) 547;

Wallace v. Coston, 9 Whart. (Pa.) 137;

Dorrance v. Scott, 3 Whart. (Pa.) 309; s.c. 31 Am. Dec. 509;

Smith v. Starr, 3 Whart. (Pa.) 62; s.c. 31 Am. Dec. 498;

Thomas v. Folwell, 2 Whart. (Pa.) 11; s.c. 30 Am. Dec. 230;

Pullen v. Rianhard, 1 Whart. (Pa.) 514, 520;

Ashhurst v. Given, 5 Wils. & S. 323;

Cochran v. O'Hern, 4 Wils. & S. 95.

With *Harrison v. Brolaskey*, 20 Pa. St. 299, the current was turned in the opposite direction, and the tenancy from *Kuhn v. Newman*, 26 Pa. St. 227, was for a time to strike down all trusts.

See: *Kay v. Scates*, 37 Pa. St. 31; s.c. 78 Am. Dec. 399;

McKee v. McKinley, 33 Pa. St.

92, 96;

Naglee's Appeal, 33 Pa. St. 89;

Bush's Appeal, 33 Pa. St. 85;

Price v. Taylor, 28 Pa. St. 95;

Williams v. Leech, 28 Pa. St. 89;

Whichcote v. Lyle, 28 Pa. St. 73.

The counter-current received a check in *Guthrie's Appeal*, 37 Pa. St. 9, which overthrew *Williams v. Leech*, *supra*, and strongly denied some of the positions of *Price v. Taylor*, *Naglee's Appeal*, and *McKee v. McKinley*, *supra*. In *Guthrie's Appeal*, *supra*, *WOODWARD, J.*, who before had been overborne by numbers, after a graceful compliment to the principle of *stare decisis*, gave his adherence to the new majority. But the counter-current, which had been merely checked in *Guthrie's Appeal*, *supra*, gathering force, prevailed again in *Kay v. Scates*, *supra*; the opinion, however, looking one way, while the judgment faced another, ruling the case by *Kuhn v. Newman*, and *Bush's Appeal*, *supra*. After spending its force in that direction, the current began to change with *Barnett's Appeal*, 46 Pa. St. 392, 409; s.c. 86 Am. Dec. 502, and in *Ralston v. Waln*, 44 Pa. St. 279, set back strongly in its former direction in favor of the donor's control, and has so continued. *Barnett's Appeal*, *supra*, was followed by *Frey-vogle v. Hughes*, 56 Pa. St.

quently where a vested estate for a lawful purpose is distinctly given, and there is annexed to it unlawful conditions, limitations, powers, trusts, or other restraints relative to its use, management, or disposal, these restraints and the estates limited on them are void, but not the principal or vested estate.¹ But to render the trust valid there must be no uncertainty.² The intention of the settler in the creation of a trust must be carried into effect unless it contravene some public policy of the law.³

228; *Wickham v. Berry*, 53 Pa. St. 70; *Sheets's Estate*, 52 Pa. St. 257, 267; *Nice's Appeal*, 50 Pa. St. 143; *Physick's Appeal*, 50 Pa. St. 128; *Shankland's Appeal*, 47 Pa. St. 113; *Girard Life Ins. and Trust Co. v. Chambers*, 46 Pa. St. 485; s.c. 86 Am. Dec. 513; *Rife v. Geyer*, 59 Pa. St. 393; s.c. 98 Am. Dec. 351, decided at Pittsburgh, 1868; and *Bacon's Appeal*, 57 Pa. St. 504, decided at Philadelphia, 1868.

The result of these conflicting principles and authorities is that it is difficult to determine cases lying along the border. The present, in some of its aspects, is one of that kind. In order to decide it, it will be proper to refer to some leading and established principles in the doctrine of trusts. Trusts are of two kinds—simple and special: *Vaux v. Park*, 7 Wils. & S. 25. In the former, the trustee is passive, and performs no duty, and the trust is there purely technical. In the latter, he is active, being an agent to execute the donor's will, and the trust is operative. A simple trust gives to the *cestui que trust* only a right in equity to enforce the performance of the trust: *Id.* See also *Rife v. Geyer*, and *Barnett's Appeal*, *supra*. And where the trust is not active, the legal title will remain in the trustee so long as it is necessary to preserve the estate itself, as in the case of a trust for a married woman to protect the estate from her husband; or a trust for a spendthrift son to protect it from his creditors; or to preserve contingent remainders.

Rife v. Geyer, 59 Pa. St. 393; s.c. 98 Am. Dec. 351; *Barnett's Appeal*, 46 Pa. St. 392, 409; s.c. 86 Am. Dec. 503; *Wright v. Brown*, 44 Pa. St. 224; *Brown v. Williamson*, 36 Pa. St. 338; *Eyrick v. Hetrick*, 13 Pa. St. 491; *Fisher v. Taylor*, 2 Rawle (Pa.) 33; *Lancaster v. Dolan*, 1 Rawle (Pa.) 231, 247; s.c. 18 Am. Dec. 625; *Holdship v. Patterson*, 7 Watts (Pa.) 547; *Thomas v. Folwell*, 2 Whart. (Pa.) 11; s.c. 30 Am. Dec. 230; *Pullen v. Rianhard*, 1 Whart. (Pa.) 520; *Ashurst v. Given*, 5 Wils. & S. 323. As a consequence, it is a general principle that a simple or passive trust cannot continue the legal estate in the trustee, except for a proper and useful purpose, such as the law will regard and protect, and as soon as the purpose fails, or ceases to exist, the legal estate becomes executed in the *cestui que trust*. In the former case, equity preserves the trust to give effect to the donor's right of dominion over his property; and in the latter, in favor of public policy, permits it to fall as useless. *Rife v. Geyer*, *supra*; *Freyvogel v. Hughes*, 56 Pa. St. 228; *McBride v. Smyth*, 54 Pa. St. 250.

¹ *City of Philadelphia v. Girard's Heirs*, 45 Pa. St. 9; s.c. 84 Am. Dec. 470.

² See: *Post*, § 1749.

³ *Wright v. Miller*, 8 N. Y. 9; s.c. 59 Am. Dec. 438;

Methodist Church v. Remington, 1 Watts (Pa.) 218; s.c. 26 Am. Dec. 61.

In the case of *Sweet v. Dutton*, 109 Mass. 589; s.c. 12 Am. Rep. 744, by deed conveyed all her

A court of law will not entertain the question of the validity of trusts, if an estate be conveyed to a grantee capable of taking the trust estate.¹ All present gifts for present and lawful purposes amount to a vested and executed trust for that purpose;² and where such trusts would be protected if to be executed at home, in the absence of a prohibition the conveyance would be valid if the execution were ordered to take place abroad.³ A trust in favor of an unincorporated, religious, or charitable society composed entirely of members resident within the state is valid;⁴ so also is a trust based on an oral promise to sell the premises, discharge the mortgage, and pay over the surplus, and reconvey to the grantor's wife any portion remaining unsold.⁵ To render a trust

property, "both real and personal," to a trustee in trust, to pay the income to her during her life, and at her death to transfer the property as she should by will appoint, and in default of such will to convey the property to her "heirs at law." The trust property was all personal. A died intestate, and the court held that the trust property being personalty, the word "heirs" meant the persons entitled to take under the statute of distributions, and that therefore the property went to A's husband, and not to her child.

The principle of cypres in executing trusts is not applied in Pennsylvania, because no court possesses the specific powers necessary to give it effect, and because it is grossly revolting to a sense of public justice.

Methodist Church v. Remington, 1 Watts (Pa.) 218; s.c. 26 A. D. 61.

¹ *Miles v. Fisher*, 10 Ohio 1; s.c. 36 Am. Dec. 61.

² *City of Philadelphia v. Girard's Heirs*, 45 Pa. St. 9; s.c. 84 Am. Dec. 470.

³ *McDonogh v. Murdoch*, 56 U. S. (15 How.) 367; bk. 14 L. ed. 732.

⁴ *Methodist Church v. Remington*, 1 Watts (Pa.) 218; s.c. 26 A. D. 61.

If such society is not composed

entirely of residents of the state, the trust is invalid, as where a conveyance is made "for the use of the members of the Methodist Episcopal Church in the United States."

Methodist Church v. Remington, 1 Watts (Pa.) 218; s.c. 26 A. D. 61.

⁵ *Clark v. Haney*, 62 Tex. 511; s.c. 50 Am. Rep. 536.

See: *Ante*, § 1741.

Statute of frauds—In force in Texas

—*Clark v. Haney*.—In the case of *Clark v. Haney*, *supra*, the court say: "Even in those states where the seventh section of the statute of frauds (29 Car. II., c. 3), forbidding express verbal trusts, is in force, promises of this nature have been enforced; deeds apparently absolute have had parol trusts engrafted upon them to prevent fraud, although the trust was express, and as such forbidden by the statute (*Arnold v. Cord*, 16 Ind. 176, 177; *Nelson v. Worrall*, 20 Iowa 469; *Jones v. McDougal*, 32 Miss. 179; and see *Babcock v. Wyman*, 60 U. S., 19 How. 289; bk. 15 L. ed. 644), and parol express trusts are not forbidden.

"This section is not in force in our state, and it is the current of decision here that parol evidence is admissible to prove that a deed absolute on its face was executed and delivered

valid it must not only be free from all uncertainty,¹ but there must also be a proper trustee to take and execute the trust.²

A spendthrift trust may be lawfully established for the support of a designated person, the income of the principal to be paid to such person for life, free from the power of alienation and beyond the reach of his creditors.³ But

upon certain trusts not reduced to writing, and which the grantor promised to perform. *Gibbs v. Penny*, 43 Tex. 560; *McClenny v. Floyd*, 10 Tex. 159; *Mead v. Randolph*, 8 Tex. 191. Indeed every express trust may be considered as involving in some measure a promise on the part of the trustee to do some act for the grantor or some person named by him. If this promise can be repudiated at the will of the trustee and the grantor be left to his action for breach of contract, the subject of express trusts may as well be removed from equity jurisdiction."

¹ See: *Post*, § 1749.

² **Insolvency and unfitness** of party to become trustee must be put in issue by pleadings, and proved, in order to make them objections to the validity of a trust deed.

Hempstead v. Johnston, 18 Ark. 123; s.c. 65 Am. Dec. 458.

³ *Roberts v. Stevens*, 84 Me. 325; s.c. 24 Atl. Rep. 873; 17 L. R. A. 266;

Garland v. Garland, 87 Va. 758; s.c. 15 Va. L. J. 450; 13 S. E. Rep. 478; 13 L. R. A. 212.

See: *Bull v. Kentucky National Bank*, 12 Ky. L. Rep. 536; s.c. 14 S. W. Rep. 425; 12 L. R. A. 37;

Haycraft v. Bland, 90 Ky. 400; s.c. 12 Ky. L. Rep. 532; 14 S. W. Rep. 423; 9 L. R. A. 599;

Roberts v. Stevens, 84 Me. 325; s.c. 24 Atl. Rep. 873; 17 L. R. A. 266;

Slattery v. Wason, 151 Mass. 256; s.c. 23 N. E. Rep. 843; 7 L. R. A. 393;

Lee v. Harrison, 69 Miss. 923; s.c. 18 L. R. A. 49;

Lampert v. Hydell, 96 Mo. 439; s.c. 9 S. W. Rep. 568; 2 L. R.

A. 113;

Rice v. Rockefeller, 134 N. Y. 174; s.c. 31 N. E. Rep. 907; 17 L. R. A. 237;

Ghormley v. Smith, 139 Pa. St. 584; s.c. 21 Atl. Rep. 135; 11 L. R. A. 565;

Wales' Admr. v. Bowdish Exr., 61 Vt. 23; s.c. 17 Atl. Rep. 1000; 4 L. R. A. 819;

Sharpe v. Cosserat, 20 Beav. 470; *Churchill v. Marks*, 1 Coll. 441; *Rochford v. Hackman*, 9 Hare 475;

Kearsley v. Woodcock, 3 Hare 185;

Re Muggeridge's Trusts, 1 Johns. (Eng.) 625;

Joel v. Mills, 3 Kay & J. 458;

Large's Case, 2 Leon. 82;

Cooper v. Wyatt, 5 Madd. 482;

Stanton v. Hall, 2 Russ. & M. 175;

Yarnold v. Moorhouse, 1 Russ. & M. 364;

Lewes v. Lewes, 6 Sim. 304;

Stephens v. James, 4 Sim. 499;

Lockyer v. Savage, 2 Strange 947;

Ex parte Hinton, 14 Ves. Jr. 598;

Shee v. Hale, 13 Ves. Jr. 404; s.c. 9 Rev. Rep. 198;

Ex parte Oxley, 1 Ball & B. 257.

A will giving an estate in trust for the brother of testatrix, to have the use and occupation during his natural life, and at his death to be conveyed to whom and in the manner he shall direct, does not, at least to his prior creditors, make the property chargeable with his debts.

Wales' Admr. v. Bowdish Exr., 61 Vt. 23; s.c. 17 Atl. Rep. 1000; 4 L. R. A. 819.

Creditors cannot reach the interest of a debtor under a will creating a trust for his support during life, providing that the trustee shall make quarterly payments to him until his death,—at least

where such a trust is created in favor of the grantor himself as the sole beneficiary for life, with the power of disposition of the trust property at death, leaving neither the income nor the corpus of the estate subject to his debts, it cannot be upheld.¹ It has been said that the insertion in a will which establishes a trust fund, directs its income to be paid to certain persons for life, and disposes of the remainder, of provisions which enjoin all persons interested in the will not to "in any way, directly or indirectly," transfer any claim or rights they may have by virtue thereof, or "to pay to any other person than those entitled under the will" any legacy or annuity or any part thereof, on penalty of its forfeiture,—is sufficient to place the income beyond the reach of creditors of the life tenants.² In those cases where so much of the income of a trust fund is given to a person as shall be necessary for his support, his right thereto is in its nature inalienable, and the intention of the donor that it shall not be alienated is presumed. Hence such income cannot be reached by a creditor of the donee, and the court will not for his benefit fix the amounts and times of future payments, and decree that they shall be fixed sums which can be reached by him.³ The trustee cannot

where it does not appear that there is any accumulation of the income over and above the sum needed for his support.

Leigh v. Harrison, 69 Miss. 923; s.c. 18 L. R. A. 49.

¹ *Ghormley v. Smith*, 139 Pa. St. 584; s.c. 21 Atl. Rep. 135; 11 L. R. A. 565.

² *Roberts v. Stevens*, 84 Me. 325; s.c. 24 Atl. Rep. 873; 17 L. R. A. 266.

³ *Slattery v. Wason*, 151 Mass. 256; s.c. 23 N. E. Rep. 843; 7 L. R. A. 393;

Lampert v. Haydel, 96 Mo. 439; s.c. 9 S. W. Rep. 568; 2 L. R. A. 113;

Garland v. Garland, 87 Va. 758; s.c. 15 Va. L. J. 450; 13 S. E. Rep. 478; 13 L. R. A. 212.

The donor of the income of a trust fund to a person for life may qualify the gift by a provision that the right to receive the income shall be inalienable.

Such qualification need not be in express terms, but it will suffice if the intention to make it can be clearly gathered from the instrument of grant when construed in the light of all the circumstances.

Slattery v. Wason, 151 Mass. 256; s.c. 23 N. E. Rep. 843; 7 L. R. A. 393.

The limitation of the power of a cestui que trust to dispose of his interest in the income of property devised in trust for the use of testator's sons, to enjoy the rents, issues, and profits thereon during their natural lives, is valid; and an assignment by one son of his interest in such rents and profits is not valid either as to the rents already accrued or thereafter to accrue.

Lampert v. Haydel, 96 Mo. 439; s.c. 9 S. W. Rep. 568; 2 L. R. A. 113.

effect the forfeiture of any sum due to one entitled to a share of the income of the trust fund for life, by paying it to a third person without the consent of the beneficiary, although the will provides that the payment of such income to a person not entitled under the will shall cause its forfeiture, such action being merely a breach of trust on the part of the trustee.¹ A declaration in a will establishing a trust fund, the income of which is to be paid annually to a certain person for life, and providing that such income shall not be subject to the debts of the beneficiary, and that if any attempt is made to subject it to such debts it shall be added to the principal and the beneficiary shall receive no part of it, will not take it out of the operation of a statute making trust estates subject to, the debts of those to whose use they are held, where the beneficiary is given power to dispose of the principal by will.²

SEC. 1744. **Aliens—Trusts by and for.**—A trust contrary to the avowed policy of the law, or in violation of any statute, will not be enforced through the equitable powers of the court;³ hence, in those states where an alien who is prohibited from taking the title to real property, pur-

A gift by a will of the use of the profits of a plantation to a person, "under his superintendence," but not to be "bound for his past debts, or for future debts and liabilities other than decent and comfortable support," does not give him any absolute property in the profits, but he holds them as trustee for the remaindermen, except as to what he needs for "decent and comfortable support." Therefore such profits cannot be reached by his creditors.

Garland v. Garland, 87 Va. 758; s.c. 15 Va. L. J. 450; 13 S. E. Rep. 478; 13 L. R. A. 212.

¹ *Roberts v. Stevens*, 84 Me. 325; s.c. 24 Atl. Rep. 873; 17 L. R. A. 266.

² *Haycraft v. Bland*, 90 Ky. 400; s.c. 12 Ky. L. Rep. 532; 9 L. R. A. 599.

Under a statute for the subjection of beneficial interests to the payment

of the beneficiary's debts, if a fund is devised to trustees, with directions to pay the income to testator's son during his life, free from the claims of creditors, and with further directions that if a court of last resort shall at any time determine that the income is liable to be subjected to the payment of the son's debts, then the trustees shall pay it to the son's wife for her separate use, income which accrues prior to a decision by a court of last resort, authorizing the application, is applicable to the payment of the son's debts, but not that which accrues after such decision.

Bull v. Kentucky Nat. Bank, 12 Ky. L. Rep. 536; s.c. 14 S. W. Rep. 425; 12 L. R. A. 37.

³ *Methodist Church v. Remington*, 1 Watts (Pa.) 218; s.c. 26 Am. Dec. 61.

chases land in the name of a trustee for the purpose of evading the statutes prohibiting him from holding the land, upon an express trust to sell the premises, pay off incumbrances, and pay the residue to such alien, such trust will be invalid, and a purchaser from the trustee takes the land discharged of any claim in favor of such alien or purchaser from him.¹

SEC. 1745. Statutory regulations—New York statute.—We have heretofore seen that the statute of uses has been adopted in and now prevails generally throughout this country.² In some states, however, as in New York, the statute of uses is specially repudiated by local statutes, and only such trusts are valid as are expressly authorized by the statute.³ All other trusts created by will or otherwise are void.⁴ In New York a trust to receive and pay over rents and profits is valid ; but a trust for the use and benefit of the beneficiary, not requiring any action or management on the part of the trustee, except to make conveyances at the direction and appointment of the beneficiary, is not a valid trust, but inures as a legal estate in the beneficiary.⁵ But a contingent right of a trustee to receive the rents and profits of land purchased in the names of the testator's children, until and even after such children have attained the age of twenty-two, if he shall think proper, is not a trust authorized by the revised statutes.⁶

SEC. 1746. Trusts to accumulate income.—A trust to accumulate income is valid, even in those states in which the provisions of the statute of uses have been abolished by special legislation,⁷ because such statutes do not affect

¹ *Leggett v. Dubois*, 5 Paige Ch. (N. Y.) 114 ; s.c. 28 Am. Dec. 413.

² See : *Ante*, § 1641, *et seq.*

³ See : *Fellows v. Heermans*, 4 Lans. (N. Y.) 230, 251 ;

Leonard v. Bell, 1 Thomp. & C. (N. Y.) 608, 609, *aff'd* 58 N. Y. 676 ;

Ruth v. Oberbrunner, 40 Wis. 36.

Leonard v. Bell, 1 Thomp. & C. (N. Y.) 608, 609, *aff'd* 58 N. Y. 676.

⁵ *Bowen v. Chase*, 94 U. S. 812 ; bk. 24 L. ed. 184.

⁶ *Wood v. Wood*, 5 Paige Ch. (N. Y.) 596 ; s.c. 28 Am. Dec. 451.

⁷ *Commissioners v. Walker*, 7 Miss. (6 How.) 143 ; s.c. 38 Am. Dec. 433 ;

Kane v. Gott, 24 Wend. (N. Y.) 641 ; s.c. 35 Am. Dec. 641 ;

City of Philadelphia v. Girard's Heirs, 45 Pa. St. 9 ; s.c. 84 Am. Dec. 470.

trusts in personalty, and land directed to be sold and the proceeds to be invested is regarded as personalty in equity, where things directed to be done are considered as already done.¹

SEC. 1747. **Immoral trusts—Atheistical books.**—We have already seen that trusts which contravene public policy,² or public morality,³ will not be enforced. Thus a court of equity will not enforce a trust where its object is the propagation of atheistical infidelity, immorality, or hostility to the existing form of government, but will strike it down as *contra bonos mores*.⁴ But a testamentary provision in trust for founding and endowing a public library is not avoided by the direction to publish books written by the testator, averred to be atheistical, nor by a direction that the trustees shall not exclude any book “on account of its difference from the ordinary or conventional opinions on science, government, theology, morals or medicine;” the former not being a condition precedent, and the latter being a mere negative recommendation.⁵

SEC. 1748. **Trusts violating rule against perpetuity.**—If an estate be so limited as by possibility to extend beyond a life or lives in being at the time of its commencement,

Trust to executors to sell realty, invest proceeds in stock, etc., and accumulate the income, and dispose of it as directed by the will, is not prohibited by the provision of the Revised Statutes of New York abolishing uses and trusts not therein authorized, the property directed to be sold being regarded as personalty.

Kane v. Gott, 24 Wend. (N. Y.) 641; s.c. 35 Am. Dec. 641.

Trust created by act of Legislature providing for “sinking fund under the management of the auditor of public accounts and the president and cashier” of a specified bank, for the redemption of certain bonds. The officers named are trustees and have the legal title to the money thus entrusted to them,

and the power to loan it, and to sue for and recover it at law. *Commissioners v. Walker*, 7 Miss. (6 How.) 143; s.c. 38 Am. Dec. 433.

¹ *Kane v. Gott*, 24 Wend. (N. Y.) 641; s.c. 35 Am. Dec. 641.

² See: *Ante*, §§ 1744, 1746.

³ See: *Ante*, § 1692.

⁴ *Manners v. Philadelphia Library Co.*, 93 Pa. St. 165; s.c. 39 Am. Rep. 741.

See: *Zeissweiss v. James*, 63 Pa. St. 465; s.c. 3 Am. Rep. 558; *Updegraph v. Commonwealth*, 11 Serg. & R. (Pa.) 394; *Vidal v. Girard's Exrs.*, 43 U. S. (2 How.) 127; bk. 11 L. ed. 205.

⁵ *Manners v. Philadelphia Library Co.*, 93 Pa. St. 165; s.c. 39 Am. Rep. 741.

and twenty-one years and a fraction of a year (to cover the period of gestation),¹ afterwards, during which time the property would be withdrawn from the market, or the power over the fee suspended, it is a perpetuity, and void as against the policy of the law, which will not permit property to be inalienable for a longer period.² In calculating the time to determine whether the estate is too remote, the time runs from the testator's death, and not from the date of the will or instrument creating the trust.³ A trust restricted to lives in being at the time of the death of the testator, and to the survivor of them, does not infringe the rule against perpetuities as above set out.⁴ In those cases where the trusts are absolutely void under the rule against perpetuities, legacies springing out of them must be regarded as void also.⁵ It has

¹ It is sufficient if the estate begins within lives in being and twenty-one years, or within whatever time is provided by statute, though it may end beyond this period. Thus it is held that an estate may be limited to unborn persons for life, and if he be born within the time limited by the rule, his interest is not bad for remoteness.

Heald v. Heald, 56 Md. 300 ;

Goldsbrough v. Martin, 41 Md. 488 ;

Minot v. Taylor, 129 Mass. 160 ;

Simonds v. Simonds, 112 Mass. 157 ;

Lovering v. Worthington, 106 Mass. 86 ;

Loring v. Blake, 98 Mass. 253 ;

Otis v. McLellan, 95 Mass. (13 Allen) 339 ;

Wood v. Griffin, 46 N. H. 230 ;

Donohue v. McNichol, 61 Pa. St. 73.

Law allows vesting of estate or interest, or the power of alienation, to be postponed, and the accumulation of its increase to be made previous to vesting, for the period of lives in being, and twenty-one years and nine months thereafter, and all restraints upon the vesting, that may suspend it beyond the period, are treated as perpetual restraints, and void ; conse-

quently, the estates or interests dependent on them are void ; and nothing is denounced by the law as a perpetuity that does not transgress this rule, which is followed in equity by way of analogy, in dealing with executory trusts, and those trusts which transgress the rule it calls "Transgressive" trusts, being in equity the substantial equivalent of what in law are called perpetuities.

City of Philadelphia v. Girard's Heirs, 45 Pa. St. 9 ; s.c. 84 Am. Dec. 470.

² *Barnum v. Barnum*, 26 Md. 119 ; s.c. 90 Am. Dec. 88.

³ *Hosea v. Jacobs*, 98 Mass. 65 ; *Griffen v. Ford*, 1 Bosw. (N. Y.) 123 ;

Lang v. Wilbraham, 2 Duer (N. Y.) 171 ;

Lang v. Ropke, 5 Sandf. (N. Y.) 363 ; s.c. 10 N. Y. Leg. Obs. 70 ;

McArthur v. Scott, 113 U. S. 340 ; bk. 28 L. ed. 1015 ;

4 Kent Com. (13th ed.) 283, n. 1.

⁴ *Barnett's Appeal*, 46 Pa. St. 392 ; s.c. 86 Am. Dec. 502.

⁵ *Barnum v. Barnum*, 26 Md. 119 ; s.c. 90 Am. Dec. 88.

See : *Darling v. Rogers*, 22 Wend. (N. Y.) 483 ;

Coster v. Lorillard, 14 Wend. (N. Y.) 265.

been held that a demise in trust is void under the rule against perpetuities, where the testator, after empowering and directing trustees named to lease his hotel property and apply the rents, provided that "the period during which my trustees, and their heirs and successors, shall have the power and are not required to lease as aforesaid shall be so long as my said children, or any children or descendants of them, or any of them, left by them, or any of them, at the death of them, or any of them, shall live; it being understood that any lease made during the period aforesaid shall have full effect, and continue for its stipulated term, notwithstanding the cessation of all of said lives before the end of the term;" for under these provisions the period for continuing the trust or power to lease may extend so as to embrace persons and lives not *in esse* at the time of the testator's death.¹

SEC. 1749. **Trusts void for uncertainty.**—We have already seen² that in order to be valid a trust must be certain.³ The general rules are well settled that: (1) When a gift or bequest is made in terms clearly manifesting an intention that it shall be taken in trust, and the trust is not sufficiently defined to be carried into effect, the donee or legatee takes the legal title only, and a trust results by implication of law to the donor and his representatives, or to the testator's residuary legatees or next of kin;⁴ and (2) a trust which by its terms may be applied to objects which are not charitable in the legal sense, and to persons not defined, by name or by class, is too indefinite to be carried out.⁵ Thus a trust will be held to be void where it is so vague that neither the object nor the beneficiaries

¹ Barnum v. Barnum, 26 Md. 119; s.c. 90 Am. Dec. 88.

² See: *Ante*, § 1743.

³ Baker v. Vining, 30 Me. 121, 127; s.c. 1 Am. Dec. 617;

Olcott v. Bynum, 84 U. S. (17 Wall.) 44, 64; bk. 21. L. ed. 570.

⁴ Nichols v. Allen, 130 Mass. 211; s.c. 39 Am. Rep. 445.

See: Sheedy v. Roach, 124 Mass. 472; s.c. 26 Am. Rep. 680;

Thayer v. Wellington, 91 Mass.

(9 Allen) 283; s.c. 85 Am. Dec. 753;

Briggs v. Penny, 3 DeG. & S. 525; s.c. 3 Macn. & G. 546.

⁵ Nichols v. Allen, 130 Mass. 211; s.c. 39 Am. Rep. 445; Chamberlain v. Stearns, 111 Mass. 267;

James v. Allen, 3 Meriv. 17;

Morice v. Bishop of Durham, 9 Ves. 399; s.c. 7 Rev. Rep. 232; 10 Ves. 521; 8 Rev. Rep. 40.

can be ascertained ;¹ as a devise in trust to build a free school-house, and extend the education of poor children ;² or a devise “for the benefit of herself and family ;”³ “what shall remain or be left at the decease” of a prior legatee ;⁴ “what the legatee is possessed of at the time of his death,”⁵ or “what he does not want,”⁶ or “does not spend ;”⁷ or “what the legatee can save out of his yearly income ;”⁸ or “can transfer ;”⁹ or “is not disposed of by deed or will,”¹⁰ and the like.

SEC. 1750. *Public charities.*—Gifts to charitable purposes have always been favored, and trusts created for such purposes are carried into effect by courts of equity upon general principles of equity jurisdiction,¹¹ where the bequest is sufficiently definite and certain, but not where otherwise.¹² As to what constitutes a public charity there

¹ *Power v. Cassidy*, 79 N. Y. 602 ; s.c. 35 Am. Rep. 550 ; 54 How. Pr. (N. Y.) 6 ; 16 Hun (N. Y.) 297 ; 1 Am. Prob. Rep. 368.

See : *Gott v. Cook*, 7 Paige Ch. (N. Y.) 521, 534.

² *Stonestreet v. Doyle*, 75 Va. 356 ; s.c. 40 Am. Rep. 731.

See : *Rizer v. Perry*, 58 Md. 112 ; *Nichols v. Allen*, 130 Mass. 211 ; s.c. 39 Am. Rep. 445 ;

Nickerson v. Bowley, 49 Mass. (8 Met.) 424, 431 ;

Winship v. Bass, 12 Mass. 198, 204 ;

Hays v. Jackson, 6 Mass. 149, 152, 153 ;

Kelly v. Love's Admrs., 20 Gratt. (Va.) 124 ;

Gallego's Exr. v. Attorney-General, 3 Leigh (Va.) 450 ; s.c. 24 Am. Dec. 650 ;

Baptist Association v. Hart, 17 U. S. (4 Wheat.) 4 ; bk. 4 L. ed. 499 ;

2 Story Eq. Jur. (14th ed.), § 1208.

³ *Lambe v. Eames*, L. R. 10 Eq. 287 ; s.c. L. R. 6 Ch. 597.

See : *Sears v. Cunningham*, 122 Mass. 538 ;

Hess v. Singler, 114 Mass. 56 ;

Spooner v. Lovejoy, 108 Mass. 529 ;

In re Bond, 4 Ch. D. 238 ; s.c. 19 Moak Eng. Rep. 784 ;

Sale v. Moore, 1 Sim. 534 ;

Reid v. Atkinson, Jr. R. 5 Eq.

373, 376 ;

As to precatory words, see : *Ante*, §§ 1708, 1709, 1710.

⁴ *Bland v. Bland*, 2 Cox 349 ;

Perry v. Merritt, L. R. 18 Eq. 152 ; s.c. 9 Moak Eng. Rep. 702 ;

Pushman v. Filliter, 3 Ves. 7.

⁵ *Attorney-General v. Hall*, 1 Jac. & W. 158 ;

Pope v. Pope, 10 Sim. 1.

⁶ *Sprague v. Barnard*, 2 Bro. C. C. 585.

⁷ *Henderson v. Cross*, 29 Beav. 216.

⁸ *Cowman v. Harrison*, 17 Jur. 313.

⁹ *Mills v. Newberry*, 112 Ill. 123 ; s.c. 54 Am. Rep. 213 ;

Flint v. Hughes, 6 Beav. 342.

¹⁰ *Phillips v. Eastwood*, 1 L. & G. 270 ;

Bourn v. Gibbs, 1 R. & My. 614.

¹¹ *Williams v. First Presbyterian Society of Cincinnati*, 1 Ohio St. 478 ;

Trustees of McIntire v. Zanesville Canal and Manufg. Co., 9 Ohio 203 ; s.c. 34 Am. Dec. 436.

¹² Thus in *Brown v. Caldwell*, 23 W. Va. 187 ; s.c. 48 Am. Rep. 376, it was held that a grant of land for a valuable consideration upon trust that the trustee “shall at all times permit all the white religious societies to use the land as a common burying-ground and for no other purpose,” is not upon a condition subsequent, but is void for

are a great many decisions. It has been held, among other things, that a bequest for the relief of "deserving poor," or of "indigent but deserving" individuals, is a charitable bequest, not by force of the word "deserving," but in virtue of the word "poor" or "indigent," and would be equally charitable if the word "deserving" had been omitted.¹ So a bequest "for the education of deserving youth" is charitable, because it is for the promotion of education and learning.² And possibly a bequest for "deserving literary men" might be held upon like grounds to be a charity.³ Bequests for poor relations have been held to be charitable bequests.⁴ But for "such relations" of the testator as are "most deserving" (without use of the word "poor" or any of equivalent import) is not a charitable use; and includes all relations of the testator within a certain degree, because, as was observed by Sir Joseph Jekyll, master of the rolls, a court of chancery has "no rule of judging of the merits of the testator's relations;"⁵ so also is a devise for the "supportation, aid, and help of young tradesmen and handicraftsmen," and for relief of "poor people" and "persons."⁶ A gift for the erection of a house for public worship, or for the use of the ministry, may constitute a public charity if there is no definite body for whose use the gift was intended, capable of receiving, holding, and

the want of certainty in the beneficiaries.

See: *Fairfield v. Lawson*, 50 Conn. 501; s.c. 47 Am. Rep. 669;

Carskadon v. Torreyson, 17 W. Va. 43;

Knox v. Knox, 9 W. Va. 124;

Bible Society v. Pendleton, 7 W. Va. 79.

¹ *Kendall v. Granger*, 5 Beav. 300, 303.

² *Saltonstall v. Sanders*, 93 Mass. (11 Allen) 446, 454.

³ *Thompson v. Thompson*, 1 Coll. 381, 399.

⁴ *Attorney-General v. Northumberland*, 7 Ch. D. 745; s.c. 38 L. T. 245;

Gillam v. Taylor, L. R. 16 Eq. 581; s.c. 42 L. J. Ch. 674; 28 L. T. 833; 21 W. R. 823; 23

Moak Eng. Rep. 832;

Boyle on Char. 31-36.

⁵ *Harding v. Glyn*, 1 Atk. 469;

Salisbury v. Denton, 3 K. & J. 529, 538;

Burrough v. Philcox, 5 Myl. & Cr. 72, 91, 93;

Doyley v. Attorney-General, 4 Vin. Ab. Charitable Uses, C,

pl. 16; s.c. 2 Eq. Cas. Ab. 194, pl. 15; 7 Ves. 58, note.

⁶ *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 569, 570;

Odell v. Odell, 92 Mass. (10 Allen) 1, 12;

Attorney-General v. Ironmongers' Co., Coop. Pract. Cas. 283;

In re Prison Charities, L. R. 16 Eq. 129; s.c. 6 Moak Eng. Rep.

670;

Duke on Char. Uses (Bridgm. ed.) 1, 131.

using it in the manner intended. But where there is a body, or a definite number of persons, ascertained or ascertainable, clearly pointed out by the terms of the gift to receive, control, and enjoy its benefits, it is not a public charity, however carefully and exclusively the trust may be restricted to religious uses alone.¹

SEC. 1751. **Trust to religious use.**—Bequests of land to religious uses, like public charities, are valid where sufficiently definite and certain.² Thus a devise in trust “to assist, relieve, and benefit poor and necessitous persons, and to assist and co-operate with any such charitable, benevolent, religious, literary, and scientific societies and associations, or any or either of them, as shall appear to the trustee best to deserve such assistance or co-operation,” is valid.³

SEC. 1752. **Bequests to burying-grounds, etc.**—By the civil law, the early English law, and the law in this country down to the time of the American Revolution, the maintenance and repair of the tomb or monuments of the donor was a charitable use; but the prevailing rule at present both in England and the United States is that a trust to keep in repair the graves and monuments of the testator and other persons named does not constitute a charitable use.⁴

¹ *Old South Society v. Crocker*, 119 Mass. 1; s.c. 20 Am. Rep. 299.

² It has been held that the grant of land for a valuable consideration upon trust that the trustee “shall at all times permit all the white religious societies of Christians and the members of such societies to use the land as a common burying-ground and for no other purpose,” is not upon a condition subsequent, but is void for the want of certainty in the beneficiaries. *Brown v. Caldwell*, 23 W. Va. 187; s.c. 48 Am. Rep. 376.

See: *Fairfield v. Lawson*, 50 Conn. 501; s.c. 47 Am. Rep. 669.

³ *Suter v. Hilliard*, 132 Mass. 412; s.c. 42 Am. Rep. 444.

⁴ *Johnson v. Holifield*, 79 Ala. 423;

Coit v. Comstock, 51 Conn. 352; s.c. 50 Am. Rep. 29;

Piper v. Moulton, 72 Me. 155;

Bates v. Bates, 134 Mass. 110; s.c. 45 Am. Rep. 305;

Kelly v. Nichols, 18 R. I. ; s.c. 25 Atl. Rep. 840; 19 L. R. A. 413;

Hornberger v. Hornberger, 12 Heisk. (Tenn.) 635;

Fite v. Beasley, 12 Lea (Tenn.) 328.

See: *Giles v. Boston F. & W. Soc.*, 92 Mass. (10 Allen) 355.

It is said in the American and English Encyclopædia of Law (Vol. III., page 132) that “a trust to erect and maintain monuments or tombs of the donor or others is now generally upheld in this country, though not in England.”

Consequently a bequest of money or property to be held in perpetuity in trust, the income or interest to be expended annually in the repair, preservation, or keeping of the tomb or the graves and monuments of the testator and other named relatives, is not a bequest to a charitable use, within the exception to the rule against perpetuities, and for that reason is void.¹ It is said in *Vaughan v.*

Citing: Swasey v. American Bible Soc., 57 Me. 523;

Dexter v. Gardner, 89 Mass. (7 Allen) 243;

Jones v. Habersham, 107 U. S. 174; bk. 27 L. ed. 401; s.c. 3 Woods C. C. 443; Fed. Cas. No. 7465.

An examination of these authorities shows that this statement in the *Encyclopædia* is not warranted by the decisions of the courts in the cases referred to as authority. In *Jones v. Habersham*, 107 U. S. 174; bk. 27 L. ed. 401; s.c. 3 Woods C. C. 443; Fed. Cas. No. 7465, a bequest to keep a burial-ground in good order was held to be valid because the Code of Georgia enumerates among charitable uses "the improvement or repair of burying-grounds or tombstones." In *Dexter v. Gardner*, 89 Mass. (7 Allen) 243, a bequest in trust form, "the income of which is to be appropriated for the benefit of the Friends' meeting," was held not to be invalid because of the fact that the purchase and repair of burying-grounds is regarded by Friends as one of their religious duties, to which, under their usages and discipline, they apply their funds. It was a good bequest to a religious society for religious purposes, and the court say: "Where a denomination of Christians regard the providing and oversight of burying-grounds as a religious duty, accompanying burials of the dead with religious services, as is usual among most sects of Christians here, it is difficult to see by what principle this religious duty can be distinguished from that of maintaining and repairing meeting-houses in re-

spect to the statute." That case, therefore, stood upon a very different ground from that of a bequest for keeping in repair a monument or tombstone. The other authority cited is *Swasey v. American Bible Soc.*, 57 Me. 523. The court in their opinion, indeed, say that bequests for the repair of tombs have been recognized as charitable; but, very surprisingly, they cite as their only authority for the statement two cases which decided exactly the opposite. *Perry* (2 *Perry on Trusts*, 4th ed., § 706) states that such bequests have been held good, but he cites only the cases above referred to. We therefore think that both English and American authorities are in accord in declaring that a bequest of this character is not a charitable bequest.

¹ *Johnson v. Holifield*, 79 Ala. 423; s.c. 58 Am. Rep. 596;

Holifield v. Robinson, 79 Ala. 419;

Coit v. Comstock, 51 Conn. 352; s.c. 50 Am. Rep. 29;

Bates v. Bates, 134 Mass. 110; s.c. 45 Am. Rep. 305;

Fowler v. Fowler, 33 Beav. 616;

Richard v. Robson, 31 Beav. 244;

In re Vaughan: Vaughan v. Thomas, 55 L. T. Rep. N. S. 547;

Dawson v. Small, L. R. 18 Eq. Cas. 114; s.c. 43 L. J. Ch. 406; 30 L. T. 252; 22 W. R. 514; 9 Moak Eng. Rep., 685;

Hoare v. Osborne, L. R. 1 Eq. Cas. 583; s.c. 35 L. J. Ch. 345; 12 Jur. N. S. 243; 14 L. T. 9; 14 W. R. 383;

Doe d. Thompson v. Pitcher, 2 Marsh. 61; s.c. 6 Taunt. 358; 1 Eng. C. L. 653.

Thomas,¹ that a gift to repair the family vault and a brother's tomb was void, but that a gift to repair the churchyard was good as a charitable gift for a public object. Justice NORTH, who wrote the opinion of the court, says: "It seems to me that the repair of a parish churchyard is clearly for the benefit of the inhabitants of the parish. In the first place, it was the duty of the parishioners to keep their churchyard in repair. * * * Then again, a case was cited which shows that if a person whose duty it is to repair the churchyard does not repair it he is subject to indictment. It is clear that the repair of a church is beyond all question a charitable object. So, too, the repair of a parsonage. Attorney-General *v.* Bishop of Chester² is an authority for that. The repair of ornaments of a church has been held a charitable object in *Hoare v. Osborne*.³ There KINSERLEY, Vice-Chancellor, said: 'With respect to the monument in the church, there is no decision on the point how far a gift for perpetual repair, not of the fabric of the church, but of the ornaments in the church, can be treated as a charity. In the absence of authority, I think I ought to hold such a gift to be a charity, and as such good.' * * * To put it shortly, I do not see any difference between a gift to keep in repair what is called 'God's house,' and a gift to keep in repair the churchyard round it, which is often called 'God's acre.' Then it is said that keeping in repair the tombs in a churchyard is only the same thing as keeping in repair a tomb in the churchyard. I do not think so. A testator providing for the repair of a family tomb is only ministering to his own private feeling or pride, or it may be a feeling of affection he has for his own relations, and it is not for the benefit of the parish at large that a particular tomb should be kept in repair. But in respect of the repair of the churchyard as a whole, it is for their benefit. That distinction was pointed out by Lord ROMILLY in the case of *Rickard v. Robson*,⁴ where he says: 'I have had to consider this point lately in a case respecting the promulgation of

¹ 55 L. T. Rep. N. S. 547.

² 1 Bro. C. C. 444.

³ L. R. 1 Eq. Cas. 585.

⁴ 7 L. T. Rep. N. S. 87; s.c. 31 Beav. 244.

the doctrines of Joanna Southcote. In that case I thought the gift was intended to be for a public benefit, and that it was a charitable gift which could be supported ; but on comparing it with the present I am satisfied that this does not come within the term “charity,” and is not within any of the words used in the preamble of the statute.¹ *Lloyd v. Lloyd*,² and the other cases of *Thomson v. Shakespeare*,³ showing that a gift merely for the purpose of keeping up a tomb or building which is of no public benefit, and only an individual advantage, is not a charitable use but a perpetuity. The cases run into very fine distinction, because if the gift is to keep up an institution for the benefit of the public, then it is clearly a charity. But that does not occur in this case, for here the gift is merely to keep up certain individuals’ “tombs.” It seems to me clear therefore that if the gift had been for keeping in repair the churchyard and nothing else it would have been good.’”

SEC. 1753. **Construction of trusts—Introductory.**—We have already seen ⁴ that no particular form of words is necessary in the creation of an express trust ⁵ so long as the instrument shows a *cestui que trust* and the interest in, or some right or profit growing out of, the conveyed property,⁶ and supplies every essential detail of the trust.⁷ Thus a trust may be declared by a bill in equity ; ⁸

¹ 43 Eliz., c. 4.

² 2 Sim. N. S. 255.

³ 1 L. T. Rep. (N. S.) 398 ; s.c. 1 Johns. Ch. (Eng.) 612.

⁴ See : *Ante*, §§ 1674, *et seq.*, 1684, 1685.

⁵ *Tyler v. Tyler*, 25 Ill. App. 333, 339 ;

Quinn v. Shields, 62 Iowa 129 ; s.c. 17 N. W. Rep. 437 ;

Urann v. Coates, 109 Mass. 581 ;

Giddings v. Palmer, 107 Mass. 269, 270 ;

Fisher v. Fields, 10 John. (N. Y.) 495.

⁶ *Eldridge v. See Yup Co.*, 17 Cal. 44.

⁷ *Dyer's Appeal*, 107 Pa. St. 446.

⁸ *Martin v. Tenison*, 26 Ala. 738 ;
Price v. Minot, 107 Mass. 49, 62 ;
Baylies v. Payson, 87 Mass. (5

Allen) 473.

See : *Page v. Summers*, 70 Cal. 121 ; s.c. 12 Pac. Rep. 120 ;

South-Side Town M. & M. Co. v. Rhodes, 33 Kan. 229 ; s.c. 6 Pac. Rep. 278 ;

Phelps v. Phelps, 143 Mass. 570 ; s.c. 10 N. E. Rep. 452 ;

Freeholders v. Henry, 41 N. J. Eq. (14 Stew.) 388 ;

Cooper v. Cooper, 36 N. J. Eq. (7 Vr.) 121 ;

Chamberlain v. Taylor, 105 N. Y. 185 ; s.c. 11 N. E. Rep. 625 ;

Lawrence v. Cooke, 104 N. Y. 632 ; s.c. 11 N. E. Rep. 144 ;

Weeks v. Cornwell, 104 N. Y. 325 ; s.c. 10 N. E. Rep. 431 ;

Westlake v. Wheat, 43 Hun (N. Y.) 77 ;

Paxton v. Stuart, 80 Va. 873 ;

by a contract in writing mentioned in a deed as part of it,¹ or by any contract in writing made by a person having the power of disposal over the property, in which contract such person agrees or directs that specified property shall be held or dealt with in a particular manner for the benefit of another;² a trust may also be established under the statute of frauds where manifested or proved by any subsequent act or acknowledgment on the part of the trustee, as by a declaration,³ or any memorandum,⁴ or a single letter written,⁵ or from any number of letters taken

Hobson *v.* Whitlow, 80 Va. 784;
Dougall *v.* Dougall, 26 Grant Ch.

(Up. Can.) 401;

Kerr *v.* Read, 23 Grant Ch. (Up. Can.) 525;

Whiteside *v.* Miller, 14 Grant Ch. (Up. Can.) 393;

Smith *v.* Stuart, 12 Grant Ch. (Up. Can.) 246;

Attorney-General *v.* Grasett, 6 Grant Ch. (Up. Can.) 485; s.c. 8 Id. 130;

Picard *v.* Central Bank, Sall. (N. B.) 472;

Oxford *v.* Oxford, 6 Ont. Rep. 6.

¹ See: Vancott *v.* Prentice, 35 Hun (N. Y.) 317, 322.

² Conway *v.* Kinsworthy, 21 Ark. 9;

Price *v.* Reeves, 38 Cal. 457;

Rabun *v.* Rubun, 15 La. An. 471;

Giddings *v.* Palmer, 107 Mass. 269;

Homer *v.* Homer, 107 Mass. 82;

Price *v.* Minot, 107 Mass. 49, 61;

Baylies *v.* Peyton, 87 Mass. (5 Allen) 473, 488;

Pingree *v.* Coffin, 78 Mass. (12 Gray) 288;

Waddingham *v.* Loker, 44 Mo. 132; s.c. 100 Am. Dec. 260;

Paul *v.* Fulton, 32 Mo. 110; s.c. 82 Am. Dec. 125;

Currie *v.* White, 45 N. Y. 822, rev'g 6 Abb. (N. Y.) Pr. N. S. 352; 1 Sweeny (N. Y.) 166; s.c. 37 How. (N. Y.) Pr. 330;

Reed *v.* Lukens, 44 Pa. St. 200; s.c. 84 Am. Dec. 425;

Cressman's Appeal, 42 Pa. St. 147; s.c. 82 Am. Dec. 498;

Rees *v.* Livingston, 41 Pa. St. 113;

Pownall *v.* Taylor, 10 Leigh (Va.) 172, 183;

Seymour *v.* Freer, 75 U. S. (8

Wall.) 202; bk. 19 L. ed. 306;

Legard *v.* Hodges, 1 Ves. Jr. 478;
2 Spence Eq. Jur. 860.

See: Jones *v.* Wilson, 60 Ala. 332;

Jones *v.* Lloyd, 117 Ill. 597; s.c. 7 N. E. Rep. 119;

Freer *v.* Lake, 115 Ill. 662; s.c. 4 N. E. Rep. 512;

Ogden *v.* Larrabee, 57 Ill. 389;

Lake *v.* Freer, 11 Ill. App. 576;

Pinson *v.* McGehee, 44 Miss. 229;

Conway *v.* Cutting, 51 N. H. 408;

Kelley *v.* Babcock, 49 N. Y. 318, 320;

Whitcomb *v.* Cardell, 45 Vt. 24;

Titchenell *v.* Jackson, 26 W. Va. 460.

³ Knox *v.* McFarran, 4 Colo. 586;

Phillips *v.* South Park Commis-
sioners, 119 Ill. 640; s.c. 10 N.

E. Rep. 220;

Urann *v.* Coates, 109 Mass. 581;

Homer *v.* Homer, 107 Mass. 82;

Willard *v.* Willard, 56 Pa. St. 119;

Crop *v.* Norton, 10 Mod. 233;

Ambrose *v.* Ambrose, 1 Pr. Wms. 321;

1 Lewin on Trusts (8th ed.) 62.

⁴ Urann *v.* Coates, 109 Mass. 581;

Fisher *v.* Fields, 10 John. (N. Y.) 495;

Brooke's Appeal, 109 Pa. St. 188;

Bellamy *v.* Burrow, Cas. temp. Talb. 97.

⁵ Kingsbury *v.* Burnside, 58 Ill. 310; s.c. 11 Am. Rep. 67;

Montague *v.* Hayes, 76 Mass. (10 Gray) 609;

Steere *v.* Steere, 5 John. Ch. (N. Y.) 1; s.c. 9 Am. Dec. 256;

Johnson *v.* Delony, 35 Tex. 42;

Phelps *v.* Seely, 22 Gratt. (Va.) 573;

Bentley *v.* Mackay, 15 Beav. 12;

together ;¹ by an affidavit filed in court ;² by an answer to a bill in equity ;³ by a recital in a bond⁴ or deed ;⁵ by an entry in a book of deposit ;⁶ by a pamphlet written by the trustee,⁷ or by any other writing by the trustee in which the fiduciary relation of the parties is clearly made to appear.⁸ But in regard to letters and loose acknowl-

- O'Hara v. O'Neill, 7 Bro. C. C. 227 ;
Gray v. Smith, 43 Ch. Div. 208 ; s.c. 59 L. J. Ch. 145 ;
Childers v. Childers, 1 DeG. & J. 482 ; s.c. 26 L. J. Ch. 743 ; 3 Jur. N. S. 1277 ;
Gardner v. Rowe, 2 Sim. & S. 346 ;
Crook v. Brooking, 2 Vern. 106 ;
Forster v. Hale, 5 Ves. 308 ; s.c. 3 Ves. Jr. 696 ; 4 Rev. Rep. 128 ;
Smith v. Wilkinson, 3 Ves. Sr. 705 ;
Morton v. Tewart, 2 Young & C. Ch. 67.
¹ McCandless v. Warner, 26 W. Va. 754 ;
Loring v. Palmer, 118 U. S. 321 ; bk. 30 L. ed. 211.
² Pinney v. Fellows, 15 Vt. 525 ;
Barkworth v. Young, 4 Drew 1 ; s.c. 26 L. J. Ch. 153 ; 3 Jur. N. S. 34.
³ Phillips v. South Park Commissioners, 119 Ill. 626 ; s.c. 10 N. E. Rep. 220 ;
Moore v. Pickett, 62 Ill. 158 ;
McLaurie v. Partlow, 53 Ill. 340 ;
McCubbin v. Cromwell, 7 Gill & J. (Md.) 175 ;
Jones v. Slubey, 5 Har. & J. (Md.) 372 ;
Montague v. Hays, 76 Mass. (10 Gray) 609 ;
Dyer's Appeal, 107 Pa. St. 446 ;
Phelps v. Seely, 22 Gratt. (Va.) 573 ;
Cottingham v. Fletcher, 2 Atk. 155 ;
Ryall v. Ryall, 1 Atk. 59 ;
Butler v. Portarlington, 1 Con. & L. 1 ;
Barkworth v. Young, 4 Drew 1 ; s.c. 26 L. J. Ch. 153 ; 3 Jur. N. S. 34 ;
Nab v. Nab, 10 Mod. 404 ;
Wilson v. Dent, 3 Sim. 385 ;
Hampton v. Spencer, 2 Vern. 288 ;
1 Eq. Cas. Abr. 464 ;
Gil. Eq. 146.
Where the trust is established on the answer of the trustee, the terms of it must be regulated by the whole answer as it stands, and not be taken from one part of the answer to the rejection of another.
Nab v. Nab, 10 Mod. 404 ;
Hampton v. Spencer, 2 Vern. 288.
⁴ Gomez v. Tradesmen's Bank, 4 Sandf. (N. Y.) 102 ;
Wright v. Douglass, 7 N. Y. 564, rev'g 10 Barb. (N. Y.) 97 ;
Moorcroft v. Dowding, 2 Pr. Wms. 314.
⁵ Selden's Appeal, 31 Conn. 548 ;
Wright v. Douglass, 7 N. Y. 564, rev'g 10 Barb. (N. Y.) 97 ;
Deg v. Deg, 2 Pr. Wms. 412.
⁶ Barker v. Frye, 75 Me. 29.
⁷ Barrell v. Joy, 16 Mass. 221.
⁸ Hardin v. Baird, 6 Litt. (Ky.) 346 ;
Bragg v. Paulk, 42 Me. 502 ;
Unitarian Society v. Woodbury, 14 Me. 281 ;
McCubbin v. Cromwell, 7 Gill & J. (Md.) 157 ;
Baylies v. Payson, 87 Mass. (5 Allen) 473 ;
Orleans v. Chatham, 19 Mass. (2 Pick.) 29 ;
Packard v. Putnam, 57 N. H. 43 ;
Cuyler v. Bradt, 2 Cai. (N. Y.) Cas. 326 ;
Fisher v. Fields, 10 John. Ch. (N. Y.) 505 ;
Steere v. Steere, 5 John. Ch. (N. Y.) 1 ; s.c. 9 Am. Dec. 256 ;
Gomez v. Tradesmen's Bank, 4 Sandf. (N. Y.) 102, 106 ;
Raybold v. Raybold, 20 Pa. St. 308 ;
Graham v. Lambert, 5 Humph. (Tenn.) 595 ;
Barron v. Barron, 24 Vt. 375 ;
Blake v. Blake, 2 Bro. C. C. 250 ;
Paterson v. Murphy, 17 Jur. 298 ;
Murray v. Glass, 23 L. J. Ch. 126 ;
Podmore v. Gunning, 7 Sim. 655 ;
Plymouth v. Hickman, 2 Vern. 167.

edgments of that kind, courts of equity require demonstration that they relate to the subject-matter.¹

SEC. 1754. **Same—Rules of construction.**—It has been said to be a fundamental proposition that all equitable estates and trusts are governed by the same rules as legal estates.² If there was one rule on the equitable side and another on the law side of the courts, there would be no certainty or uniformity in the interpretation or construction of trusts, or other equitable estates. There is a difference, however, in the rules regulating the construction of executory and executed trusts. In the case of executed trusts courts will not mold or alter the contracts or instruments by putting any particular construction on them, in order to avoid or evade the rules against perpetuities, but will adhere to the ordinary rules of construction without regard to the consequences of avoiding trusts that are illegal.³ In the case of executory trusts, however, another rule will be applied. Thus it has been said that in those cases where the trustees are directed to settle a formal deed of trust upon terms which are faintly and incompletely sketched, if from the articles or will it appear that a perpetuity was intended, that must be the end of the trust, whether executed or executory. But if the direct object of the limitations suggested in the articles is not the creation of a perpetuity, and if the remoteness is confined to some of the distant links only in the chain of limitations, equity, in decreeing the settlement, will carry into effect the general intention, especially if the expression of that intention clearly indicates that the limitations are to be carried out so far as the law allows.⁴

¹ *Smith v. Matthews*, 3 DeG. F. & J. 139;

Forster v. Hale, 3 Ves. 696, 708; s.c. 5 Ves. 308; 4 Rev. Rep. 128.

² 1 *Perry on Trusts* (4th ed.), § 357. See: *Cushing v. Blake*, 30 N. J. Eq. (3 Stew.) 689;

Price v. Sisson, 13 N. J. Eq. (2 Beas.) 168;

Frye v. Porter, 1 Mod. 300;

Cowper v. Cowper, 2 Pr. Wms.

753;

Burgess v. Wheate, 1 Wm. Bl. 123.

³ *Balgrave v. Hancock*, 16 Sim. 371.

⁴ *Fregonwell v. Sydenham*, 3 Dow. 194;

Kampf v. Jones, 2 Keen 756;

Banks v. Le Despencer, 11 Sim. 508; s.c. 10 Sim. 576; 7 Jur. 210;

Dorchester v. Effingham, 10 Sim. 587, 588; s.c. 3 Beav. 180;

SEC. 1755. **Same—Rule in Shelley's Case.**—It has been said that inasmuch as the rule in Shelley's Case is not one of construction but of law, established to remedy certain mischiefs, which, if heirs were allowed to take as purchasers, would be introduced into feudal tenures, that it does not apply to trusts, because they are wholly independent of tenure, and for that reason ought not to be affected by the operation of the rule.¹ But it is thought to be the established principle that although the rule may not be equally applicable to trusts, it shall be equally applied to them.² Under the rule in Shelley's Case, in order to vest the fee in the ancestor the word "heir" must be used, not in the sense *persona designata*, but as a term of succession, so as to transmit the estate to the heir for the time being forever.³ In this country the rule

Woolmore v. Burrows, 1 Sim. 512;

Lincoln v. Newcastle, 12 Ves. 218; s.c. 3 Ves. 387; s.c. 8 Rev. Rep. 324;

Phipps v. Kelynge, 2 Ves. & B. 57; s.c. 15 Rev. Rep. 16.

See: Hale v. Pew, 25 Beav. 335;

Tennent v. Tennent, Drury 161;

Monypenny v. Daring, 7 Hare 568; s.c. 2 DeG. M. & G. 145; 16 Mees. & W. 418;

Vanderplank v. King, 3 Hare 5;

Jervoise v. Northumberland, 1 J. & W. 559;

Parfitt v. Hember, L. R. 4 Eq. 443;

Deerhurst v. St. Albans, 5 Madd. 232;

Mogg v. Mogg, 1 Meriv. 654;

White v. Briggs, 15 Sim. 17;

Boydell v. Golightly, 14 Sim. 346;

Trevor v. Trevor, 13 Sim. 108; s.c. 1 H. L. Cas. 239;

Bengough v. Edridge, 1 Sim. 226, 227;

Humberston v. Humberston, 2 Vern. 737; s.c. 1 Pr. Wms. 332;

Pr. Ch. 455;

Blackburn v. Stables, 2 Ves. & B. 367; s.c. 15 Rev. Rep. 120.

¹ See: 1 Lewin on Trusts (8th ed.), § 4, p. 109.

Citing: Withers v. Allgood, 1 Ves. Sr. 150; s.c. 1 Call. Jur. 403;

Bagshaw v. Spencer, 1 Ves. Jr. 142; s.c. 1 Call. Jur. 378.

² See: Green v. Green, 90 U. S. (23 Wall.) 486; bk. 23 L. ed. 75;

Roberts v. Dixwell, 1 Atk. 610;

Jones v. Morgan, 1 Bro. C. C. 206;

Re White's Contract, 7 Ch. D. 201; s.c. 23 Moak Eng. Rep. 519;

Spence v. Spence, 12 C. B. N. S. (12 J. Scott N. S.) 199; s.c. 104 Eng. C. L. 199.

Wright v. Pearson, 1 Eden 128;

Batteste v. Maunsell, 10 Ir. Eq. 97;

Collier v. Walters, L. R. 17 Eq. Cas. 252; s.c. 43 L. J. Ch. 216;

29 L. T. 868; 22 W. R. 209; 7 Moak Eng. Rep. 798;

Cooper v. Kynock, L. R. 7 Ch. App. 398; s.c. 41 L. J. Ch. 296;

26 L. T. 566; 20 W. R. 503;

Britton v. Twining, 3 Meriv. 176;

Webb v. Earl of Shaftesbury, 2 Myl. & K. 599;

Brydges v. Brydges, 3 Ves. 120.

The rule in Shelley's Case is applicable to trust estates where both the life estate and the remainder are of the same character, not where the life estate is an equitable, and the remainder is a legal, estate, or *vice versa*.

Green v. Green, 90 U. S. (23 Wall.) 486; bk. 23 L. ed. 75.

³ If, therefore, land be devised to a trustee in trust for A for life, and after his decease in trust

in Shelley's Case has been abolished by statute in many of the states, and was always an arbitrary rule for the disposition of property, and not one designed for the executing of the intentions of the testator,¹ and where applied at all in this country relates only to executed trusts.²

SEC. 1756. **Same—When executed by statute—Pennsylvania rule.**—A court of equity never interferes with the execution of use by statute, unless, or any longer than, there is something for the trustee to do, which being done, will produce a different result from the statute.³ We have already seen that in Pennsylvania the general rule regarding trusts has been so far modified that they will not be sustained, but will be treated as executed, and the legal estate as vested in the *cestui que trust*, where the persons named as trustees have no duties to perform which require the seisin or possession of the estate to be in them, and the persons for whose use the trust was created are *sui juris*.⁴ In Pennsylvania a mere dry trust will not be sustained when persons equitably entitled to any property take absolutely the entire beneficial interest and the trustee has no duty to perform; unless it be a special trust intended to accomplish some object, as to preserve contingent remainders, protect property for the sole and separate use of a married woman,

for the person who shall then be his heir or heiress and his or her heirs, in this case A takes a life estate only, and the heir or heiress takes the fee-simple by purchase; and of course the rule does not apply, if the legal estate be vested in trustees for the life of A in trust for him, and the legal remainder after the death of A be limited to the heirs of A's body, for here, as the life estate and the remainder are of different qualities (viz., one equitable and the other legal), they cannot unite.

¹ Yarnall's Appeal, 70 Pa. St. 340; Doeblers Appeal, 64 Pa. St. 9;

Hileman v. Bouslaugh, 13 Pa. St. 344, 351; s.c. 53 Am. Dec. 474;

Coape v. Arnold, 2 Sm. & G. 311.

² Imlay v. Huntington, 20 Conn. 146, 162;

Wiley v. Smith, 3 Ga. 551;

Carradine v. Carradine, 33 Miss. 698;

Cushing v. Blake, 30 N. J. Eq. (3 Stew.) 689;

Wood v. Burnham, 26 Wend. (N. Y.) 9, aff'g s.c. *sub nom.* Tallman v. Wood, 6 Paige Ch. (N. Y.) 512;

Porter v. Doby, 2 Rich. (S. C.) Eq. 49;

Neves v. Scott, 54 U. S. (13 How.) 268; bk. 14 L. ed. 140.

³ Adams v. Guerard, 29 Ga. 651; s.c. 76 Am. Dec. 624.

⁴ Kay v. Scates, 37 Pa. St. 31; s.c. 78 Am. Dec. 399.

See: Dodson v. Ball, 60 Pa. St. 492; s.c. 100 Am. Dec. 586;

Rife v. Geyer, 59 Pa. St. 393; s.c. 98 Am. Dec. 351;

Stacy v. Rice, 27 Pa. St. 75; s.c. 67 Am. Dec. 447.

or from the creditors of the *cestui que trust*.¹ But where it is necessary that legal title should remain in the trustee to enable him to perform his trust, it will so remain, and will not be divested by other provisions in the instrument creating it.² And equity preserves the special trust to give effect to the donor's right of dominion over his property; while as to a passive trust it permits it to fall in favor of public policy.³

SECTION IX.—HOW TRUSTS ESTABLISHED.

SEC. 1757. Introductory—Burden of proof.

SEC. 1758. Proof of trust—Written instrument.

SEC. 1759. Same—Same—Consideration.

SEC. 1760. Same—By parol.

SEC. 1761. Same—By declaration of trust.

SEC. 1762. Same—Same—Declarations of trustee.

SECTION 1757. **Introductory—Burden of proof.**—Where the existence of a trust is set up, the *onus probandi* is on the party who alleges it; but the trust once established the burden is shifted to the other party to show its extinguishment.⁴ But where a party setting up a resulting trust in lands has made no payment, he cannot be per-

¹ *Kay v. Scates*, 37 Pa. St. 31; s.c. 73 Am. Dec. 399.

Use executed by statute is a legal estate to all intents and purposes, as much as if it had been given by the instrument creating the estate, without the intervention of a trustee.

Steady v. Rice, 27 Pa. St. 75; s.c. 67 Am. Dec. 447.

Where entire beneficial interest is in *cestui que trust*, without restriction as to enjoyment, the trust should be considered as executed. No conveyance of the legal title is necessary, though it will be decreed for the purpose of removing a nominal cloud from the title.

Rife v. Geyer, 59 Pa. St. 393; s.c. 98 Am. Dec. 351.

² *Rife v. Geyer*, 59 Pa. St. 393; s.c. 98 Am. Dec. 351.

³ *Dodson v. Ball*, 60 Pa. St. 492; s.c. 100 Am. Dec. 586.

Special trusts are not within statute of uses, and a trust to hold for the separate use of a married woman is special; if the woman become sole, the special trust for her separate uses ceases, and the legal estate vests fully in her.

Dodson v. Ball, 60 Pa. St. 492; s.c. 100 Am. Dec. 586;

Steady v. Rice, 27 Pa. St. 75; s.c. 67 Am. Dec. 447.

⁴ *Prevost v. Gratz*, 19 U. S. (6 Wheat.) 481, 494; bk. 5 L. ed. 311, 314.

Where a person has an independent equity, arising from his purchase from persons holding the relation of trustee and *cestui que trust*, in order to enforce his right, there is no need for any inquiry into the consideration or motives that operated upon such parties, to assume their relation of trustee and

mitted to show by parol evidence that the purchase was made for his benefit or on his account.¹

SEC. 1758. **Proof of trust—Written instrument.**—A writing is not essential to the creation of a trust, but the statute of frauds requires that its terms and conditions must be clearly manifested and proved in writing, under the hand of the party to be charged, before the court will carry it into execution.² To be effectual such writing must not only show that there is a trust, but also what that trust is.³ Yet the principle that a trust estate cannot legally exist without a declaration in writing, signed by the party who holds the legal estate, does not apply to secret trusts and confidences, created for the purpose of defeating or delaying creditors, which may always be proved by parol.⁴

SEC. 1759. **Same—Same—Consideration.**—While a trust in real property can be created only by an instrument in writing,⁵ yet a trust is not created by a written acknowledgment by one party that another is entitled to certain property in his possession, where such written acknowledgment is made without consideration.⁶ On the other

cestui que trust. In such cases equity does not refuse to lend its assistance.

Gridley v. Wynant, 64 U. S. (23 How.) 500; bk. 16 L. ed. 411;

McBlair v. Gibbes, 58 U. S. (17 How.) 232; bk. 15 L. ed. 132.

¹ Irwin v. Ivers, 7 Ind. 308; s.c. 63 Am. Dec. 420;

Botsford v. Burr, 2 John. Ch. (N. Y.) 405, 406.

² Ring v. Franklin, 2 Hall (N. Y.) 1, 15;

Steere v. Steere, 5 John. Ch. (N. Y.) 1; s.c. 9 Am. Dec. 256;

Jackson ex d. Williams v. Miller, 6 Wend. (N. Y.) 228; s.c. 21 Am. Dec. 316.

* McClellan v. McClellan, 65 Me. 506;

Steere v. Steere, 5 John. Ch. (N. Y.) 1; s.c. 9 Am. Dec. 256.

Writing creating trust—What must show.—The writing must show the nature of the trust, and the terms and conditions of it must

sufficiently appear, so that the court may not be called upon to execute the trust in a manner different from that intended.

Dillaye v. Greenough, 45 N. Y. 438, 445;

Getman v. Getman, 1 Barb. Ch. (N. Y.) 499, 504;

Whelan v. Whelan, 3 Cow. (N. Y.) 537, 580;

Steere v. Steere, 5 John. Ch. (N. Y.) 1; s.c. 9 Am. Dec. 256.

⁴ Hills v. Eliot, 12 Mass. 26; s.c. 7 Am. Dec. 26.

⁵ See: *Ante*, § 1758.

⁶ Lloyd v. Carter, 17 Pa. St. 216, 221;

Freeman v. Freeman, 2 Pars. Sel. Cas. (Pa.) 81, 89;

Thompson v. Branch, 1 Meigs (Tenn.) 390; s.c. 33 Am. Dec. 153.

See: Shackelford v. Handley, 1 A. K. Marsh. (Ky.) 496; s.c. 10 Am. Dec. 753;

Anderson v. Green, 7 J. J. Marsh.

hand, want of consideration for the deed is evidence of a trust between the parties ;¹ and the possession of land by the grantor after conveyance is a strong corroborative circumstance to establish a trust relation between such grantor and the grantee.² While it is true, as a gen-

- (Ky.) 448 ; s.c. 23 Am. Dec. 417, 423 ;
Shepherd v. Shepherd, 1 Md. Ch. 244 ;
Berry v. Waring, 1 Har. & G. (Md.) 100 ;
Lee v. Kirby, 104 Mass. 420 ;
Butnam v. Porter, 100 Mass. 337 ;
Western R. Co. v. Babcock, 47 Mass. (6 Met.) 346, 357 ;
Mercer v. Stark, 1 Walker Ch. (Mich.) 451 ; s.c. 12 Am. Dec. 583 ;
Vasser v. Vasser, 23 Miss. 378, 382 ;
Harrison v. Town, 17 Mo. 237 ;
Bean v. Valle, 12 Mo. 126 ;
Margraf v. Muir, 57 N. Y. 155 ;
Parmelee v. Cameron, 41 N. Y. 392 ;
Lobdell v. Lobdell, 36 N. Y. 331 ; s.c. 33 How. Pr. (N. Y.) 347, 369 ; 4 Abb. Pr. N. S. (N. Y.) 56, 61, rev'g 32 How. Pr. (N. Y.) 1 ;
Burling v. King, 66 Barb. (N. Y.) 633 ;
Losee v. Morey, 57 Barb. (N. Y.) 561 ;
Viele v. Troy, etc., R. Co., 21 Barb. (N. Y.) 381 ;
Seymour v. Delancey, 3 Cow. (N. Y.) 445 ; s.c. 15 Am. Dec. 270 ;
Woodcock v. Bennet, 1 Cow. (N. Y.) 711 ; s.c. 13 Am. Dec. 568 ;
Westervelt v. Matheson, 1 Hoff. Ch. (N. Y.) 37 ;
Minturn v. Seymour, 4 John. Ch. (N. Y.) 497, 500 ;
Davidson v. Little, 22 Pa. St. 245 ; s.c. 60 Am. Dec. 81 ;
Sarter v. Gordon, 2 Hill (S. C.) Eq. 121 ;
Tripp v. Tripp, 1 Rice (S. C.) Eq. 84 ;
Curlin v. Hendricks, 35 Tex. 225 ;
White v. McGannon, 29 Gratt. (Va.) 511 ;
Hale v. Wilkinson, 21 Gratt. (Va.) 75 ;
Cathcart v. Robinson, 30 U. S. (5 Pet.) 264, 271 ; bk. 8 L. ed. 120 ;
Cochrane v. Willis, 34 Beav. 359 ;
Collier v. Brown, 1 Cox Ch. Cas. 428 ;
Abbott v. Sworder, 4 DeG. & S. 448 ;
Wycherley v. Wycherley, 2 Eden 178 ;
Borell v. Dann, 2 Hare 450 ;
Bower v. Cooper, 2 Hare 408 ;
Ord v. Johnston, 1 Jur. N. S. 1063 ;
Houghton v. Lees, 1 Jur. N. S. 862 ;
Marler v. Tommas, L. R. 17 Eq. Cas. 8 ; s.c. 43 L. J. Ch. 73 ; 22 W. R. 25 ;
Burrowes v. Lock, 10 Ves. 470 ; s.c. 8 Rev. Rep. 33, 856 ;
Coles v. Trecothick, 9 Ves. 234, 246 ; s.c. 7 Rev. Rep. 167 ;
Groves v. Groves, 3 You. & J. 163.
¹ *Vandever's Admrs. v. Freeman*, 20 Tex. 333 ; s.c. 70 Am. Dec. 391.
² *Peralta v. Castro*, 6 Cal. 354, 358 ;
Irwin v. Ivers, 7 Ind. 308 ; s.c. 63 Am. Dec. 420 ;
Ratliff v. Ellis, 2 Iowa 59 ; s.c. 63 Am. Dec. 471 ;
Morrall v. Watterson, 7 Kan. 199 ;
Dryden v. Hanway, 31 Md. 254 ; s.c. 100 Am. Dec. 61 ;
McElderry v. Shipley, 2 Md. 25 ; s.c. 56 Am. Dec. 703 ;
Pritchard v. Brown, 4 N. H. 397 ; s.c. 17 Am. Dec. 431 ;
German v. Gabbald, 3 Binn. (Pa.) 302 ; s.c. 5 Am. Dec. 372 ;
Wallace v. Duffield, 2 Serg. & R. (Pa.) 521 ; s.c. 7 Am. Dec. 660 ;
Leshey v. Gardner, 3 Watts & S. (Pa.) 314 ; s.c. 38 Am. Dec. 764 ;
Blake v. Jones, 1 Bailey (S. C.) Eq. 141 ; s.c. 21 Am. Dec. 530 ;
Vandever's Admrs. v. Freeman, 20 Tex. 333 ; s.c. 70 Am. Dec. 391 ;
Miller v. Thatcher, 9 Tex. 482 ; s.c. 60 Am. Dec. 172 ;
James v. Fulcrod, 5 Tex. 512 ; s.c. 55 Am. Dec. 743 ;
Union Pacific R. Co. v. Durant, 95 U. S. 576 ; bk. 24 L. ed. 391.
Proof of fraudulent combination between purchaser on execution and

eral proposition, that parol evidence is inadmissible to contradict or vary the terms of a deed or other instrument in writing,¹ yet where land of an intestate is con-

the debtor, to defraud the latter's creditors, by making the purchase in trust for him, and giving him a lease of the premises, is inadmissible to defeat an ejectment brought by the purchaser against the debtor.

Leshey v. Gardner, 3 Watts & S. 314; s.c. 38 Am. Dec. 764.

Where a deed designates the grantee as "trustee," without setting forth for whom or for what purpose, parol evidence is admissible to show for whom and for what purpose he is trustee.

Union Pac. R. R. Co. v. Durant, 95 U. S. 576; bk. 24 L. ed. 391.

Executors were authorized by will to sell land devised to the testator's family on giving security, and they sold the land and employed the money it produced in the purchase of other lands; these circumstances, together with evidence of the declarations of one of the executors, will be sufficient to raise a trust for the family in the lands thus purchased.

Wallace v. Duffield, 2 Serg. & R. (Pa.) 521; s.c. 7 Am. Dec. 660.

Extrinsic evidence to show amounts loaned, and the time during which the loans are to be continued, is admissible where a deed of trust to secure future advances is given; such evidence does not contradict or alter the deed.

Wilson v. Russell, 13 Md. 495; s.c. 71 Am. Dec. 645.

No use results to grantor in deed expressing consideration, though it is merely nominal, and never paid, and parol proof that the conveyance was intended to be in trust for the grantor will not raise a trust.

Hogan v. Jaques, 19 N. J. Eq. (4 C. E. Gr.) 123; s.c. 97 Am. Dec. 644.

¹ *Ware v. Cowles*, 24 Ala. 446; s.c. 60 Am. Dec. 482;

Melton v. Watkins, 24 Ala. 433; s.c. 60 Am. Dec. 481;

Frederick v. Youngblood, 19 Ala. 680; s.c. 54 Am. Dec. 209;

West v. Kelly, 19 Ala. 353; s.c. 54 Am. Dec. 192;

Waddell v. Glassell, 18 Ala. 561; s.c. 54 Am. Dec. 170;

Ruiz v. Norton, 4 Cal. 355; s.c. 60 Am. Dec. 618;

Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; s.c. 54 Am. Dec. 309;

Belden v. Seymour, 8 Conn. 304; s.c. 21 Am. Dec. 661;

Groves v. Steel, 2 La. An. 480; s.c. 46 Am. Dec. 551;

Harrison v. Laverty, 8 Mart. (La.) 213; s.c. 13 Am. Dec. 283;

Tyler v. Carlton, 7 Me. (7 Greenl.) 175; s.c. 20 Am. Dec. 357;

Betts v. Union Bank of Maryland, 1 Har. & G. (Md.) 175; s.c. 18 Am. Dec. 283;

O'Neale v. Lodge, 3 Har. & McH. (Md.) 433; s.c. 1 Am. Dec. 377;

Davis v. Ball, 60 Mass. (6 Cush.) 505; s.c. 53 Am. Dec. 53;

Bullard v. Briggs, 24 Mass. (7 Pick.) 533; s.c. 19 Am. Dec. 292;

Porter v. Pierce, 22 N. H. 275; s.c. 55 Am. Dec. 151;

Hersom v. Henderson, 21 N. H. 224; s.c. 53 Am. Dec. 185;

Whitbeck v. Whitbeck, 9 Cow. (N. Y.) 266; s.c. 18 Am. Dec. 503;

Bowen v. Bell, 20 John. (N. Y.) 338; s.c. 11 Am. Dec. 286;

Schemerhorn v. Vanderheyden, 1 John. (N. Y.) 139; s.c. 3 Am. Dec. 304;

Graves v. Carter, 2 Hawks. (N. C.) 576; s.c. 11 Am. Dec. 786;

Inglebright v. Hammond, 19 Ohio 337; s.c. 53 Am. Dec. 430;

Rearich v. Swinehart, 11 Pa. St. 233; s.c. 51 Am. Dec. 540;

Sneed v. Hooper, 1 Cooke (Tenn.) 200; s.c. 5 Am. Dec. 691;

Pack v. Thomas, 21 Miss. (13 Smed. & M.) 11; s.c. 51 Am. Dec. 135;

Beach v. Packard, 10 Vt. 96; s.c. 33 Am. Dec. 185;

Harvey v. Alexander, 1 Rand. (Va.) 219; s.c. 10 Am. Dec. 519.

See: *Gibbons v. Dillingham*, 10 Ark. 9; s.c. 50 Am. Dec. 233;

firmed to one of the heirs, by the court, at the appraisement, it may be shown to be held in trust for the others, when the trust is in writing, without impugning the sanctity or validity of the decree of the court.¹

SEC. 1760. Same—By parol.—While the general principle is that a trust in land cannot be created except by an instrument in writing,² yet they may be proven by parol.³ They may also be rebutted by parol declarations

Moore v. Madden, 7 Ark. 530;
s.c. 46 Am. Dec. 298;

Piscataqua Exchange Bank v.
Carter, 20 N. H. 246; s.c. 51
Am. Dec. 217;

Bank v. Fordyce, 9 Pa. St. 275;
s.c. 49 Am. Dec. 561;

Bolton v. Johns, 5 Pa. St. 145;
s.c. 47 Am. Dec. 404;

Ladd v. King, 1 R. I. 224; s.c.
51 Am. Dec. 624;

Campbell v. Upshaw, 7 Humph.
(Tenn.) 185; s.c. 46 Am. Dec.
75.

¹ *Bavington v. Clarke*, 2 Pen. & W.
115; s.c. 21 Am. Dec. 432.

² See: *McElderry v. Shipley*, 2 Md.
25; s.c. 56 Am. Dec. 703.
Ante, § 1758.

Conventional trust cannot be set up
on special parol agreement in-
consistent with the terms of
the deed.

McElderry v. Shipley, 2 Md. 25;
s.c. 56 Am. Dec. 703.

Minnesota doctrine—Neither result-
ing nor express trust arises, or is
created, under the Minnesota
statutes, in favor of one who
settles upon and improves gov-
ernment land, and agrees by
parol with another that the
latter should enter it in his own
name at the land office, pay
for it, and convey it to the
former upon payment of the
purchase price.

Wentworth v. Wentworth, 2
Minn. 277; s.c. 72 Am. Dec. 97.

Parol declaration of trust, either of
real or personal estate, is valid
in the absence of any statute
requiring its action to be in
writing.

Anding v. Davis, 38 Miss. 574;
s.c. 77 Am. Dec. 658.

Texas doctrine—*James v. Fulcrod*.—
Trust or agency concerning

lands may be created by parol,
under the Texas statute of
frauds.

James v. Fulcrod, 5 Tex. 512; s.c.
55 Am. Dec. 743.

Resulting trusts are not included in
this rule, and consequently are
not required to be in writing.

Dryden v. Hanway, 31 Md. 254;
s.c. 100 Am. Dec. 61.

See: *Pritchard v. Brown*, 4 N.
H. 397; s.c. 17 Am. Dec. 431;

German v. Gabbald, 3 Binn. (Pa.)
302; s.c. 5 Am. Dec. 372;

Wallace v. Duffield, 2 Serg. & R.
(Pa.) 521; s.c. 7 Am. Dec. 660.

Proof—By parol.—Such a trust may
be proved by parol even against
the face of the deed or the an-
swer of the trustee (*Irwin v.*
Ivers, 7 Ind. 308; s.c. 63 Am.
Dec. 420), notwithstanding the
statute of frauds.

Osborne v. Endicott, 6 Cal. 149;
s.c. 65 Am. Dec. 498.

A trust in personal property may be
created by parol, the statute
of frauds not extending there-
to.

Snelling v. Utterback, 1 Bibb
(Ky.) 609; s.c. 4 Am. Dec. 661;

Kimball v. Morton, 5 N. J. Eq.
(1 Halst.) 26; s.c. 53 Am. Dec.
621;

Thompson's Lessee v. White, 1
Dall. (Pa.) 424; s.c. 1 Am. Dec.
252, 258; bk. 1 L. ed. 206;

Haines v. O'Connor, 10 Watts
(Pa.) 313; s.c. 36 Am. Dec.
180, 182;

Hoge v. Hoge, 1 Watts (Pa.) 163;
s.c. 26 Am. Dec. 26;

Towles v. Burton, 1 Rich. Eq.
Cas. (S. C.) 146; s.c. 24 Am.
Dec. 409.

³ *Rhea v. Tucker*, 56 Ala. 450;

Baker v. Vining, 30 Me. 121,
126; s.c. 50 Am. Dec. 617;

of the person in whose favor the trust would otherwise be raised.¹ Trusts may be established by parol in an

- Mutual Fire Ins. Co. v. Deale*, 18 Md. 26; s.c. 79 Am. Dec. 673;
Wilson v. Russell, 13 Md. 495; s.c. 71 Am. Dec. 645;
Frederick v. Haas, 5 Nev. 389;
Hogan v. Jaques, 19 N. J. Eq. (4 C. E. Gr.) 123; s.c. 97 Am. Dec. 644;
Barry v. Lambert, 98 N. Y. 300; s.c. 50 Am. Rep. 677;
Byers v. Wackman, 16 Ohio St. 441;
Lingenfelter v. Ritchey, 58 Pa. St. 435; s.c. 98 Am. Dec. 308;
Strimpfler v. Roberts, 18 Pa. St. 283; s.c. 57 Am. Dec. 606;
Williams v. Hollingsworth, 1 Strobb. (S. C.) Eq. 103; s.c. 47 Am. Dec. 527;
Hyden v. Hyden, 6 Baxt. (Tenn.) 406;
Smitheal v. Gray, 1 Humph. (Tenn.) 491; s.c. 34 Am. Dec. 664;
Miller v. Blose's Exr., 30 Gratt. (Va.) 744;
Smith v. Patton, 12 W. Va. 541;
Ryall v. Ryall, Ambl. 413; s.c. 1 Atk. 59;
Willis v. Willis, 2 Atk. 71;
Gascoigne v. Thwing, 1 Vern. 366;
Lench v. Lench, 10 Ves. 517;
 1 Lead. Cas. in Eq. (4th ed.) 335;
 1 Perry on Trusts (4th ed.), § 137;
 2 Pom. Eq. Jur., § 1040.
 2 Story Eq. Jur. (13th ed.), § 1202.
Parol proof—The general rule is that a trust in favor of the grantor of a deed cannot be shown by parol evidence which contradicts the recital of payment in the consideration clause, where the purpose of such direct evidence is to destroy the effect and operation of the deed; but that for all other purposes parol evidence may be received to explain, vary, or even to contradict the consideration clause in a deed of conveyance.
Rhine v. Ellen, 36 Cal. 362;
Hendrick v. Crowley, 31 Cal. 471;
Peck v. Vandenberg, 30 Cal. 11;
Coles v. Soulsby, 21 Cal. 47;
Roe v. Jerome, 18 Conn. 138;
Meeker v. Meeker, 16 Conn. 383;
Belden v. Seymour, 8 Conn. 304;
 s.c. 21 Am. Dec. 661;
Morrall v. Waterson, 7 Kan. 199;
Goodspeed v. Fuller, 46 Me. 141; s.c. 71 Am. Dec. 572;
Philbrook v. Delano, 29 Me. 410;
Twomey v. Crowley, 137 Mass. 184;
Wilkinson v. Scott, 17 Mass. 249;
Aull Savings Bank v. Aull's Admr., 80 Mo. 199;
McConnell v. Brayner, 63 Mo. 461;
Hollocher v. Hollocher, 62 Mo. 267;
Henderson v. Henderson's Exrs., 13 Mo. 151;
Merriam v. Harsen, 2 Barb. (N. Y.) 232, aff'g 4 Edw. Ch. (N. Y.) 70;
Bank of United States v. Housman, 6 Paige Ch. (N. Y.) 526;
Squire v. Harder, 1 Paige Ch. (N. Y.) 494; s.c. 19 Am. Dec. 446;
Barnum v. Childs, 1 Sandf. Ch. (N. Y.) 58, aff'g 11 Barb. (N. Y.) 14;
McCrea v. Purmort, 16 Wend. (N. Y.) 460; s.c. 30 Am. Dec. 103;
Allison v. Kurtz, 2 Watts (Pa.) 185.
Same—New Hampshire rule—In *Pritchard v. Brown*, 4 N. H. 397; s.c. 17 Am. Dec. 431, the court say: "Those that hold that parol evidence is not admissible in such a case seem to rest their opinion on two grounds. In the first place, they hold that the parol evidence is repugnant to the deed, and on that account inadmissible; and in the next place, that the statute of frauds and perjuries has rendered it inadmissible."
 Citing; *Crop v. Newton*, 2 Atk. 75;
Newton v. Preston, 1 Prec. Ch. 103;
Kirk v. Webb, 1 Prec. Ch. 84;
Gascoigne v. Thwing, 1 Vern. 366;
Rob. on Frauds, 99, 100;
Sand. on Uses, 112, 113.
¹ *Adams v. Guerard*, 29 Ga. 651; s.c. 76 Am. Dec. 624;
Steere v. Steere, 5 John. Ch. (N. Y.) 1; s.c. 9 Am. Dec. 256.
Parol evidence not admissible when.

absolute deed¹ or bequest,² by showing that the grantee or legatee received the property upon a promise made to the grantor or testator to dispose thereof in a certain way, to hold it to a certain use, or to provide for a specified person out of it.³

Parol evidence, to establish a trust, must be very clear and satisfactory, otherwise the court will not decree it,⁴ and cannot change absolute deed into one of trust unless there be fraud, accident, or mistake.⁵

—Where a trust is clearly and fully established by written evidence, parol evidence is not admissible to rebut it; but where the written evidence is vague and ambiguous, parol evidence may be admitted to rebut the presumption.

Steere v. Steere, 5 John. Ch. (N. Y.) 1; s.c. 9 Am. Dec. 256.

¹ Thus a person being subject to intoxication, and therefore fearing imposition, conveyed his property by an absolute deed to another, for the benefit of his child, a minor; but no declaration to this effect appeared in the deed. Parol evidence is admissible to prove the trust.

Gay v. Hunt, 1 Murph. (N. C.) L. 141; s.c. 3 Am. Dec. 681.

² *Owing's Case*, 1 Bland Ch. (Md.) 370; s.c. 17 Am. Dec. 311;

Towles v. Burton, 1 Rich. Eq. Cas. (S. C.) 146; s.c. 24 Am. Dec. 409;

Jordan v. Money, L. R. 5 H. L. 185;

McCormick v. Grogan, L. R. 4 H. L. 97;

Strickland v. Aldridge, 9 Ves. 516; s.c. 7 Rev. Rep. 292.

See: *Barrell v. Handrick*, 42 Ala. 60;

Church v. Ruland, 64 Pa. St. 432;

Jones v. McKee, 6 Pa. St. 425;

Hoge v. Hoge, 1 Watts (Pa.) 163; s.c. 26 Am. Dec. 52;

Thynn v. Thynn, 1 Vern. 296.

² *Towles v. Burton*, 1 Rich. Eq. Cas. (S. C.) 146; s.c. 24 Am. Dec. 409.

Devisee's active or passive agency in procuring the devise must be shown, it seems, in order to enforce such a trust.

Hoge v. Hoge, 1 Watts (Pa.) 163; s.c. 26 Am. Dec. 52.

⁴ *Snelling v. Utterback*, 1 Bibb (Ky.) 609; s.c. 4 Am. Dec. 661.

⁵ *Ratliff v. Ellis*, 2 Iowa 59; s.c. 63 Am. Dec. 471;

Sturtevant v. Sturtevant, 20 N. Y. 39; s.c. 75 Am. Dec. 371.

See: *Melton v. Watkins*, 24 Ala. 433; s.c. 60 Am. Dec. 481;

West v. Kelly, 19 Ala. 353; s.c. 54 Am. Dec. 192;

Waddell v. Glassell, 18 Ala. 561; s.c. 54 Am. Dec. 170;

Gordon v. Phillips, 13 Ala. 565, 567;

Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; s.c. 54 Am. Dec. 309;

Baldwin v. Carter, 17 Conn. 201; s.c. 43 Am. Dec. 735;

Tucker v. Baldwin, 13 Conn. 136; s.c. 33 Am. Dec. 384;

Allen v. Lee, 1 Ind. 58; s.c. Smith (Ind.) 12; 48 Am. Dec. 352;

Hayworth v. Worthington, 5 Blackf. (Ind.) 361; s.c. 35 Am. Dec. 126;

Foley v. Cowgill, 5 Blackf. (Ind.) 18; s.c. 32 Am. Dec. 49;

Union Bank v. Meeker, 4 La. An. 189; s.c. 50 Am. Dec. 559;

Osgood v. Davis, 18 Me. 146; s.c. 36 Am. Dec. 708;

Woolen v. Hillen, 9 Gill (Md.) 185; s.c. 52 Am. Dec. 690;

Henderson v. Mayhew, 2 Gill (Md.) 393; s.c. 41 Am. Dec. 434;

Adams v. Wilson, 53 Mass. (12 Met.) 138; s.c. 45 Am. Dec. 240;

Holmes v. Charlestown Mutual Fire Ins. Co., 51 Mass. (10 Met.) 211; s.c. 43 Am. Dec. 428;

Brooks v. White, 43 Mass. (2 Met.) 283; s.c. 37 Am. Dec. 95;

Hunt v. Adams, 7 Mass. 519;

Pack v. Thomas, 21 Miss. (13 Smed. & M.) 11; s.c. 51 Am. Dec. 135;

SEC. 1761. **Same—By declaration of trust.**—We have already seen¹ that a declaration of trust is essential to create an equitable estate in land in a third person, consequently an equitable title may be completely divested by a clear and unambiguous declaration of trust, although a further disposition of the legal title is still in contemplation.² But declarations of trust defining the nature of the trust, executed by the trustee and *cestuis que trust* after the execution of the trust deed, and changing the character of the trust thereby constituted, cannot have a retroactive effect, so as to divest an inchoate right of dower which attached to the subject-matter of the trust upon the execution of the trust deed.³ Contemporaneous declarations of the testator at the time of making an absolute devise, and subsequent declarations of the devisee in possession, that the devise was made for the benefit of a third person upon the devisee's suggestion and promise to hold the estate in trust, raises a valid trust.⁴

SEC. 1762. **Same—Same—Declarations of trustee.**—The general rule is that evidence to establish a resulting trust must be of facts and statements of parties to the transaction, which happened or were made contemporaneous with the purchase; but there is an exception to this rule so far as relates to the declarations of the trustee made after

Heaverin v. Donnell, 15 Miss. (7 Smed. & M.) 244;

Reed v. Austin, 9 Mo. 722; s.c. 45 Am. Dec. 336;

Exeter Bank v. Stowell, 16 N. H. 61; s.c. 41 Am. Dec. 716;

Wheeler v. Reynolds, 66 N. Y. 227, 234;

Horn v. Keteltas, 46 N. Y. 605, 610; s.c. 42 How. (N. Y.) Pr. 138;

Hodges v. Tennessee Marine & Fire Ins. Co., 8 N. Y. 416;

Bank of Utica v. Finch, 3 Barb. (N. Y.) 293; s.c. 49 Am. Dec. 175;

Thompson v. Ketcham, 8 John. (N. Y.) 190; s.c. 5 Am. Dec. 332;

Barnes v. Simms, 5 Ired. (N. C.) Eq. 392; s.c. 49 Am. Dec. 435;

Rearich v. Swinehart, 11 Pa. St. 233; s.c. 51 Am. Dec. 540;

Bank v. Fordyce, 9 Pa. St. 275; s.c. 49 Am. Dec. 561;

Norwood v. Byrd, 1 Rich. (S. C.) L. 135; s.c. 42 Am. Dec. 406;

Grice v. Scarborough, 2 Spears (S. C.) L. 649; s.c. 42 Am. Dec. 391;

Sylvester v. Downer, 20 Vt. 355; s.c. 49 Am. Dec. 786;

Beach v. Packard, 10 Vt. 96; s.c. 33 Am. Dec. 185.

¹ See: *Ante*, § 1678, *et seq.*

² Lane v. Ewing, 31 Mo. 75; s.c. 77 Am. Dec. 632.

³ Nicoll v. Ogden, 29 Ill. 323; s.c. 31 Am. Dec. 311.

⁴ Hoge v. Hoge, 1 Watts (Pa.) 163; s.c. 26 Am. Dec. 52.

the transaction, which may be received in evidence to establish such trust.¹ While there is a presumption of a resulting trust in one who advances purchase-money of land, when the deed is taken in the name of a stranger, which may be proved by parol evidence,² yet the declarations of the deceased alleged trustee are not sufficient to establish that fact.³

SECTION X.—JURISDICTION OF TRUSTS.

SEC. 1763. . Equitable cognizance.

SEC. 1764. Reason for the rule.

SECTION 1763. Equitable cognizance.—Cases of trusts are of equitable cognizance, and courts of equity are charged with the duty of seeing them fulfilled.⁴ Consequently whenever a trustee violates the rights of the *cestui que trust*, or fails or refuses to perform the duty imposed by the trust, courts of equity are the proper courts in which to apply for relief ; and their decrees are paramount in all questions relating to the powers and duties of the parties to a trust.⁵ Whenever property is conveyed or given by

¹ *Mutual Fire Ins. Co. v. Deale*, 13 Md. 26 ; s.c. 79 Am. Dec. 678.

² *Smith v. Strahan*, 16 Tex. 314.

³ *Vandever Admrs. v. Freeman*, 20 Tex. 333 ; s.c. 70 Am. Dec. 391.

⁴ *Norton v. Hixon*, 25 Ill. 439 ; s.c. 79 Am. Dec. 338 ;

Morrison v. Kelly, 22 Ill. 610 ; s.c. 74 Am. Dec. 169 ;

Smith v. Townsend, 27 Md. 368 ; s.c. 92 Am. Dec. 637 ;

Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242 ; s.c. 89 Am. Dec. 779 ;

Newhall v. Wheeler, 7 Mass. 189, 198 ;

Fisher v. Fields, 10 John. (N. Y.) 495 ;

Shober v. Hauser, 4 Dev. & B. (N. C.) L. 91, 96 ;

Broughton v. Langley, 2 Ld. Raym. 878.

A court of chancery has jurisdiction in Maryland under the act of 1785, c. 72, and supplement, to decree a sale of trust property for the purpose of a division among the parties entitled to

it, upon competent and satisfactory proof that the same is not susceptible of partition without loss, and that a sale will be advantageous to the parties.

Smith v. Townshend, 27 Md. 368 ; s.c. 92 Am. Dec. 637.

Suit to cancel deed alleged to be in trust need not be brought in the county in which the land is situated.

Vandever's Admrs. v. Freeman, 20 Tex. 333 ; s.c. 70 Am. Dec. 391.

This is true even of trusts of an official character.

Norton v. Hixon, 25 Ill. 439 ; s.c. 79 Am. Dec. 338.

⁵ *Robinson v. Mauldin*, 11 Ala. 977 ;

Williams v. Dwinelle, 51 Cal. 442 ;

Jones v. Dougherty, 10 Ga. 273 ;

Iles v. Martin, 69 Ind. 114 ;

Presley v. Stribbing, 24 Miss. 527 ;

James v. Cowing, 82 N. Y. 449, rev'g 17 Hun (N. Y.) 256 ;

Den v. Troutman, 7 Ired. (N. C.) L. 155 ;

one person to another, to hold for the use of a third person, such a trust is thereby created as authorizes a court of equity to entertain jurisdiction to compel its application to the purpose of the trust. And the property may be pursued into the hands of all persons who have obtained it with notice of the trust, or where it has been converted into money the money may be recovered; or where the money arising from the sale of trust property or funds has been invested in other property, a court of equity will compel the trustee to account¹ for the trust thus acquired, and treat it in every respect as if it were the original trust property.²

SEC. 1764. Reason for the rule.—The reason why courts of equity take cognizance of trusts is because they are interests resting in equity and conscience, and are governed by the same rules that were formerly applicable to uses,³ a trust being merely what a use was before the statute of uses, notwithstanding the fact that trusts have been more nearly assimilated to legal estates than uses ever were.⁴ In exercising its jurisdiction over executory trusts, the Court of Chancery is not bound by the technical rules of law, but takes a wider range in favor of the intent of the party. This principle seems to be well established, and it has been ably vindicated by Fonblanque,⁵ but courts of equity will not assume jurisdiction to establish trusts in every case where mere confidence has been reposed or a credit given.⁶ In cases

Tucker v. Palmer, 3 Brev. (S. C.)

L. 47;

McLean v. Nelson, 1 Jones (S. C.)

L. 396;

Bush v. Bush, 1 Strobbh. (S. C.)

Eq. 377.

¹ See: *Post*, § 1780.

² Doyle v. Murphy, 22 Ill. 502, 512; s.c. 74 Am. Dec. 165.

³ Fisher v. Fields, 10 John. Ch. (N. Y.) 495, 506. In this case the court say: "Before the statute of uses, if a man had bargained and sold his land for a valuable consideration without inserting the word 'heirs,' the Court of Chancery would have decreed an execution of the use in fee,

because the use was merely in trust and confidence, and because this was according to the conscience and intent of the parties. But after the statute of 27 Hen. VIII., as the uses were transferred and made a legal estate, a different rule took place. (1 Co. 87b, 100b.)"

⁴ Price v. Sisson, 13 N. J. Eq. (2 Beas.) 168, 179;

Burgess v. Wheate, 1 W. Bl. 180; Banks v. Sutton, 2 Pr. Wms. 713.

⁵ 1 Fonbl. 395n, 490n; 2 Id. 18. See: Fisher v. Fields, 10 John. Ch. (N. Y.) 495, 506;

⁶ Doyle v. Murphy, 22 Ill. 502; s.c. 74 Am. Dec. 165.

of pure trust, resort to a court of equity must be had for relief, and that court will grant relief where there are special circumstances requiring such interference in cases of *quasi* trusts.¹ In some states where the interest of the *cestui que trust* is not created by a deed to the trustee, but by an original contract of purchase, in connection with certain contemporaneous correspondence, the legal title does not vest in the *cestui que trust* by virtue of the statute abolishing passive trusts, but the trustee merely takes an equitable title; and his remedy, if any, is in a court of equity, and not by ejectment.² In limitations in a devise for a charity, prohibiting a sale of the property and requiring it to be leased for terms of not more than thirty years, and the rents applied to the use of charity, are regulations to guide the trustees, and create a trust which those who take the estate are bound to perform; and in the case of a breach, a court of equity will interpose and enforce performance.³

SECTION XI.—RIGHTS AND LIABILITIES UNDER TRUSTS.

SEC. 1765. Introductory.

SEC. 1766. Of trustee—In respect to beneficiary.

SEC. 1767. Same—In respect to trust property—Estate and title.

SEC. 1768. Same—Same—Continuance of estate.

SEC. 1769. Same—Same—At common law.

SEC. 1770. Same—Same—Right to maintain action.

SEC. 1771. Same—In management of estate.

SEC. 1772. Same—Same—General powers.

SEC. 1773. Same—Same—Investment.

SEC. 1774. Same—Same—Same—In name of trustee.

SEC. 1775. Same—Same—Same—How investment made.

SEC. 1776. Same—Same—Same—In what investment to be made.

SEC. 1777. Same—Same—Right to sue.

SEC. 1778. Same—Same—Liabilities for mismanagement.

SEC. 1779. Same—Same—Allowance for improvements.

SEC. 1780. Same—Accounting and discharge.

SEC. 1781. Of co-tenants—Nature of estate taken—Survivorship.

SEC. 1782. Same—Duty of.

SEC. 1783. Same—Liability of—Generally.

SEC. 1784. Same—Same—For acts of each other.

¹ *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242; s.c. 89 Am. Dec. 779. bk. 30 L. ed. 211.
² *Stanley v. Colt*, 72 U. S. (5 Wall.) 119; bk. 18 L. ed. 502.

³ *Loring v. Palmer*, 118 U. S. 321;

- SEC. 1785. Of beneficiary—Mutual relations.
 SEC. 1786. Same—Title and interest of.
 SEC. 1787. Same—Enforcement of trust.
 SEC. 1788. Same—Same—When enforced.
 SEC. 1789. Same—Rights and powers of.
 SEC. 1790. Same—Same—To call for legal title.
 SEC. 1791. Same—Same—Same—When reconveyance presumed.
 SEC. 1792. Same—Same—To maintain ejectment.
 SEC. 1793. Same—Estoppel of.
 SEC. 1794. Of third parties—Creditors of beneficiary.
 SEC. 1795. Same—For performance of trust.

SECTION 1765. **Introductory.**—The rights and powers of both trustees and *cestuis que trust* necessarily vary materially with the character and terms of the particular trust. Where the trust is an executed one, the rights and authorities of the trustee are least and those of the *cestui que trust* are greatest; while the status is reversed where the trust is an executory one. Where the trust is active, the powers that either the trustee or the *cestui que trust* may have, and which are peculiar to such trusts, depend entirely upon the provisions of each particular trust, and for that reason no general rule can be laid down for their government. But in all trusts possessory actions, and actions for the protection of the legal estate, must be brought by the trustee, who is the custodian of such estate, and in courts of law is deemed entitled to the possession of the land; the *cestui que trust* cannot maintain such actions,¹ and the trustee may even oust him from the possession. Where the *cestui que trust* is in possession he holds merely as a tenant at sufferance,² or at will,³ of the trustee;⁴ and a trustee

¹ In Pennsylvania, in the early case of *Kennedy v. Fury*, 1 U. S. (1 Dal.) 72; bk. 1 L. ed. 42, it was held that the *cestui que trust* may bring ejectment in his own name. The court say: "We have no court of equity here; and, therefore, unless the *cestui que trust* could bring an ejectment in his own name, he would be without remedy in the case of an obstinate trustee."

See: *Post*, § 1792.

² See: *Ante*, § 1459, *et seq.*

³ See: *Ante*, § 1378, *et seq.*

⁴ *Gunn v. Barrow*, 17 Ala. 743;
Fitzpatrick v. Fitzgerald, 79 Mass. (13 Gray) 400;
Russell v. Lewis, 19 Mass. (2 Pick.) 508;
Brown v. Combs, 29 N. J. L. (5 Dutch.) 36;
Newton v. McLean, 41 Barb. (N. Y.) 285, 289;
Trustees of Methodist Episcopal Church in Pultney v. Stewart, 27 Barb. (N. Y.) 553;
Hepburn v. Hepburn, 2 Bradf. (N. Y.) 74;

may maintain trover against him for a conversion of the trust property.¹

SEC. 1766. **Of trustees—In respect to beneficiary.**—It is a general rule that a trustee will not be permitted to deal with the *cestui que trust* in reference to the trust estate, because no party can be permitted to purchase an interest where he has a duty to perform that is inconsistent with the character of such purchase.² There are cases, however, where purchases made by a trustee of his *cestui que trust* have been supported; but these are where, after a scrupulous examination of all the circumstances, the court is satisfied that there is no fraud, no concealment, no advantage taken by the trustee of the information acquired by him in the character of trustee.³ Con-

- Jackson *v.* Van Slyck, 8 John. (N. Y.) 487;
 Mordecai *v.* Parker, 3 Dev. (N. C.) 425;
 White *v.* Albertson, 3 Dev. (N. C.) 241; s.c. 22 Am. Dec. 719;
 Freeman *v.* Cooke, 6 Ired. (N. C.) Eq. 373;
 William's Appeal, 83 Pa. St. 377;
 Woodman *v.* Good, 6 Watts & S. (Pa.) 169;
 Aiken *v.* Smith, 1 Sneed (Tenn.) 304;
 Beach *v.* Beach, 14 Vt. 28; s.c. 39 Am. Dec. 204;
 Stone *v.* Bishop, 4 Cliff. C. C. 593; s.c. Fed. Cas. No. 13482;
 Allen *v.* Imlet, 1 Holt 641;
 May *v.* Taylor, 6 Man. & Gr. 261; s.c. 46 Eng. C. L. 259.
¹ Reece *v.* Allen, 10 Ill. (5 Gilm.) 241; s.c. 48 Am. Dec. 336;
 Sawyer *v.* Skowhegan, 57 Me. 500, 513;
 Fitzpatrick *v.* Fitzgerald, 79 Mass. (13 Gray) 402;
 Guphill *v.* Isbell, 1 Bailey (S. C.) L. 230; s.c. 19 Am. Dec. 675;
 Cearnas *v.* Irving, 31 Vt. 604, 606;
 Pownal *v.* Myers, 16 Vt. 408, 414;
 Doe ex d. Reade *v.* Reade, 8 Durnf. & E. (8 T. R.) 118.
² Van Dyke *v.* Johns, 1 Del. Ch. 93; s.c. 12 Am. Dec. 76;
 Robbins *v.* Butler, 24 Ill. 387;
 Casey *v.* Casey, 14 Ill. 112;
 Grider *v.* Payne, 9 Dana (Ky.) 188, 190;
 Ricketts *v.* Montgomery, 15 Md. 46;
 Davis *v.* Simpson, 5 Har. & J. (Md.) 147; s.c. 9 Am. Dec. 500;
 Singstack *v.* Harding, 4 Har. & J. 186; s.c. 7 Am. Dec. 669;
 Dorsey *v.* Dorsey, 3 Har. & J. (Md.) 410; s.c. 6 Am. Dec. 506;
 Ames *v.* Port Huron L. D. B. Co., 11 Mich. 139; s.c. 83 Am. Dec. 731;
 Winn *v.* Dillon, 27 Miss. 494;
 Jamison *v.* Glascock, 29 Mo. 191;
 Hoitt *v.* Webb, 36 N. H. 158;
 Torrey *v.* Bank of Orleans, 9 Paige Ch. (N. Y.) 649;
 Van Epps *v.* Van Epps, 9 Paige Ch. (N. Y.) 237;
 Hill *v.* Frazier, 22 Pa. St. 320;
 McCants *v.* Bee, 1 McC. (S. C.) Eq. 383; s.c. 16 Am. Dec. 610;
 Collins *v.* Smith, 1 Head (Tenn.) 251;
 Moore *v.* Hilton, 12 Leigh (Va.) 1;
 Michoud *v.* Girod, 45 U. S. (4 How.) 503; bk. 11 L. ed. 1077.
³ McCants *v.* Bee, 1 McC. (S. C.) Eq. 383; s.c. 16 Am. Dec. 610.
 See: Morse *v.* Royal, 12 Ves. 355, 372, 373; s.c. 8 Rev. Rep. 338;
 Coles *v.* Trecothick, 9 Ves. 234, 247; s.c. 7 Rev. Rep. 167;
 Gibson *v.* Jeyes, 6 Ves. 266; s.c. 5 Rev. Rep. 295.
Purchases by a trustee from his cestui que trust will not be sustained by courts of equity unless, after

tracts between *cestuis que trust* and their trustees, although not void, are strictly scrutinized by courts of equity in order that no injustice may be done the *cestui que trust*, and before the same will be upheld it must appear that the latter were free to act as rational intelligent men.¹ Fraud or advantage on the part of the purchaser need not be shown in such case.² Neither will a trustee be permitted to derive any benefit from a contract in reference to the subject-matter of the trust. Thus where he purchases a mortgage or a judgment, which is a lien on the trust estate, such purchase inures to the benefit of the *cestui que trust*.³ This is on the well-recognized principle in equity that a person placed in a situation of trust and confidence with respect to the subject of a purchase cannot retain such purchase for his own exclusive benefit.⁴ The object of the rule is to keep trustees within the line of their duty, for, as Chancellor KENT says in *Green v. Winter*,⁵ “a court of equity watches the conduct of a trustee with jealousy; and if he compounds debts or mortgages, or purchases them in

the most rigorous scrutiny, it clearly appears that there is no fraud or concealment in the transaction, and no advantage taken by the trustee of information obtained by him in that capacity.

McCants v. Bee, 1 McC. (S. C.) Eq. 383; s.c. 16 Am. Dec. 610.

¹ *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; s.c. 18 Am. Dec. 250;

Bruch v. Lantz, 2 Rawle (Pa.) 392; s.c. 21 Am. Dec. 458.

² *Bruch v. Lantz*, 2 Rawle (Pa.) 392; s.c. 21 Am. Dec. 458.

³ *McClanahan v. Henderson*, 2 A. K. Marsh. (Ky.) 388; s.c. 12 Am. Dec. 412;

Green v. Winter, 1 John. Ch. (N. Y.) 27; s.c. 7 Am. Dec. 475.

See: *Norris v. Le Neve*, 3 Atk. 37;

Morret v. Paske, 2 Atk. 52;

Forbes v. Ross, 2 Bro. C. C. 430.

Buying in adverse claim.—Where one holding a tract of land, one-half to himself and one-half as a trustee for another, buys in an adverse claim, the latter is entitled to the benefit of half

of such a claim, and is liable for half the purchase-money and interest.

McClanahan v. Henderson, 2 A. K. Marsh. (Ky.) 388; s.c. 12 Am. Dec. 412.

⁴ *Brittin v. Handy*, 20 Ark. 381; s.c. 73 Am. Dec. 497;

⁴ *Kent Com.* (13th ed.) 371;

² *Story Eq. Jur.* (13th ed.), § 1211a.

See: *Wilson v. Troup*, 2 Cow. (N. Y.) 195; s.c. 14 Am. Dec. 458;

Steele v. Babcock, 1 Hill (N. Y.) 527;

Davoue v. Fanning, 2 John. Ch. (N. Y.) 252;

Holdrige v. Gillespie, 2 John. Ch. (N. Y.) 30;

Carter v. Palmer, 11 Bligh 397, 418, 419;

Lees v. Nuttall, 1 Russ. & M. 53; s.c. Tam. 382;

Griffin v. Griffin, 1 Sch. & Lef. 352; s.c. 9 Rev. Rep. 51;

James v. Dean, 11 Ves. 392; s.c. 15 Ves. 236; 8 Rev. Rep. 178;

Nesbitt v. Tredenick, 1 Ball & B. 46, 47.

⁵ 1 John. Ch. (N. Y.) 27; s.c. 7 Am. Dec. 475.

at a discount, he shall not be suffered to turn the speculation to his own advantage."

SEC. 1767. **Same**—In respect to trust property—Estate and title.—The relation existing between a trustee and his *cestui que trust*, as regards the title of the trust estate, is that subsisting between a landlord and tenant.¹ As between the trustee and his *cestui que trust* the former can have no equity against the express trusts to which he assented ;² and takes exactly that quantity of interest in the property conveyed which the purposes of the trust require, and in the absence of any express limitation sufficient to carry the legal inheritance. The estate of the trustees may be enlarged and extended into such an estate as the nature of the trust may require ; the construction in this respect is to be governed mainly by the intention of the testator, as gathered from the general scope of the will.³ When the purposes of the trust are executed the trust estate ceases.⁴ In case of doubt as to what estate the trustee has, he will be presumed to take an estate large enough to enable him

¹ Wilden v. Bodley, 39 U. S. (14 Pet.) 156 ; bk. 10 L. ed. 398.

² Smith v. McCann, 65 U. S. (24 How.) 398 ; bk. 16 L. ed. 714.

³ Ellis v. Fisher, 3 Sneed (Tenn.) 231 ; s.c. 65 Am. Dec. 52 ;

Neilson v. Lagow, 53 U. S. (12 How.) 98 ; bk. 13 L. ed. 909.

See : Murdock v. Johnson, 7 Coldw. (Tenn.) 611 ;

Williamson v. Wickersham, 2 Coldw. (Tenn.) 52, 55 ;

Harding v. St. Louis Life Ins. Co., 3 Cooper Ch. (Tenn.) 468 ;

Hooberry v. Harding, 10 Lea (Tenn.) 397 ;

Henderson v. Hill, 9 Lea (Tenn.) 25, 32 ;

Turley v. Massengill, 7 Lea (Tenn.) 359 ;

Say-and-Seal v. Jones, 3 Bro. C. C. 113 ; s.c. 1 Eq. Cas. Abr. 383 ;

Robinson v. Grey, 9 East 1 ;

Doe d. Hallen v. Ironmonger, 3 East 533.

Language of instrument—Intention of parties.—Although a deed contains some language which, taken by itself, might raise a

use executed, such language is controlled by an intent manifested in the instrument to have the legal estate remain in the trustees, to enable him to execute a trust which the deed declares ; and where the trust is to sell and convey in fee-simple absolute, a legal title is vested in the trustees commensurate with the interest which they must convey in execution of the trust.

Neilson v. Lagow, 53 U. S. (12 How.) 98 ; bk. 13 L. ed. 909.

⁴ Hooberry v. Harding, 3 Cooper Ch. (Tenn.) 677, 681 ;

Belote v. White, 2 Head (Tenn.) 703, 708 ;

Smith v. Metcalf, 1 Head (Tenn.) 64, 68 ;

Turner v. Ivie, 5 Heisk. (Tenn.) 222, 234 ;

Bowers v. Bowers, 4 Heisk. (Tenn.) 293, 303 ;

Turley v. Massengill, 7 Lea (Tenn.) 359 ;

Beecher v. Hicks, 7 Lea (Tenn.) 207, 213.

to accomplish the purposes of the trust;¹ but he will never be construed to take or hold a greater estate than the nature of the trust requires.²

A deed to trustees and their successors in trust, with power to sell in fee-simple, vests a legal estate in fee-

¹ Trustees take exactly that quantity of interest in estate which purposes of trust require, and in the absence of any express limitation sufficient to carry the legal inheritance, the estate of the trustees may be enlarged and extended into such an estate as the nature of the trust may require; the construction in this respect to be governed mainly by the intention of the testator, as gathered from the general scope of the will.

Ellis v. Fisher, 3 Sneed (Tenn.) 231; s.c. 65 Am. Dec. 62.

² *Morton v. Barrett*, 22 Me. 257; s.c. 39 Am. Dec. 575;

Gould v. Lamb, 52 Mass. (11 Met.) 84; s.c. 45 Am. Dec. 187;

Coulter v. Robertson, 24 Miss. 278; s.c. 57 Am. Dec. 168;

Rice v. Burnett, 1 Speer (S. C.) Eq. 579; s.c. 42 Am. Dec. 336;

Ellis v. Fisher, 3 Sneed (Tenn.) 231; s.c. 65 Am. Dec. 62;

Portis v. Hill, 14 Tex. 69; s.c. 65 Am. Dec. 99;

Webster v. Cooper, 55 U. S. (14 How.) 488; bk. 14 L. ed. 510;

Doe ex d. White v. Simpson, 5 East 162;

Doe ex d. Woodcock v. Barthrop, 5 Taunt. 283; s.c. 1 Eng. C. L. 200.

See: *Cleveland v. Hallett*, 60 Mass. (6 Cush.) 403, 407;

Curtis v. Gardner, 54 Mass. (13 Met.) 457, 463.

Passing of fee to trustee—Word “heirs” not necessary.—Fee-simple passes by conveyance in trust when necessary to the execution of the trusts, although the word “heirs” is not used; as where the conveyance is to the trustee, “to have and to hold the said granted premises to the said M. H., in trust as aforesaid, and to his successors and assigns, to his and their sole use and behoof forever,” where the trusts

created by the indenture are such that the trustee must have the fee-simple title in order to execute them.

Gould v. Lamb, 52 Mass. (11 Met.) 84; s.c. 45 Am. Dec. 187.

Two parcels of land in one conveyance—Dissimilar estates pass when.—

Where two parcels of land are devised to trustees in the same words, it does not necessarily follow that they take a legal estate in one; they are required to do certain acts regarding it which can only be done by the holder of the legal estate, they take a legal estate in the other, concerning which such acts are not required.

Webster v. Cooper, 55 U. S. (14 How.) 488; bk. 14 L. ed. 510.

Conveyance in trust for others—Estate vests when.—Real estate being devised to trustees and their heirs, to use of or in trust for another and his heirs, if the testator has imposed upon the trustees any trust or duty, the performance of which requires that the estate should be vested in them, they will take an estate co-extensive with the duties to be performed; if not, the legal ownership will pass over to the beneficial devisee.

Ellis v. Fisher, 3 Sneed (Tenn.) 231; s.c. 65 Am. Dec. 62.

Nominal vendee naked trustee when.—Where it appears that vendee in deed is mere nominal party, that consideration passed from another, and that conveyance was made for latter's sole and exclusive benefit, it seems that the nominal vendee is a mere naked trustee, having no estate, no interest in the lands conveyed, which will pass to his legal representatives, or which his heirs can take by inheritance.

Portis v. Hill, 14 Tex. 69; s.c. 65 Am. Dec. 99.

simple in the trustees without words of limitation, such an estate being necessary to the execution of the trust.¹ Parol evidence is inadmissible to enlarge the estate of a trustee, and to show that he has not merely a barren legal title, but a beneficial interest which was liable for the payment of his debts.² Evidence to prove that the trusts in a deed are fraudulent, and that the deed was executed to hinder and defraud creditors, is not admissible for the purpose of showing that the grantee had a beneficial interest in the property, liable to be seized and sold for payment of his debts.³

SEC. 1768. **Same—Same—Continuance of estate.**—At law it is the settled rule that a trust estate, given for specific purposes, should continue for so long a period only as is necessary to effect the purposes of the trust;⁴ even in those cases where words of inheritance are used in the instrument creating the trust, the estate does not continue in the trustee for a longer time than is necessary for the performance of such trust.⁵

SEC. 1769. **Same—Same—At common law.**—At common law the trustee is regarded as the owner of the trust property,⁶ but whether he takes the legal title or not

¹ Neilson v. Lagow, 53 U. S. (12 How.) 98; bk. 13 L. ed. 909.

² Smith v. McCann, 65 U. S. (24 How.) 398; bk. 16 L. ed. 714.

In an ejectment suit brought by one claiming under a trustee by virtue of a sale on execution against the trustee, where the *cestuis que trust* are not before the court, an inquiry into the validity of the trusts cannot be made for the purpose of enlarging the trustee's interest to cover the whole title and estate.

Smith v. McCann, 65 U. S. (24 How.) 398; bk. 16 L. ed. 714.

³ Smith v. McCann, 65 U. S. (24 How.) 398; bk. 16 L. ed. 714.

⁴ Coulter v. Robertson, 24 Miss. 278; s.c. 57 Am. Dec. 168;

Steacy v. Rice, 27 Pa. St. 75; s.c. 67 Am. Dec. 447;

Doe ex d. Player v. Nicholls, 2 Dow. & Ry. 480; s.c. 16 Eng. C. L. 103.

⁵ Coulter v. Robertson, 24 Miss. 278; s.c. 57 Am. Dec. 168;

Brown v. Webster, 8 Miss. (7 How.) 185;

Doe ex d. Player v. Nicholls, 2 Dow. & Ry. 480; s.c. 16 Eng. C. L. 103;

Doe v. Simpson, 5 East 162;

Doe ex d. Woodcock v. Barthrop, 5 Taunt. 382; s.c. 1 Eng. C. L. 200.

⁶ Webster v. Cooper, 55 U. S. (14 How.) 488; bk. 15 L. ed. 510; Neilson v. Lagow, 53 U. S. (12 How.) 98; bk. 13 L. ed. 909.

Where trustees are in the exclusive possession and control of property for the benefit of a charity, and are to lease the property and apply the proceeds to the purposes specified, and "do all other legal acts for the well-ordering and management of the estate," they are clothed with the legal estate.

depends chiefly on the fact whether the testator has imposed upon him any active trust or duty, the performance of which requires that the legal estate should be vested in him in order that he may execute the declared purposes of the will.¹

SEC. 1770. **Same—Same—Right to maintain action.**—The legal estate being in the trustee, he may maintain an action at law for the possession of the same;² may sue or defend all suits at law in regard to it, in the absence of a prohibition in the instrument creating the trust estate.³ We have already seen that a trustee may even

Stanley v. Colt, 72 U. S. (5 Wall.) 119; bk. 18 L. ed. 502.

¹ Morton v. Barrett, 22 Me. 257; s.c. 39 Am. Dec. 575;

Hooberry v. Harding, 3 Cooper Ch. (Tenn.) 677, 680;

Ellis v. Fisher, 3 Sneed (Tenn.) 231; s.c. 65 Am. Dec. 52;

Sanford v. Irby, 3 Barn. & Ald. 654; s.c. 5 Eng. C. L. 376;

Houston v. Hughes, 6 Barn. & C. 403; s.c. 13 Eng. C. L. 188;

Murthwaite v. Jenkinson, 2 Barn. & C. 336; s.c. 9 Eng. C. L. 162;

Tenney v. Moody, 3 Bing. 3; s.c. 11 Eng. C. L. 12;

Harton v. Harton, 7 Durnf. & E. (7 T. R.) 652; s.c. 4 Rev. Rep. 537;

Silvester v. Wilson, 2 Durnf. & E. (2 T. R.) 441; s.c. 1 Rev. Rep. 519;

Wykham v. Wykham, 18 Ves. 414;

Biscoe v. Perkins, 1 Ves. & B. 485, 489; s.c. 12 Rev. Rep. 279.

Legal title remains in the trustee where real estate or personal property has been vested in him to be held by one person until marriage; afterwards for the joint use of husband and wife, and of the survivor, with contingent remainder over.

Rice v. Burnett, 1 Speer (S. C.) Eq. 579; s.c. 42 Am. Dec. 336.

Trustee's title does not cease at death of married woman, where slaves are conveyed to him by deed, his heirs, executors, and administrators, in trust for her sole and separate use during her

life, and after her death for the use, benefit, and behoof of her children by her present husband, and their heirs forever.

Bryan v. Weems, 29 Ala. 423; s.c. 65 Am. Dec. 407.

Where the testators devise an estate to trustees in trust for use and benefit of a *feme covert* during her natural life, and at her death to the use of the heirs of her body, and in default of heirs of her body, then to the testator's own right heirs; the evident intention of the trust being to protect the property against the marital rights of the husband, the trustees take only a legal estate for the life of the *feme covert*, and upon her death the legal title vests in the heirs of her body as purchasers, under the limitation in the will.

Ellis v. Fisher, 3 Sneed (Tenn.) 231; s.c. 65 Am. Dec. 52.

² Commissioners of the Sinking Fund v. Walker, 7 Miss. (6 How.) 143; s.c. 38 Am. Dec. 433.

³ Huckabee v. Billingsly, 16 Ala. 414; s.c. 50 Am. Dec. 183.

See: Marriott v. Givens, 8 Ala. 694;

Chambers v. Mauldin, 4 Ala. 477;

Nicoll v. Mumford, 4 John. Ch. (N. Y.) 522, 529;

Gray v. Hill, 10 Serg. & R. (Pa.) 436;

Galt v. Dibrell, 10 Yerg. (Tenn.) 146;

Brooks v. Marbury, 24 U. S. (11 Wheat.) 79, 97; bk. 6 L. ed. 423;

bring an action in ejectment and recover the possession as against his *cestui que trust*.¹ This is on the ground that at common law the trustee is the legal owner of the property, and for that reason entitled to the possession thereof as against all the world so long as the trust remains.² But a trustee will not be permitted to prejudice the rights or interests of his *cestui que trust* by submission to arbitration, and equity will enjoin him from so doing; and if such submission be made without the approbation of the *cestui que trust*, he will not be bound.³

SEC. 1771. **Same—In management of estate.**—A trustee is bound to manage and employ the trust property for the benefit of the *cestui que trust*, with the care and diligence that a provident owner would ordinarily use in his own business; and no matter how full a discretionary power of management may be given, if the trustee omit doing what would be plainly beneficial, he will be answerable therefor.⁴ Thus, where a trust estate consists

- Halsey v. Fairbanks, 4 Mas. C. C. 206; s.c. Fed. Cas. No. 5964;
 Small v. Marwood, 9 Barn. & C. 300; s.c. 17 Eng. C. L. 140;
 Acton v. Woodgate, 2 Myl. & K. 492;
 Garrard v. Lauderdale, 3 Sim. 11.
 Beach v. Beach, 14 Vt. 28; s.c. 39 Am. Dec. 204.
 See: Reece v. Allen, 10 Ill. (5 Gilm.) 236; s.c. 48 Am. Dec. 336;
 Matthews v. Ward's Lessee, 10 Gill & J. (Md.) 443;
 Fitzpatrick v. Fitzgerald, 30 Mass. (13 Gray) 400;
 Pownal v. Myers, 16 Vt. 408;
 Doe v. Reade, 8 Durnf. & E. (8 T. R.) 118, 122;
 Doe v. Wroot, 5 East 132.
² See: Reece v. Allen, 10 Ill. (5 Gilm.) 236; s.c. 48 Am. Dec. 336;
 Peck v. Newton, 46 Barb. (N. Y.) 173;
 Moore v. Spellman, 5 Den. (N. Y.) 225;
 Jackson v. Pierce, 2 John. (N. Y.) 221;
 Smith's Lessee v. Hunt, 13 Ohio 260; s.c. 42 Am. Dec. 201;
- Doe v. Reade, 8 Durnf. & E. (8 T. R.) 118;
 Goodtitle v. Jones, 7 Durnf. & E. (7 T. R.) 47;
 Doe v. Staples, 2 Durnf. & E. (2 T. R.) 684; s.c. 1 Rev. Rep. 595;
 Doe v. Wroot, 5 East 132.
³ Crum v. Moore, 14 N. J. Eq. (1 McC.) 436; s.c. 82 Am. Dec. 264.
⁴ Christy v. McBride, 2 Ill. 75;
 Fudge v. Durn, 51 Mo. 264, 266;
 State v. Meagher, 44 Mo. 356;
 Litchfield v. White, 7 N. Y. 438;
 Nyce's Estate, 5 Watts & S. (Pa.) 254; s.c. 40 Am. Dec. 498;
 Carpenter v. Carpenter, 12 R. I. 544;
 Mikell v. Mikell, 5 Rich. (S. C.) Eq. 220;
 Belchier v. Parsons, Ambl. 219;
 Massey v. Banner, 1 Jac. & W. 241;
 Speight v. Gaunt, L. R. 22 Ch. D. 727; s.c. L. R. 9 App. Cas. 1;
 53 L. J. Ch. 503; 48 L. T. 279;
 31 W. R. 401; 53 L. J. Ch. 419.
 Where the trustee in the management of the trust property is guilty of fraud or negligence, want of caution, misrep-

of money, it is the duty of the trustee, in management of the trust fund, to keep it invested in good securities;¹ and where it consists of lands it is his duty to keep it rented to the best advantage and to collect the rents therefrom,² pay off all taxes and other charges against the estate,³ and at his discretion to pay any incumbrance on the trust property.⁴ But a trustee in possession of trust property is only bound to ordinary diligence in its preservation and protection.⁵

Trustees are not allowed to deal with the trust estate for their own benefit,⁶ cannot pledge the trust subject,⁷

resentation, mistake or concealment, or wilful conduct or misapplication, or omits doing what is plainly beneficial to the estate, notwithstanding the utmost latitude may be given for the conducting of the trust, he will be guilty of a breach of trust.

Hutchinson v. Lord, 1 Wis. 286 ; s.c. 60 Am. Dec. 381.

¹ *Commissioners of the Sinking Fund v. Walker*, 7 Miss. (6 How.) 143 ; s.c. 38 Am. Dec. 433 ;

Knowlton v. Bradley, 17 N. H. 458 ; s.c. 43 Am. Dec. 609.

² *Mansfield v. Alwood*, 84 Ill. 497 ; *Hepburne v. Hepburne*, 2 Ill. App. 74.

³ *Mansfield v. Alwood*, 84 Ill. 497 ; *Hepburne v. Hepburne*, 2 Ill. App. 74.

⁴ *Pratt v. Thornton*, 28 Me. 355 ; s.c. 48 Am. Dec. 492.

See : *Mansfield v. Alwood*, 84 Ill. 497 ;

Hepburne v. Hepburne, 2 Ill. App. 74.

⁵ *Campbell v. Miller*, 38 Ga. 304 ; s.c. 95 Am. Dec. 389.

As to the amount of care required of trustees in the preservation and protection of the trust estate,

See : *Christy v. McBride*, 2 Ill. 75 ;

Commissioners of the Sinking Fund v. Walker, 7 Miss. (6 How.) 143 ; s.c. 38 Am. Dec. 433 ;

Fudge v. Durn, 51 Mo. 266 ;

State v. Meagher, 44 Mo. 356 ;

Kimball v. Reding, 31 N. H. 352 ;

s.c. 64 Am. Dec. 333 ;

Knowlton v. Bradley, 17 N. H. 458 ; s.c. 43 Am. Dec. 609 ;

Litchfield v. White, 7 N. Y. 438 ; *Carpenter v. Carpenter*, 12 R. I. 544 ;

Mikell v. Mikell, 5 Rich. (S. C.) Eq. 220 ;

Hutchinson v. Lloyd, 1 Wis. 286 ; s.c. 60 Am. Dec. 381 ;

Belchier v. Parsons, Ambl. 219 ; *Massey v. Banner*, 1 Jac. & W. 241 ;

Speight v. Gaunt, L. R. 22 Ch. D. 727 ; s.c. L. R. 9 App. Cas. 1 ; 52 L. J. Ch. 503 ; 48 L. T. 279 ; 31 N. R. 401 ; 53 L. J. Ch. 419.

A trustee is not answerable for losses accruing without any fault or negligence on his part.

Knowlton v. Bradley, 17 N. H. 458 ; s.c. 43 Am. Dec. 609.

⁶ *Miller v. Davidson*, 8 Ill. 518 ; s.c. 44 Am. Dec. 715.

See : *Mulligan v. Wallace*, 3 Rich. (S. C.) Eq. 111.

This is a case where W and R were administrators appointed in the state of Michigan, of the estate of B. They and another party agreed to purchase lands in Illinois, "owned or pretended to be owned" by such estate and a bank, and to pay a price therefor to be measured by the price paid in the bank. The court held (1) that whether the estate had title or not, the contract to purchase was one that a trustee of the estate could not lawfully make; but (2) that the letters of adminis-

⁷ *Shaw v. Spencer*, 100 Mass. 382 ; s.c. 1 Am. Rep. 115.

or use the money arising therefrom in their own business,¹ or in continuing that of the testator.² Neither are they permitted to mix the proceeds arising from the trust estate with their own moneys, and, if they do so, will be chargeable with interest, and their bondsman will be liable in case of loss.³ It is also a breach of trust to

tration issued in Michigan gave the administrators no control over lands in Illinois, and that the contract was not in fraud of their duty as trustees, and could be enforced against them. *Sheldon v. Estate of Rice*, 30 Mich. 296; s.c. 18 Am. Rep. 136.

¹ *Flagg v. Ely*, 1 Edm. (N. Y.) 206; s.c. 4 N. Y. Leg. Obs. 100; *Westover v. Chapman*, 1 Call (Va.) 177.

See: *Lathrop v. Smalley*, 23 N. Y. Eq. (8 C. E. Gr.) 192.

Where the private business of the trustee is not hazardous in its nature, and he is a man of large means, and the money is in no danger of being lost, it is not necessarily a breach of trust, authorizing the removal of the trustee, that he uses the funds arising from the trust in his own business.

Lathrop v. Smalley, 23 N. J. Eq. (8 C. E. Gr.) 192.

A trustee cannot loan the funds arising from the trust estate to a firm of which he is a member (*French v. Hobson*, 9 Ves. 103) except in those cases where the instrument creating the trust authorizes such a loan.

Paddon v. Richardson, 7 DeG. M. & G. 563.

² This is true in those cases where the instrument creating the trust does not authorize such an investment or continuance, although the *cestui que trust* has an election to claim the profits of the investment if he chooses.

Kyle v. Barnett, 17 Ala. 306;

Brown v. Rickets, 4 John. Ch. (N. Y.) 303; s.c. 8 Am. Dec. 567;

Thompson v. Brown, 4 John. Ch. (N. Y.) 619;

Ryder v. Sisson, 7 R. I. 341;

Spear v. Spear, 9 Rich. (S. C.) Eq.

184, 186;

In re Thorp, 2 Ware (Dav.) C. C. 290; s.c. 4 N. Y. Leg. Obs. 377; Fed. Cas. No. 14002;

Collinson v. Lister, 20 Beav. 356;

Kirkman v. Booth, 11 Beav. 273, 280; s.c. 18 L. J. Ch. 25; 13 Jur. 525;

Booth v. Booth, 1 Beav. 125;

Cock v. Goodfellow, 10 Mod. 495;

Wedderburn v. Wedderburn, 4 My. & C. 41;

Docker v. Somes, 2 My. & K. 655.

The trustee may continue the business of the testator, no doubt, upon the request of all the parties interested.

Poole v. Munday, 103 Mass. 174.

³ *Knowlton v. Bradley*, 17 N. H. 458; s.c. 43 Am. Dec. 609;

Gordon v. West, 8 N. H. 444, 455.

Where the trustee mixes the trust funds with his own money and uses it in his business or trade, the profits of which cannot be ascertained, he is liable for interest.

Brown v. Rickets, 4 John. Ch. (N. Y.) 303; s.c. 8 Am. Rep. 567.

See: *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 79; s.c. 18 Am. Dec. 250, 265;

Gillet v. Van Rensselaer, 15 N. Y. 397, 400;

Cowing v. Howard, 46 Barb. (N. Y.) 579, 580;

Duffy v. Duncan, 32 Barb. (N. Y.) 587, 593;

Schieffelin v. Stewart, 1 John. Ch. (N. Y.) 620, 623, 624, 629; s.c. 7 Am. Dec. 507;

Manning v. Manning, 1 John. Ch. (N. Y.) 527, 535;

Dunscorn v. Dunscomb, 1 John. Ch. (N. Y.) 508, 510; s.c. 7 Am. Dec. 504;

Child v. Gibson, 2 Atk. 603;

Adams v. Gale, 2 Atk. 106;

Ratcliffe v. Graves, 2 Ch. Cas. 152; s.c. 1 Vern. 196;

permit the trust property to be diverted from its destination, or to diminish in value.¹

It is thought that a trustee will not be permitted to change the trust subject by substituting other property in its place, to be held subject to the same trust;² neither can the trustee convert money into land, or land into money, at his pleasure, unless specially authorized; and if he invests money in land, the *cestui que trust* may take the land or demand the money, at his option.³ We have already seen⁴ that the utmost good faith is required where fiduciary relation exists, in all transactions, so as to prevent undue advantage being taken; and if in such a case there is any suspicion of artifice or undue influence, equity will pronounce the transaction void.⁵ Yet a trustee may contract with his *cestui*

Lee v. Lee, 2 Vern. 548.

In *Brown v. Rickets*, *supra*. Chancellor KENT says that if a "trustee mingles the trust money with his own, so as to answer the purpose of credit, or if he puts the money in jeopardy by involving it in the risk of his trade, he must answer for what it may reasonably be supposed to have made."

Citing: *Schieffelin v. Stewart*, 1 John. Ch. (N. Y.) 620, 623, 629; s.c. 7 Am. Dec. 507;

Manning v. Manning, 1 John. Ch. (N. Y.) 527, 535;

Dunscomb v. Dunscomb, 1 John. Ch. (N. Y.) 508, 510; s.c. 7 Am. Dec. 504.

Abuse of trust does not confer any privilege on the guilty party, nor on those in privity with him.

Brown v. Johnson, 20 Miss. (12 Smed. & M.) 398; s.c. 51 Am. Dec. 118.

¹ *Pearson v. Moreland*, 15 Miss. (7 Smed. & M.) 609; s.c. 45 Am. Dec. 319;

Planter's Bank v. Neely, 8 Miss. (7 How.) 80; s.c. 40 Am. Dec. 51;

Hester v. Wilkinson, 6 Humph. (Tenn.) 215; s.c. 44 Am. Dec. 303;

Michoud v. Girod, 45 U. S. (4 How.) 503; bk. 11 L. ed. 1076.

Fraud on the part of the trustee, tending to defeat the ends of his trust, renders his acts void, and they will be set aside at the instance of any party in interest, where the application has been made at the earliest opportunity, and before any rights have accrued to innocent third parties.

Planter's Bank v. Neely, 8 Miss. (7 How.) 80; s.c. 40 Am. Dec. 51.

Chancery never permits trustees to break in upon the capital of the trust fund, of their own authority. To sanction the expenditure after it has been made would give a license to trustees that would endanger estates committed to them.

Hester v. Wilkinson, 6 Humph. (Tenn.) 215; s.c. 44 Am. Dec. 303.

² *Heth v. Richmond, F. & P. R. Co.*, 4 Gratt. (Va.) 482; s.c. 50 Am. Dec. 88.

³ *Kaufman v. Crawford*, 9 Watts & S. (Pa.) 131; s.c. 42 Am. Dec. 323.

See: *Bonsall's Case*, 1 Rawle (Pa.) 266, 274.

⁴ See: *Ante*, § 1766.

⁵ *Juzan v. Toulmin*, 9 Ala. 662; s.c. 44 Am. Dec. 448.

See: *Field v. Arrowsmith*, 3 Humph. (Tenn.) 442; s.c. 39 Am. Dec. 185;

Buckles v. Lafferty's Legatees,

que trust in relation to the trust property, where the latter is of full age and capable of contracting, while the power of disposal is in the beneficiary ;¹ but in such case the *onus* of proof is on the trustee to show that it was done in good faith and without fraud.²

SEC. 1772. **Same—Same—General powers.**—The conduct of trustees in the management and disposition of trust property must be regulated and controlled by the provisions and conditions of the deed of trust ; and trustees accepting the trust, upon the terms and conditions creating it, have no power to alter, change, or dispense with those terms and conditions.³ Neither can they, by declaration of trust, relieve themselves of any duties thereof, though they may voluntarily assume new duties.⁴ We have already seen that a trustee is not permitted to allow a diminution of the trust fund ;⁵ and it follows as a corollary that the trustee will not be permitted to mortgage or otherwise encumber the trust estate.⁶ To this general rule there is an exception in those cases where a trustee takes a conveyance of real estate in trust for a married woman, in which case he may give a mortgage back to secure the payment of the purchase-

2 Rob. (Va.) 292 ; s.c. 40 Am. Dec. 752 ;

Bailey v. Robinsons, 1 Gratt. (Va.) 4 ; s.c. 42 Am. Dec. 540 ;

Blackford v. Christian, 1 Kn. A. C. 77.

¹ Marshall v. Stephens, 8 Humph. (Tenn.) 159 ; s.c. 47 Am. Dec. 601.

See : Coffee v. Ruffin, 4 Cald. (Tenn.) 487, 514.

² Baines v. Barnes, 64 Ala. 375, 383 ;

Juzan v. Toulmin, 9 Ala. 662 ; s.c. 44 Am. Dec. 448 ;

Coffee v. Ruffin, 4 Cald. (Tenn.) 487, 514 ;

Marshall v. Stephens, 8 Humph. (Tenn.) 159 ; s.c. 47 Am. Dec. 601.

³ Cassell v. Ross, 33 Ill. 244 ; s.c. 85 Am. Dec. 270 ;

Hunt v. Townshend, 31 Md. 336 ; s.c. 100 Am. Dec. 63 ;

Dolan v. Mayor, etc., of Baltimore, 4 Gill (Md.) 394, 405, 406.

See : Kimball v. Reding, 31 N. H. 352 ; s.c. 64 Am. Dec. 333.

Where trustees voluntarily confess judgment, contrary to the provision of the trust deed, such judgment is not a lien upon the trust property, and can only bind the individual property of the parties confessing it.

Hunt v. Townshend, 31 Md. 336 ; s.c. 100 Am. Dec. 63.

Paying over money in good faith.—Trustee does not transcend his power or abuse his trust by paying over to the *cestui que trust* money in good faith, where charged by the will of testator to do so, when in his judgment it seems necessary.

Kimball v. Reding, 31 N. H. 352 ; s.c. 64 Am. Dec. 333.

⁴ Nicoll v. Ogden, 29 Ill. 323 ; s.c. 81 Am. Dec. 311.

⁵ See : *Ante*, § 1771.

⁶ Green v. Sargeant, 23 Vt. 466 ; s.c. 56 Am. Dec. 88.

money, in those instances where the deed and mortgage are executed at the same time, and together form a part of one and the same transaction.¹ Where the trust estate, or a portion of it, consists of notes held in trust, when due, or the trust property consists of land rented for a cash rental, the trustee may receive payment in such currency as a prudent man would receive for debts due him individually under similar circumstances.²

SEC. 1773. Same—Same—Investment.—A trustee having trust funds in his hands is required to invest them and take the proper security therefor, and will be held liable for his failure to do so, in the absence of a good reason shown for such failure.³ It is an ancient principle of the English equity system that a trustee shall be held liable for all loss occasioned by an improper investment of the trust funds, even though such investment has been made in the utmost good faith and solely for the advancement of the objects of the trust, without any view to personal profit.⁴ This is on the principle that it is the duty of the trustee to invest the trust money in good securities,⁵ for

¹ *Mavrich v. Grier*, 3 Nev. 52; s.c. 93 Am. Dec. 373.

² *Campbell v. Miller*, 38 Ga. 304; s.c. 95 Am. Dec. 389.

Payment in Confederate currency, where accepted in good faith at a time when such currency was taken by prudent business men on their own account, has been held to be such care and prudence in receiving the same as to discharge the assignee of liability for the loss thereby sustained through the results of the war.

Hathorn v. Maynard, 54 Ga. 687, 688;

Jepson v. Patrick, 39 Ga. 569, 573.

Trustee who received Confederate currency in payment of promissory notes held in trust, before the adoption of the Georgia Code in 1863, and after its adoption invested it in securities not authorized by law, and without an order of court, did so at his own risk, and is liable for the

value of the currency at the same time when it should have been re-invested.

Campbell v. Miller, 38 Ga. 304; s.c. 95 Am. Dec. 389.

³ *Knowlton v. Bradley*, 17 N. H. 458; s.c. 43 Am. Dec. 609;

Smith v. Smith, 4 John. Ch. (N. Y.) 281.

⁴ *May v. Duke*, 61 Ala. 53; *Clough v. Bond*, 3 My. & C. 490, 496; s.c. 2 Jur. 968.

⁵ *Commissioners of the Sinking Fund v. Walker*, 7 Miss. (6 How.) 143; s.c. 38 Am. Dec. 433; *Kimball v. Reding*, 31 N. H. 352; s.c. 64 Am. Dec. 333.

Where directions, neither express nor implied, can be derived from the will of the donor as to the investment of trust funds, it is the duty of the trustee to whom money is conveyed in trust to invest it in good and safe securities.

Kimball v. Reding, 31 N. H. 352; s.c. 64 Am. Dec. 333.

the safety of the capital and certainty of the income.¹ The trustee is required to exercise such judgment as a prudent man would in his own affairs, keeping in view the purposes of the trust;² and if he acts with due prudence, discretion, and diligence, and in accordance with the established rules of equity, in making investments, and endeavoring to prevent loss, he will not be chargeable with any deterioration of the security or property in which the fund is laid out.³ An investment, to be deemed safe, must have some evidence that it is so, to distinguish it from mere adventure; it must have a valuation, yield an actual income, and not be founded upon remote contingencies.⁴ The fact that a trustee is directed to use his "best skill and judgment" in investing the trust funds does not enlarge his power and discretion by the use of the words "best skill and judgment."⁵

SEC. 1774. **Same—Same—Same—In name of trustee.**—A trustee cannot invest trust property, or the proceeds of trust property, in his own name; and if he does so the *cestui que trust* may either insist upon a transfer of the investment, or charge the trustee with the amount so invested and interest thereon.⁶ Neither can he place money arising from a trust fund or the proceeds of trust property in a bank in his own name, without liability for all loss resulting by reason thereof.⁷

- ¹ See: *Garesche v. Priest*, 9 Mo. App. 270;
Kimball v. Reding, 31 N. H. 352;
 s.c. 64 Am. Dec. 333;
Stewart v. Sanderson, L. R. 10 Eq. Cas. 26.
- ² *Commissioners of the Sinking Fund v. Walker*, 7 Miss. (6 How.) 143; s.c. 38 Am. Dec. 433;
Sand. on Uses, 364;
Willis on Trust, 126.
- ³ *Clough v. Bond*, 3 My. & C. 490, 496; s.c. 2 Jur. 968.
- ⁴ *Kimball v. Reding*, 31 N. H. 352;
 s.c. 64 Am. Dec. 333.
- ⁵ *Kimball v. Reding*, 31 N. H. 352;
 s.c. 64 Am. Dec. 333.
 See: *Harvard College v. Amory*, 26 Mass. (9 Pick.) 446.
- ⁶ *Morris v. Wallace*, 3 Pa. St. 319; s.c. 45 Am. Dec. 642.
 See: *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; s.c. 18 Am. Dec. 250;
Knowlton v. Bradley, 17 N. H. 458; s.c. 43 Am. Dec. 609;
McAllister v. Commonwealth, 30 Pa. St. 538;
Myers v. Entriken, 6 Watts & S. (Pa.) 44; s.c. 40 Am. Dec. 538;
Wren v. Kirton, 11 Ves. 377, 382; s.c. 8 Rev. Rep. 174.
- ⁷ *Jenkins v. Walter*, 8 Gill & J. (Md.) 218; s.c. 29 Am. Dec. 539;
In re Stafford, 11 Barb. (N. Y.) 353;
Commonwealth v. McAllister, 30 Pa. St. 536, aff'g s.c. 28 Pa. St. 480;

Yet where money is placed in a bank by a trustee merely for safe keeping until an investment can be found, although at a small rate of interest, and with a requirement of two weeks' notice for withdrawal, it is, when treated by the bank as a deposit and so entered on its books, merely a deposit, and not a loan to the bank, and is not at the trustee's risk, if he has used due care in selecting the bank.¹ But when a trustee opens a bank account for trust money he should be very careful to designate the account as for the trust, and not deposit in his own name; otherwise he will be liable for loss.

We have already seen that a trustee will not be permitted to change the trust property or fund;² but where a trustee changes the investment of trust funds with the consent of the *cestui que trust*, who is of full age, and capable of transacting business, he is not liable for any loss growing out of such new investment.³

SEC. 1775. Same—Same—Same—How investment made.—We have already seen that trustees are liable for investment of trust funds, or the proceeds of land held in trust, upon their own responsibility;⁴ but where investments are made by the trustee under the direction of a court of competent jurisdiction, this will protect the trustee from liability for loss.⁵ Thus it has been said in New Jersey that under the act relative to loaning money held by trustees, the permission of the court to loan the money

Barney v. Saunders, 57 U. S. (16 How.) 535; bk. 14 L. ed. 1047;

Darke v. Martyn, 1 Beav. 525;

Pennell v. Deffell, 4 DeG. M. & G. 372, 386, 392; s.c. 23 L. J. Ch. 115; 18 Jur. 273;

Massey v. Banner, 1 Jac. & W. 241;

Wilkinson v. Bewick, 4 Jur. N. S. 1010;

Lunham v. Blundell, 4 Jur. N. S. 3;

Speight v. Gaunt, L. R. 22 Ch. Div. 727; s.c. L. R. 9 App. Cas. 1; 52 L. J. Ch. 503; 48 L. T. 279; 31 W. R. 401; 53 L. J. Ch. 419;

Fletcher v. Walker, 3 Madd. 73;

Moyle v. Moyle, 2 Russ. & M. 710;

Lowry v. Fulton, 9 Sim. 115;

Wren v. Kirton, 11 Ves. 377; s.c. 8 Rev. Rep. 174; Lofft. 492.

¹ *Re Law's Estate*, 144 Pa. St. 499; s.c. 22 Atl. Rep. 831; 14 L. R. A. 103.

² See: *Ante*, § 1771.

³ *Campbell v. Miller*, 38 Ga. 304; s.c. 95 Am. Dec. 389.

⁴ *Hancom v. Allen*, 1 Dick. 498. See: *Ante*, § 1773.

⁵ See: *Re Cardwell*, 55 Cal. 137; *Brown v. Wright*, 39 Ga. 96; *Wheeler v. Perry*, 18 N. H. 307; *Gray v. Fox*, 1 N. J. Eq. (1 Saxt.) 259; s.c. 22 Am. Dec. 508.

should first be had ; the money should not be loaned and an order of approval applied for afterwards.¹

SEC. 1776. **Same—Same—Same—In what investment to be made.**—In this country the investment of trust funds, or the proceeds arising from real estate held in trust, are to be invested in real estate securities,² the general doctrine being imperative that the loaning of money upon mere personal security is a *prima facie* breach of trust.³ The investment by a trustee in bonds or stocks of private corporations is on the same footing with loans on personal security not protected by real estate mortgages, and the trustee is liable for any loss that may arise therefrom.⁴ But trust funds may safely be invested in government securities ;⁵ and state bonds and stocks are

¹ Gray v. Fox, 1 N. J. Eq. (1 Saxt.) 259 ; s.c. 22 Am. Dec. 508.

Order of the orphans' court, that money loaned remain on interest, is no protection to the administrator, such order being beyond the jurisdiction of the court.

Gray v. Fox, 1 N. J. Eq. (1 Saxt.) 259 ; s.c. 22 Am. Dec. 508.

² Gray v. Fox, 1 N. J. Eq. (1 Saxt.) 259 ; s.c. 22 Am. Dec. 508.

English doctrine.—In England there was a long period during which the investment of trust funds upon real estate security was not favored, and the English courts would neither direct nor sanction such an investment except under very special circumstances.

Ex parte Cathorpe, 1 Cox Ch. 182.

See : Raby v. Ridehalgh, 7 DeG. M. & G. 104 ;

Barry v. Marriott, 2 DeG. & S. 491 ;

Ex parte Franklin, 1 DeG. & S. 228 ;

Ridgeway's Minors, 1 Hogan 309 ;

Ex parte Ellice, Jac. 234 ;

Norbury v. Norbury, 4 Madd. 191 ;

Widdowson v. Duck, 2 Meriv. 494 ;

1 Perry on Trusts (4th ed.), § 457.

³ Gray v. Fox, 1 N. J. Eq. (1 Saxt.)

259 ; s.c. 22 Am. Dec. 508.

See : Corlies v. Corlies, 23 N. J. Eq. (8 C. E. Gr.) 197 ;

Lathrop v. Smalley, 23 N. J. Eq. (8 C. E. Gr.) 192.

In New Hampshire, however, the general rule that a trustee cannot, in any case, invest funds in his hands upon personal security has not been adopted.

Knowlton v. Bradley, 17 N. H. 458 ; s.c. 43 Am. Dec. 609.

⁴ Kimball v. Reding, 31 N. H. 352 ; s.c. 64 Am. Dec. 333 ;

Tucker v. Tucker, 33 N. J. Eq. (6 Stew.) 235 ;

Ward v. Kitchen, 30 N. J. Eq. (3 Stew.) 31 ;

Adair v. Brimmer, 74 N. Y. 539, 552 ;

King v. Talbot, 40 N. Y. 476, aff'g 50 Barb. (N. Y.) 453 ;

Ackerman v. Emott, 4 Barb. (N. Y.) 626 ;

Pray's Appeal, 34 Pa. St. 100 ;

Worrall's Appeal, 9 Pa. St. 508 ;

Morris v. Wallace, 3 Pa. St. 319 ; s.c. 45 Am. Dec. 642 ;

Trafford v. Boehm, 3 Atk. 440 ;

Hynes v. Redington, 1 Jones & Lat. 589.

⁵ Brown v. Wright, 39 Ga. 96 ;

King v. Talbot, 40 N. Y. 97, aff'g 50 Barb. (N. Y.) 453 ;

Barton's Estate, 1 Pars. Eq. (Pa.) 28.

included in the public securities in which a trustee may safely invest.¹

SEC. 1777. **Same—Same—Right to sue.**—The trustee of an express trust may prosecute an action on behalf of the trust in his own name,² without joining the beneficiary.³ It is not necessary in order to enable the trustee to maintain his action that he prove his acceptance of the trust, the bringing of the action as trustee being sufficient evidence of such acceptance ;⁴ but trustees for the benefit of another cannot recover in that capacity where they do not seek to do so, and have repudiated the trust relation by bringing the action in their own right.⁵ A trustee may bring an action as such

¹ *Brown v. Wright*, 39 Ga. 96 ;

Tucker v. Tucker, 33 N. J. Eq. (6 Stew.) 235 ;

Lathrop v. Smalley's Exrs., 23 N. J. Eq. (8 C. E. Gr.) 192 ;

Ackerman v. Emott, 4 Barb. (N. Y.) 626.

Subsequent repudiation by the state of its indebtedness, it seems, will not render the trustee liable for loss because of such repudiation.

Brown v. Wright, 39 Ga. 96.

² *Harney v. Dutcher*, 15 Mo. 89 ; s.c. 55 Am. Dec. 131.

See : *Huckabee v. Billingsly*, 16 Ala. 414 ; s.c. 50 Am. Dec. 183 ;

Sheets v. Peabody, 6 Blackf. (Ind.) 120 ; s.c. 38 Am. Dec. 132 ;

Lahy v. Holland, 8 Gill (Md.) 445 s.c. 50 Am. Dec. 705 ;

Commissioners of the Sinking Fund v. Walker, 7 Miss. (6 How.) 143 ; s.c. 38 Am. Dec. 433 ;

Williams v. Maus, 6 Watts (Pa.) 278 ; s.c. 31 Am. Dec. 462.

Quondam trustee may sue after resignation for debt agreed to be paid to him, or "such other trustee as may be lawfully appointed," and the debtor cannot object that he is not the proper party.

Lahy v. Holland, 8 Gill (Md.) 445 ; s.c. 50 Am. Dec. 705.

Trustee appointed by court of another state in the place of a deceased trustee to whom land in Pennsylvania has been conveyed ob-

tains no title to the land so as to enable him to maintain ejectment for it.

Williams v. Maus, 6 Watts (Pa.) 278 ; s.c. 31 Am. Dec. 462.

³ *Bardstown R. Co. v. Metcalfe*, 4 Met. (Ky.) 199 ; s.c. 81 Am. Dec. 541.

In Kentucky, section 33 of the Code, enabling trustees to bring actions in their own names without joining the beneficiaries, has not changed the rule under the old practice providing that a trustee under a mortgage made to secure the payment of money to others could not sue for a foreclosure and sale without making the *cestuis que trust* parties.

Bardstown R. Co. v. Metcalfe, 4 Met. (Ky.) 199 ; s.c. 81 Am. Dec. 541.

Trustee, to maintain action in his own name, without joining the *cestuis que trust*, under section 37, Code of Kentucky, must allege or show that the beneficiaries are numerous, and that it is impracticable to bring them before the court within a reasonable time.

Bardstown R. Co. v. Metcalfe, 4 Met. (Ky.) 199 ; s.c. 31 Am. Dec. 541.

⁴ *O'Neill v. Henderson*, 15 Ark. 235 ; s.c. 60 Am. Dec. 568.

⁵ Thus, where A paid purchase-money, and took a conveyance to B of an undivided one-half

trustee which he would be estopped to bring in his individual capacity.¹ On the death of the trustee his administrator may sue for a debt which accrued in the trustee's lifetime, where such action is instituted before the appointment of another trustee.²

SEC. 1778. Same—Same—Liabilities for mismanagement.—We have already seen that the trustee is bound to conduct the business of the trust in the same way in which an ordinarily prudent man of business would conduct his own affairs, and if he fail to do so he is liable therefor.³ The trustee will not be permitted to make any

of a tract of land, and after the death of A and B the heirs of B, in their own right, sued the grantor for partition, they cannot recover as trustees for benefit of A.

Portis v. Hill, 14 Tex. 69; s.c. 65 Am. Dec. 99.

¹ *Worthy v. Johnson*, 10 Ga. 358; s.c. 54 Am. Dec. 393;

Paschal v. Davis, 3 Ga. 256.

The tendency of the decisions is to hold that when a right of action vests in a trustee who is under no legal disability the statute of limitations will commence to run, notwithstanding the disability of the minor for whom the trustee may act, and if the trustee neglect to sue the claim may be lost by the minor's being barred.

Daniel v. Day, 51 Ala. 431;

Bozeman v. Browning, 31 Ark. 364;

Rogers v. Brown, 61 Mo. 187;

Jackson v. Moore, 13 John. (N. Y.) 513; s.c. 7 Am. Dec. 398;

Moore v. Armstrong, 10 Ohio 11; s.c. 36 Am. Dec. 63;

Williams v. First Presbyterian Soc., 1 Ohio St. 478;

Henry v. Carson, 59 Pa. St. 297;

Smilie v. Biffle, 2 Pa. St. 52; s.c. 44 Am. Dec. 156;

Faysoux v. Prather, 1 Nott & McC. (S. C.) L. 296; s.c. 9 Am. Dec. 691;

Haynes v. Jones, 2 Head (Tenn.) 372;

Pownall v. Taylor, 10 Leigh (Va.) 172; s.c. 34 Am. Dec. 725.

Ground of the decisions.—This is

on the same principle which holds that where the statute begins to run against the ancestor, it will continue to run against the heir though he is under the disability of infancy.

Daniel v. Day, 51 Ala. 431;

Bozeman v. Browning, 31 Ark. 364;

Rogers v. Brown, 61 Mo. 187;

Jackson v. Moore, 13 John. (N. Y.) 513; s.c. 7 Am. Dec. 398;

Williams v. First Presbyterian Soc., 1 Ohio St. 478;

Henry v. Carson, 59 Pa. St. 297;

Faysoux v. Prather, 1 Nott & McC. (S. C.) L. 296; s.c. 9 Am. Dec. 691;

Haynes v. Jones, 2 Head (Tenn.) 372.

Compare: *Ladd v. Jackson*, 43 Ga. 288;

Sentney v. Overton, 4 Bibb (Ky.) 445;

Machir v. May, 4 Bibb (Ky.) 43;

Patterson v. Hansel, 4 Bush (Ky.) 654;

May v. Slaughter, 3 A. K. Marsh. (Ky.) 505;

South v. Thomas, 7 T. B. Mon. (Ky.) 59;

Cook v. Wood, 1 McC. (S. C.) L. 139.

² *Lahy v. Holland*, 8 Gill (Md.) 445; s.c. 50 Am. Dec. 705.

³ *Christy v. McBride*, 2 Ill. 75;

Fudge v. Durn, 51 Mo. 264;

Litchfield v. White, 7 N. Y. 438;

Carpenter v. Carpenter, 12 R. I. 544;

Mikell v. Mikell, 5 Rich. (S. C.) Eq. 220;

Belchier v. Parsons, Ambl. 219;

profit by the relationship. This rule is inflexible without regard to considerations paid by the trustee, or his honesty of purpose.¹ Trust property and funds must be kept separate from the private property and funds of the trustee, or the trustee will be liable in case of loss.² We have already seen that where a trustee loans money without taking due security therefor, he is liable for any loss that may occur.³ But a trustee in possession of trust property is only bound to ordinary care and diligence in its preservation and protection;⁴ he is not answerable for losses occurring without any fault or negligence on his part;⁵ such as by theft, robbery, or burglary, whereby the trust funds or property is lost without negligence or fault on his part.⁶ While the

Massey v. Banner, 1 Jac. & W. 245;

Speight v. Gaunt, L. R. 22 Ch. Div. 727; s.c. L. R. 9 App. Cas. 1; 52 L. J. Ch. 503; 48 L. T. 279; 31 W. R. 401; 53 L. J. Ch. 419.

¹ *Chorpenning's Appeal*, 32 Pa. St. 315; s.c. 73 Am. Dec. 789.

The liability of a trustee who, in consideration of a deed, has charged property with a trust for the support of an incompetent person, cannot be avoided by transferring the property charged with such support; but he is liable for such part of the expense thereof, if not furnished by his grantee, as cannot be recovered from the land itself or from a second grantee.

McArthur v. Gordon, 126 N. Y. 597; s.c. 27 N. E. Rep. 1033; 12 L. R. A. 667.

² *Brackenridge v. Holland*, 2 Blackf. (Ind.) 377; s.c. 20 Am. Dec. 123;

Coffin v. Bramlitt, 42 Miss. 194; s.c. 97 Am. Dec. 449;

Knowlton v. Bradley, 17 N. H. 458; s.c. 43 Am. Dec. 609;

Morris v. Wallace, 3 Pa. St. 319; s.c. 45 Am. Dec. 642.

Confounding trustee's with the trust property.—Person having charge of the property of another, who confounds the same with his own, so that it cannot be distinguished, must bear all the inconvenience of the con-

fusion, and is liable for the utmost value of the property.

Brackenridge v. Holland, 2 Blackf. (Ind.) 377; s.c. 20 Am. Dec. 123.

Trust funds must be kept separate from private funds of trustee, or he will be liable in case of loss. They must be deposited and loaned as trust funds, and kept separate from other funds; and a trustee who mingles trust funds with his own thereby becomes a debtor to such fund. If he deposits them in his own name, and they are lost through the bank's insolvency, he is liable; so an investment of them in stocks in his individual name is a breach of the trust.

Coffin v. Bramlitt, 42 Miss. 194; s.c. 97 Am. Dec. 449.

³ *Gray v. Fox*, 1 N. J. Eq. (1 Saxt.) 259; s.c. 22 Am. Dec. 508.

See: *Ante*, § 1773.

⁴ *Campbell v. Miller*, 38 Ga. 304; s.c. 95 Am. Dec. 389.

See: *Kimball v. Reding*, 31 N. H. 352; s.c. 64 Am. Dec. 333;

Knowlton v. Bradley, 17 N. H. 458; s.c. 43 Am. Dec. 609;

Seawell v. Greenway, 22 Tex. 691; s.c. 75 Am. Dec. 794, 799;

Hutchinson v. Lord, 1 Wis. 286; s.c. 60 Am. Dec. 381.

⁵ *Knowlton v. Bradley*, 17 N. H. 458; s.c. 43 Am. Dec. 609.

⁶ *Fudge v. Durn*, 51 Mo. 264, 266;

Foster v. Davis, 46 Mo. 268;

State v. Meagher, 44 Mo. 356;

trustee cannot establish the fact of loss of the trust fund by his own uncorroborated testimony,¹ he will be allowed to testify to the extent of loss by theft or robbery, where a proper foundation for such testimony has first been laid by proving the theft or robbery *aliunde*.²

Where a trustee has mismanaged the funds or property entrusted to him, has exceeded his power, failed to invest, or has made unproductive investments, he will be chargeable with interest,³ and if he applies the same to his own use, he is chargeable with compound interest in some instances.⁴

SEC. 1779. Same—Same—Allowance for improvements.—

Stevens v. Gage, 55 N. H. 175 ;
s.c. 20 Am. Rep. 191 ;

Furman v. Coe, 1 Cai. Cas. (N. Y.) 96 ;

Carpenter v. Carpenter, 12 R. I. 544 ;

Morley v. Morley, 2 Ch. Cas. 2 ;

Jones v. Lewis, 2 Ves. Sr. 240 ;

2 Story's Eq. Jur. (13th ed.), § 1269.

See : *Ante*, § 1780.

¹ Seawell v. Greenway, 22 Tex. 691 ;
s.c. 75 Am. Dec. 794.

² Seawell v. Greenway, 22 Tex. 691 ;
s.c. 75 Am. Dec. 794.

³ Ringgold v. Ringgold, 1 Har. & G. (Md.) 11 ; s.c. 18 Am. Dec. 250 ;

Duncomb v. Duncomb, 1 John. Ch. (N. Y.) 508 ; s.c. 7 Am. Dec. 504 ;

Treves v. Townshend, 1 Bro. Ch. 384 ;

Rock v. Hart, 11 Ves. 58,

Chancellor Kent declares this rule to be founded in justice and good policy, as tending both to prevent abuse and indemnify against negligence.

Duncomb v. Duncomb, 1 John. Ch. 508 ; s.c. 7 Am. Dec. 504.

Rests of six months allowed trustees without interest, to reinvest the same, are not unreasonable.

Ringgold v. Ringgold, 1 Har. & G. (Md.) 11 ; s.c. 18 Am. Dec. 250.

⁴ Ringgold v. Ringgold, 1 Har. & G. (Md.) 11 ; s.c. 18 Am. Dec. 250.

See : Schieffelin v. Stewart, 1

John. Ch. (N. Y.) 620 ; s.c. 7 Am. Dec. 507 ;

Raphael v. Boehm, 11 Ves. 92, 108, 109 ; s.c. 13 Ves. 407, 590 ; 8 Rev. Rep. 95.

The reason for this rule is founded on the gain, or presumed gain, of the trustees, and that the *cestui que trust* may be indemnified by the efforts of the courts in this way to reach their profits, or presumed profits.

Ringgold v. Ringgold, 1 Har. & G. 11 ; s.c. 18 Am. Dec. 250.

Where there is no unreasonable delay in applying the trust money according to the directions of the trust, and there is no application made of it to his own use, a trustee will not be chargeable with interest.

Minuse v. Cox, 5 John. (N. Y.) Ch. 441 ; s.c. 9 Am. Dec. 313.

Trustees are chargeable with compound interest on the ground of the presumed gain to them, from the use of the trust fund, and if the circumstances are such as to forbid such presumption, and it appears that they invested the trust fund in good faith, although in violation of their trust, and that they have not derived any profit from such investment, they will not be charged with compound interest.

Ringgold v. Ringgold, 1 Har. & G. (Md.) 11 ; s.c. 18 Am. Dec. 250.

We have already seen ¹ that a trustee has power to make such improvements and repairs as are reasonably necessary. ² By the rules of the civil law, from which we have seen that the principle of the law regulating uses and trusts was derived, ³ the possessor of the property of another, who had erected buildings or made improvements thereon in good faith, was entitled to payment for such improvements, after deducting a fair compensation for rent, or the use of the property, during the time he occupied it. ⁴ This principle of natural equity has been adopted by the law of England and of this country to a limited extent, in the action for mesne profits ; where the *bona fide* possessor of property is permitted to offset, or recoup in damages, the improvements he has made upon the land, to the extent of the value of the rents and profits during his occupancy. ⁵ And on the same principle a trustee will be entitled to offset money necessarily expended for improvements in an action for an accounting ; ⁶ but the trustee cannot deduct the amount expended by him for additions and improvements to the trust estate to the prejudice of the *cestui que trust*, ⁷ on the

¹ See : *Ante*, § 1738.

² *Green v. Winter*, 1 John. Ch. (N. Y.) 27 ; s.c. 7 Am. Dec. 475.

³ See : *Ante*, § 1611, *et seq.*

⁴ *Bell, L. of Scot.* 130, art. 538 ;
Code Nap., art. 555 ;
Inst. of L. of Spain, 102 ;
3 Partida, tit. 28, law 41 ;
Puff., Bk. 4, c. 6, § 6 ;
Rutherf. Inst. 71.

⁵ *Putnam v. Kitchie*, 6 Paige Ch. (N. Y.) 390, 404.

⁶ *McClanahan v. Henderson*, 2 A. K. Marsh. (Ky.) 388 ; s.c. 12 Am. Dec. 412 ;
Fountain v. Pellett, 1 Ves. Jr. 337 ;

Thus where one holds land, one moiety for himself and one moiety as trustee for another, he is entitled to be reimbursed one-half the amount expended in improvements, and is liable for one-half the rents.

McClanahan v. Henderson, 2 A. K. Marsh. (Ky.) 388 ; s.c. 12 Am. Dec. 412.

⁷ *Pratt v. Thornton*, 28 Me. 355 ;

s.c. 48 Am. Dec. 492.

See : *Bellinger v. Shafer*, 2 Sandf. Ch. (N. Y.) 293, 297.

Thus it has been held in *Green v. Winter*, 1 John. Ch. (N. Y.) 27 ; s.c. 7 Am. Dec. 475, that where there was a trust to sell land, to raise money, to pay off incumbrances, etc., that a trustee should not be allowed for improvements of the trust estate, though made in good faith, as in building houses and mills, clearing lands, and making roads. He is entitled only to necessary expenditures, as for repairs, etc.

In *Bostock v. Blakeny*, 2 Bro. C. C. 653, there was a trust to purchase land, and the land was purchased, and money expended in repairs and improvements ; and though the improvements were substantial and lasting, the chancellor would not admit of such an application of the funds of the trust.

principle that equity will not permit the trustee to trench upon the capital or trust fund ;¹ and the *cestui que trust* will always have the option to take or refuse the benefit or loss of the unauthorized act of his trustee.²

SEC. 1780. **Same—Accounting and discharge.**—A trustee may be called into a court of equity,³ by the *cestui que trust* at any and all times, for the purpose of compelling the proper application of the trust funds,⁴ or for the purpose of having an accounting of the trust property.⁵ Consequently the trustee of a life tenant of part of a residuary estate, who receives the income therefrom, is liable therefor to the *cestui que trust*, although he may have paid such income over to executors of the will creating the estate, to be treated as principal, and a distribution of it as part of the estate has been confirmed by the court, followed by an annual trustee's accounting approved by the court.⁶

In proceedings by the *cestui que trust* to compel an accounting all orders of court approving accounts of the trustee may be considered as orders of judgment *nisi*, and are not conclusive ; but the court may, at a future

¹ *Hester v. Wilkinson*, 6 Humph. (Tenn.) 215 ; s.c. 44 Am. Dec. 303.

See : *Cohen v. Shyer*, 1 Tenn. Ch. 192, 194 ;

Beeler v. Dunn, 3 Head (Tenn.) 87, 91 ;

Carter v. Rolland, 11 Humph. (Tenn.) 333, 399.

² *Green v. Winter*, 1 John. Ch. (N. Y.) 27 ; s.c. 7 Am. Dec. 475 ;

Bostock v. Blakeny, 2 Bro. C. C. 653 ;

Harrison v. Harrison, 2 Atk. 120 ; s.c. 2 Bro. C. C. 656, 658.

³ See : *Ante*, §§ 1763, 1764.

⁴ *Dole v. Olmstead*, 36 Ill. 150 ; s.c. 85 Am. Dec. 397.

⁵ *Smith v. Townshend*, 27 Md. 368 ; s.c. 92 Am. Dec. 637 ;

Dennison v. Goehring, 7 Pa. St. 175 ; s.c. 47 Am. Dec. 505.

See : *Lawrence v. Security Co.*, 56 Conn. 423 ; s.c. 15 Atl. Rep. 406 ; 1 L. R. A. 342 ;

Racine & M. R. Co. v. Farmers' L. & T. Co., 49 Ill. 331 ; s.c. 95 Am. Dec. 595 ;

Coulter v. Robertson, 24 Miss. 278 ; s.c. 57 Am. Dec. 168.

In suit against trustee of corporate property, who is managing it for the protection of a mortgagee thereof, to compel an accounting, the decree should be that the account be first taken and stated, and that a reasonable time be given for redemption from a sale to the trustee under a second mortgage, and for payment of such balance as should be found due upon the first-mortgage debt, after deducting the net earnings of the property ; and that in default of such redemption and payment being made, the property be sold in satisfaction of the first-mortgage debt.

Racine & M. R. Co. v. Farmers' L. & T. Co., 49 Ill. 331 ; s.c. 95 Am. Dec. 595.

⁶ *Lawrence v. Security Co.*, 56 Conn. 423 ; s.c. 15 Atl. Rep. 406 ; 1 L. R. A. 342.

time, investigate and restate the account.¹ It being true that the utmost good faith is required in all transactions where fiduciary relations exist,² a trustee is bound to put his *cestui que trust* in possession of the full and true state of affairs before any statement or account will be binding.³

A trustee will not be held liable for a loss occurring without any fault or negligence on his part.⁴ Thus where a trustee exercised due care and diligence he will be exonerated from loss by theft, robbery, burglary, casualty, failure of banks and solicitors, defaults of agents, and the like.⁵ While it is true that a trustee cannot deduct amounts expended by him for additions and improvements to the trust estate, to the prejudice of the *cestui que trust*,⁶ yet such trustee, who is compelled to account to his *cestui que trust*, is entitled to credit for the sums expended by him in the acquisition of the trust property.⁷ And trustees who have in good faith expended moneys under an invalid trust, which they believed to be valid, cannot be compelled to account therefor to those who have stood by and allowed the expendi-

¹ Seawall v. Greenway, 22 Tex. 691 ;
s.c. 75 Am. Dec. 794.

² Juzan v. Toulmin, 9 Ala. 662 ; s.c.
44 Am. Dec. 448.

³ Diller v. Brubaker, 52 Pa. St. 498 ;
s.c. 91 Am. Dec. 177.

⁴ See : Ante, § 1778.

⁵ Knowlton v. Bradley, 17 N. H.
458 ; s.c. 43 Am. Dec. 609.

See : Christy v. McBride, 2 Ill.
75 ;

Hanna v. Spotts' Heirs, 5 B. Mon.
(Ky.) 362 ; s.c. 43 Am. Dec.
132 ;

Fudge v. Durn, 51 Mo. 266 ;

Foster v. Davis, 46 Mo. 268 ;

State v. Meagher, 44 Mo. 356 ;

Stevens v. Gage, 55 N. H. 175 ;

Litchfield v. White, 7 N. Y. 438 ;

Furman v. Coe, 1 Cal. Cas. (N.
Y.) 96 ;

Carpenter v. Carpenter, 12 R. I.
544 ;

Mikell v. Mikell, 5 Rich. (S. C.)
Eq. 220 ;

Hester v. Wilkinson, 6 Humph.
(Tenn.) 215 ; s.c. 44 Am. Dec.
303 ;

Belchier v. Parsons, Ambl. 219 ;

Morley v. Morley, 2 Ch. Cas. 2 ;
Massey v. Banner, 1 Jac. & W.
241 ;

Speight v. Gaunt, L. R. 22 Ch. D.
727 ; s.c. L. R. 9 App. Cas. 1 ;
52 L. J. Ch. 503 ; 48 L. T. 279 ;
31 W. R. 401—C. A. ; 53 L. J.
Ch. 419 ;

Jones v. Lewis, 2 Ves. Sr. 240 ;
2 Story's Eq. Jur. (13th ed.), §
1269 ;

In the case of Hester v. Wilkin-
son, 6 Humph. (Tenn.) 215 ; s.c.
44 Am. Dec. 403, it is said that
in a bill by the *cestui que trust*
against a trustee for account-
ing the trustee ought not to be
charged with the loss of prop-
erty taken from the benefi-
ciaries in Tennessee, upon a
judgment against their grant-
or, and which the trustee, resid-
ing in North Carolina, failed to
recover before being barred by
the statute of limitations.

⁶ See : Ante, § 1779.

⁷ Hanna v. Spott's Heirs, 5 B. Mon.
(Ky.) 362 ; s.c. 43 Am. Dec. 132.

tures without objection.¹ Where a trustee refuses to account, and an action has to be brought in equity to compel an accounting, such refusal furnishes a good reason for adopting against him the most rigid rule of calculation; and particularly is this the case where the trust fund has been commingled with the private funds of the trustee, or has been used in his business.²

While it is true, as we have already seen, that a trustee who accepts the charge cannot of his own action renounce and resign therefrom,³ yet he can be discharged by the decree of a court of equity, by force of a provision in the trust deed, or by consent of all the parties interested.⁴

SEC. 1781. Of co-tenant—Nature of estate taken—Survivorship.—At common law, where two or more trustees are named in a deed of trust, upon the death of one of the trustees the entire estate does not vest in the survivor, but a moiety of the same vests in the heirs and devisees of the deceased trustee.⁵ It is otherwise where one of the trustees named refuses to accept the trust. In this case the entire legal estate vests in the remaining trustee or trustees.⁶ In various of the states statutes have been enacted for the purpose of abolishing or discouraging joint tenancy, or of robbing it of its survivorship; but these statutes, as a rule, except from their operation estates granted or devised to two or more trustees.⁷ The reason for this is that when lands are

¹ *Kelly v. Nicholas*, 18 R. I. ; s.c. 25 Atl. Rep. 840; 19 L. R. A. 413.

² *Myers v. Myers*, 2 McC. (S. C.) Eq. 214; s.c. 16 Am. Dec. 648. See: *Ante*, § 1771.

³ See: *Ante*, § 1730.

⁴ *Ross v. Barclay*, 18 Pa. St. 179; s.c. 55 Am. Dec. 616.

See: *Shepherd v. McEvers*, 4 John. Ch. (N. Y.) 136; s.c. 8 Am. Dec. 561;

Guphill v. Isbell, 1 Bailey's (S. C.) L. 230; s.c. 19 Am. Dec. 675; *Anonymous*, Brownl. 82; s.c. 11 Vin. Abr. 139;

Fooler v. Cooke, 1 Salk. 297.

⁵ *Sanders v. Morrison*, 7 T. B. Mon.

(Ky.) 54; s.c. 18 Am. Dec. 161; *Waggener v. Waggener*, 3 T. B. Mon. (Ky.) 542;

Boston Franklinite Co. v. Condit, 19 N. J. Eq. (4 C. E. Gr.) 394, 398.

⁶ *Scull v. Reeves*, 3 N. J. Eq. (2 H. W. Gr.) 84; s.c. 29 Am. Dec. 694.

⁷ *Parsons v. Boyd*, 20 Ala. 112; *Lowe v. Brooks*, 23 Ga. 325; *Rogers v. Grider*, 1 Dana (Ky.) 242;

Nichols v. Denny, 37 Miss. 59; *Berden v. Van Riper*, 16 N. J. L. (1 Harr.) 7;

Seargent v. Steinberger, 2 Ohio 305.

granted to two or more persons to be held by them in trust for another they have no legal beneficial interest in the grant, and if either die the vesting of the entire legal estate in the other as survivor has no tendency to operate to the prejudice of those interested as beneficiaries ; but if on the the death of either trustee, the legal estate held by him descended to his heirs, this would necessarily devolve, in part, the management of the trust on persons who were strangers to the party creating the trust, and upon whom he never contemplated calling for its execution. The presumption is that where a testator appoints two or more trustees his intention was that all the trustees should join in effectuating the trust ; and on the death of one the testator's designs, it is thought, will probably be better accomplished by charging the survivor or survivors exclusively with the administration of the trust, than by introducing the heirs of the deceased trustee or an appointee of the court to represent the deceased trustee and participate in the management of the trust.¹ Where a power is coupled with the trust, and execution given to two or more trustees to be executed by them jointly, if one of the trustees renounces the trust or dies after having accepted it, the other or others will take the power as if it were originally given only to them.²

SEC. 1782. **Same—Duty of.**—Where two or more persons are named to act as trustees, and manage a trust estate, all must join in any formal act under the trust ; particularly is this the case where the exercise of discretion is required, as in the sale of the trust property, although mere ministerial acts may be delegated to and

¹ See : *Parsons v. Boyd*, 20 Ala. 112, 118 ;

Powell v. Knox, 16 Ala. 364 ;

Gray v. Lynch, 8 Gill (Md.) 403, 423 ;

Stewart v. Pettus, 10 Mo. 755 ;

Philadelphia & R. R. Co. v. Lehigh N. Co., 36 Pa. St. 204 ;

Shortz v. Unangst, 3 Watts & S. (Pa.) 45 ;

Freeman on Co-Ten. & Part. (2d ed.), § 43.

² *Osgood v. Franklin*, 2 John. Ch. (N. Y.) 1 ; s.c. 7 Am. Dec. 513.

See: *Putnam Free School v.*

Fisher, 30 Me. 523 ;

Clark v. Hornthal, 47 Miss. 434, 527 ;

Jackson v. Ferris, 15 John. (N. Y.) 346 ;

Zebach's Lessee v. Smith, 3 Binn. (Pa.) 69 ;

Bailey's Partitioner, 15 R. I. 60 ;

s.c. 1 Atl. Rep. 131 ; 1 New

Eng. Rep. 175 ;

Peter v. Beverly, 35 U. S. (10 Pet.) 532 ; bk. 9 L. ed. 522 ;

Post, bk. III., c. XXVII., "Equitable Estates—Powers."

performed by one of them.¹ This rule, however, does not apply to public trusts, in which a majority of the trustees are competent to act, in the absence of any special rule or by-law to the contrary.²

It is the duty of joint trustees to watch over the conduct of each other and to know the details of the conduct of the affairs of the trust, and the collection of the funds belonging to the trust estate. It is also the positive duty of each trustee to protect the trust estate from every misfeasance on the part of the others acting with him.³ It is the duty of each co-trustee in making investments to employ such diligence and prudence as a man of ordinary discretion in such matters would employ in his own like affairs.⁴

¹ Vandever's Appeal, 8 Watts & S. (Pa.) 405; s.c. 42 Am. Dec. 305;

Deaderick v. Cantrell, 10 Yerg. (Tenn.) 263; s.c. 31 Am. Dec. 576.

See: *Taylor v. Dickinson*, 15 Iowa 483, 484;

Latrobe v. Tiernan, 2 Md. Ch. 474;

Ridgeley v. Johnson, 11 Barb. (N. Y.) 527;

Franklin v. Osgood, 14 John. (N. Y.) 527, 553;

McCready v. Guardians, 9 Serg. & R. (Pa.) 94; s.c. 11 Am. Dec. 667;

Wilbur v. Almy, 53 U. S. (12 How.) 180; bk. 13 L. ed. 945;

Peter v. Beverley, 35 U. S. (10 Pet.) 564; bk. 9 L. ed. 522;

Townsend v. Wilson, 1 Barn. & Ald. 608;

Sinclair v. Jackson, 8 Co. 43;

Cole v. Wade, 16 Ves. 28;

1 Story Eq. Jur. (13th ed.), § 1280.

Trustee cannot justify acting alone on the ground of necessity, where his co-trustee was near at hand and might have been consulted without detriment to the interests of the trust.

Vandever's Appeal, 8 Watts & S. (Pa.) 405; s.c. 42 Am. Dec. 305.

Joint trustee of discretionary trust is liable for misapplication of the trust fund by his co-trustee, where it is through his instrumentality that the fund

has been obtained by such co-trustee, or where the wasting of the fund has been enabled by some act of his amounting to gross negligence. Thus, where notes representing a trust fund were payable to two trustees jointly, the permitting by the one of the reception of their entire amount by the other will render the former liable for the conduct of the latter.

Deaderick v. Cantrell, 10 Yerg. (Tenn.) 263; s.c. 31 Am. Dec. 576.

Majority of trustees, having power of a general nature, all of whom are assembled, may act if regular notice has been given. But where a certain number of trustees are, by act of assembly, to be appointed and sworn, all must be appointed and sworn before a majority can act, though the law vests in the majority all the powers of the whole.

McCready v. Guardians, 9 Serg. & R. (Pa.) 94; s.c. 11 Am. Dec. 667.

² *Chambers v. Perry*, 17 Ala. 726; *Hill v. Josselyn*, 21 Miss. (13 Smed. & M.) 597;

Wilkinson v. Malin, 2 Tyrwh. 544; s.c. 2 Crompt. & J. 636.

³ *Weetjen v. Vibbard*, 5 Hun (N. Y.) 265, 267.

⁴ *Ormiston v. Olcott*, 84 N. Y. 339, rev'g 22 Hun (N. Y.) 270.

SEC. 1753. **Same—Liability of—Generally.**—The general rule touching the liability of co-trustees is that where a trustee does his duty and exercises over the trust property or funds that vigilance which a man of ordinary prudence exercises over his own property, he is not liable for the acts and defaults of his co-trustees.¹ Consequently where two trustees join in receipting for money, and one of them only receives the same, that one will solely be held liable, in all cases where the joining by the other was merely for the sake of conformity:² but

See: *Thompson v. Finch*, 22 Beav. 316;

Ante, § 1773.

¹ *Jones' Appeal*, 8 Watts & S. (Pa.) 143; s.c. 42 Am Dec. 282;

State v. Guilford, 15 Ohio 500.

See: *Roberts v. Taylor*, 3 Ala. 83;

Latrobe v. Tiernan, 2 Md. Ch. 474, 480;

Banks v. Wilkes, 3 Sandf. Ch. (N. Y.) 99;

Stell's Appeal, 10 Pa. St. 149;

Boyd v. Boyd, 3 Gratt. (Va.) 113;

Leigh v. Barry, 3 Atk. 584;

Townley v. Sherbourne, Bridg. 35;

Anonymous, 12 Mod. 560;

Brice v. Stokes, 11 Ves. 319, 324; s.c. 5 Rev. Rep. 164, 167;

² *Lead. Cas. Eq.*, pt. 2, p. 1792;

1 Perry on Trusts (4th ed.), § 415;

2 Story's Eq. (13th ed.), § 1290.

Early English doctrine.—This doctrine was laid down in the case of *Townley v. Sherbourne, Bridg.* 37, as follows: "That where lands or leases were conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and after dyeth or decayeth in his estate, his co-trustees shall not be charged, or be compelled in this court, to answer for the receipts of him so dying or decayed, unless some purchase, fraud, or evil dealing appear to have been in them to prejudice their trust; for they being by law joyn-tenants or tenants in common, every one by law may receive, either all or as much of the profits as he can come by. And it being the case of most men

in these days, that their personal estates do not suffice to pay their debts, prefer their children, and perform their wills, they are enforced to trust their friends with some part of their real estate, to make up the same, either by the sale, or perception of profits: and if such of these friends, who carry themselves without fraud, should be chargeable out of their own estates for the faults and deficiencies of their co-trustees, who were not nominated by them, few men would undertake any such trust."

² *Stowe v. Bowen*, 99 Mass. 194;

Worth v. McAden, 1 Dev. & B. (N. C.) Eq. 199;

Griffin v. Macauley, 7 Gratt. (Va.) 476;

Sadler v. Hobbs, 2 Bro. C. C. 117;

In re Fryer, 3 Kay & J. 317;

Terrell v. Matthews, 11 L. J. Ch. N. S. 31;

Shipbrook v. Hinchinbrook, 16 Ves. 479;

Brice v. Stokes, 11 Ves. 319, 324; s.c. 5 Rev. Rep. 164, 167;

Chambers v. Minchin, 7 Ves. 198; s.c. 6 Rev. Rep. 111;

Fellows v. Mitchell, 1 Pr. Wms. 81.

Trustees joining in a receipt for money will raise a presumption that it came equally into the possession, or under the control of all, and there must be direct and positive proof to rebut the presumption. Where, in consequence of any act or agreement of one trustee or executor, money comes into the hands of his co-trustee or co-executor, both are held liable for it.

where there has been any fraud, or an actual or constructive breach of trust, or gross negligence, the trustees will all be equally liable.¹ Thus where one trustee collects money from the sale of the trust property and fails to apply it to the purposes to which it is applicable under the trust, and his co-trustee has knowledge thereof

- Monell *v.* Monell, 5 John. (N. Y.) Ch. 283; s.c. 9 Am. Dec. 298.
- ¹ Ringgold *v.* Ringgold, 1 Har. & G. (Md.) 11; s.c. 18 Am. Dec. 250;
- Konigmacher *v.* Kimmel, 1 Pen. & W. (Pa.) 207; s.c. 21 Am. Dec. 374;
- Deaderick *v.* Cantrell, 10 Yerg. (Tenn.) 263; s.c. 31 Am. Dec. 576;
- Townley *v.* Sherbourne, Bridg. 35;
- Mucklow *v.* Fuller, Jac. 198.
- See: Monell *v.* Monell, 5 John. Ch. (N. Y.) 283; s.c. 9 Am. Dec. 298;
- Ducommun's Appeal, 17 Pa. St. 268;
- Estate of Evans, 2 Ashm. (Pa.) 470;
- Pim *v.* Downing, 11 Serg. & R. (Pa.) 66;
- Candler *v.* Tillet, 22 Beav. 257; s.c. 25 L. J. Ch. 505;
- Egbert *v.* Butter, 21 Beav. 560;
- Dix *v.* Burford, 19 Beav. 409;
- Hewitt *v.* Foster, 6 Beav. 259;
- Williams *v.* Nixon, 2 Beav. 475;
- Booth *v.* Booth, 1 Beav. 427;
- Keble *v.* Thompson, 3 Bro. Ch. 111;
- Scurfield *v.* Howes, 3 Bro. Ch. 90;
- Sadler *v.* Hobbs, 2 Bro. Ch. 114;
- Boardman *v.* Mosman, 1 Bro. C. C. 68;
- Curtis *v.* Mason, 12 L. J. Ch. N. S. 443;
- Styles *v.* Guy, 1 Ha. & Tw. 523; s.c. 1 Mac. & G. 422; 16 Sim. 230;
- Underwood *v.* Stevens, 1 Meriv. 713;
- Clough *v.* Bond, 3 My. & Cr. 490, 496; s.c. 2 Jur. 968;
- Joy *v.* Campbell, 1 Sch. & Lef. 328, 341; s.c. 9 Rev. Rep. 39;
- Hanbury *v.* Kirkland, 3 Sim. 265;
- West *v.* Jones, 1 Sim. N. S. 205;
- Bradwell *v.* Catchpole, 3 Swanst. 78n;
- Walker *v.* Symonds, 3 Swanst. 58;
- Bate *v.* Scales, 12 Ves. 402; s.c. 8 Rev. Rep. 345;
- Langford *v.* Gascoyne, 11 Ves. 333; s.c. 8 Rev. Rep. 170;
- Brice *v.* Stokes, 11 Ves. 319; s.c. 8 Rev. Rep. 164;
- Shipbrook *v.* Hinchinbrook, 11 Ves. 252;
- French *v.* Hobson, 9 Ves. 103;
- Chambers *v.* Minchin, 7 Ves. 198; s.c. 6 Rev. Rep. 111;
- Harrison *v.* Graham, 1 Pr. Wms. 241n;
- Moses *v.* Levi, 3 You. & C. 359;
- James *v.* Frearson, 1 You. & C. Ch. 370;
- Broadhurst *v.* Balgay, 1 You. & C. Ch. 16;
- Scully *v.* Delany, 2 Ir. Eq. 165.
- Trustees are liable for gross negligence, and for their own acts, in not carefully securing money which was in their hands, and put out by them, but not for failure to sue at once a former trustee while in good credit, or on first hearing of his insolvency, when there was no probability of recovering at that time.
- Konigmacher *v.* Kimmel, 1 Pen. & W. (Pa.) 207; s.c. 21 Am. Dec. 374.
- Sale of the trust property to co-trustee is a breach of the trust, for which both are liable.**
- Ringgold *v.* Ringgold, 1 Har. & G. (Md.) 11; s.c. 18 Am. Dec. 250.
- Joint trustee permitting his co-trustee to retain trust fund for many years, without inquiry as to whether it has been invested so as to answer the purposes of the trust, will be liable, because of his neglect, for the conduct of his co-trustee.**
- Deaderick *v.* Cantrell, 10 Yerg. (Tenn.) 263; s.c. 31 Am. Dec. 576.

and takes no steps to have the proper application made, he will be jointly chargeable with his associate, on the ground that it is a positive duty of each trustee to protect the trust estate from every misfeasance on the part of the others acting with him, and that when he becomes aware they intend to abuse their trust, by a misuse of the property committed to the charge of all, it is his duty to institute such proceedings as may be attended with the effect of preventing such misuse.¹

SEC. 1784. **Same—Same—For acts of each other.**—Where two or more trustees are appointed to manage a trust estate, the act of one is deemed to be the act of all, except in the case of unlawful acts; in which case the co-trustees will not be liable, unless they participate in such unlawful acts, save in those cases where they neglect to discharge their duties as trustees, and the wrongful act or acts could have been prevented by the exercise of ordinary care on their part.² Thus a trustee who fails to see that the trust fund is managed or invested in the manner pointed out in the instrument creating the trust, will be liable for the abuse of the trust

¹ *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11; s.c. 18 Am. Dec. 250;

Commonwealth v. Eagle F. Ins. Co., 96 Mass. (14 Allen) 344;

Fonte v. Horton, 36 Miss. 350;

Schenck v. Schenck, 16 N. J. Eq. (1 C. E. Gr.) 174;

Laroe v. Douglass, 13 N. J. Eq. (2 Beas.) 308;

Weetjen v. Vibbard, 5 Hun (N. Y.) 265.

Positive knowledge of improper conduct is required on the part of a co-trustee to fix his liability; he is not expected to act on slight suspicion.

Wood v. Brown, 34 N. Y. 337;

State v. Guilford, 18 Ohio 500;

Irwin's Appeal, 35 Pa. St. 294.

² *Royall's Admr. v. McKenzie*, 25 Ala. 363;

Hall v. Carter, 8 Ga. 388;

Wayman v. Jones, 4 Md. Ch. 500;

Latrobe v. Tiernan, 2 Md. Ch. 474;

Maccubbin v. Cromwell's Exrs.,

7 Gill & J. (Md.) 157;

Ringgold v. Ringgold, 1 Har. & G. (Md.) 11; s.c. 18 Am. Dec. 250;

Towne v. Ammidown, 37 Mass. (20 Pick.) 535;

Ward v. Lewis, 21 Mass. (4 Pick.) 518;

Schenck v. Schenck, 16 N. J. Eq. (1 C. E. Gr.) 174;

Kip v. Deniston, 4 John. (N. Y.) 23;

Spencer v. Spencer, 11 Paige Ch. (N. Y.) 299;

Banks v. Wilkes, 3 Sandf. Ch. (N. Y.) 99;

Graham v. Davidson, 2 Dev. & B. (N. C.) Eq. 155;

Worth v. McAden, 1 Dev. & B. (N. C.) Eq. 199;

State v. Guilford, 15 Ohio 593;

Irwin's Appeal, 35 Pa. St. 294;

Pim v. Downing, 11 Serg. & R. (Pa.) 66;

Jones' Appeal, 8 Watts & S. (Pa.) 143; s.c. 42 Am. Dec. 282;

Edmonds v. Crenshaw, 39 U. S. (14 Pet.) 166; bk. 10 L. ed. 402.

by his co-trustee;¹ this is on the principle above laid down² that co-trustees are bound to watch over the conduct of each other, and to know of the collection of funds belonging to the trust estate; and if one of two trustees fails to apply money collected by him, from a sale of the trust fund, to certain outstanding indebtedness, and the other trustee knows of the receipt of such money, and makes no effort to have the same so applied, the latter is jointly chargeable for interest with his associate.³

SEC. 1785. **Of beneficiary—Mutual relations.**—The relation subsisting between a trustee and his *cestui que trust* is usually, as well in fact as in law, a relation of personal trust and confidence;⁴ and, because of this relation, the law discountenances all dealings between the parties, except such as are of the most open and satisfactory character,⁵ and places upon the trustee the burden of showing the fairness of such dealings.⁶ This is on the general principle that where confidence is reposed, and that confidence is abused, courts of equity will grant relief.⁷ This relation of confidence is mutual, and a

¹ Deaderick v. Cantrell, 10 Yerg. (Tenn.) 263; s.c. 31 Am. Dec. 576.

See: Ringgold v. Ringgold, 1 Har. & G. (Md.) 12; s.c. 8 Am. Dec. 250;

Porter v. Moores, 4 Heisk. (Tenn.) 16, 25;

Fulton v. Davidson, 3 Heisk. (Tenn.) 614, 629;

Hughlett v. Hughlett, 5 Humph. (Tenn.) 474;

McMurray v. Montgomery, 2 Swan (Tenn.) 377;

Thomas v. Scruggs, 10 Yerg. (Tenn.) 400, 405;

Keble v. Thompson, 3 Bro. Ch. 112;

Scurfield v. Howes, 3 Bro. Ch. 90;

Oliver v. Court, 3 Exch. 312; s.c. 8 Price 127;

Bone v. Cooke, McClel. 168;

Brice v. Stokes, 11 Ves. 319, 326; s.c. 8 Rev. Rep. 164, 167; 4 Cond. Ch. 93.

² See: *Ante*, § 1782.

³ Ringgold v. Ringgold, 1 Har. &

G. (Md.) 11; s.c. 18 Am. Dec. 250.

⁴ Tull v. David, 45 Mo. 444; s.c. 100 Am. Dec. 385.

⁵ Diller v. Brubaker, 52 Pa. St. 498; s.c. 91 Am. Dec. 177.

See: Juzan v. Toulmin, 9 Ala. 662; s.c. 44 Am. Dec. 448.

⁶ Pairo v. Vickery, 37 Md. 467, 485; Smith v. Townsend, 27 Md. 368; s.c. 92 Am. Dec. 637.

⁷ Kisling v. Shaw, 33 Cal. 425; s.c. 91 Am. Dec. 644;

Highbarger v. Stiffler, 21 Md. 338; s.c. 83 Am. Dec. 593.

See: Follansbe v. Kilbreth, 17 Ill. 522; s.c. 65 Am. Dec. 691;

Brooke v. Berry, 2 Gill (Md.) 83, 99;

Revett v. Harvey, 1 Sim. & S. 502.

Court of equity will permit *cestui que trust* to show speculative disposition toward his trustee. If the former discovers facts justifying a repudiation of the latter's acts, he is bound, after investigation, or a reasonable

trustee may divest the *cestuis que trust* of their equitable title, without their consent, by repudiating their agency, when the *cestuis que trust* have fraudulently induced the trustee to act for them, and incur personal responsibilities which he would not have undertaken but for the fraud practiced upon him.¹

SEC. 1786. **Same—Title and interest of.**—The trust estates of the present day have all the characteristics of ancient uses,² and are equitable estates enforceable in equity only.³ In the law of real property, the principles which apply to estates, both legal and equitable, with a few limited exceptions, are the same. A trust, like a legal estate, is descendible, devisable, alienable, and barrable by the act of the parties and by matter of record.⁴ While in consideration of a court of equity the *cestui que trust* is actually seized of the freehold,⁵ the trustee takes the legal estate.⁶ Consequently a special trust maintains

time therefor, to declare whether he will avail himself of that right or not, and cannot lie by indefinitely for the purpose of affirming the bargain if a profitable one, or repudiating it if it is a losing one.

Follansbe v. Kilbreth, 17 Ill. 522; s.c. 65 Am. Dec. 691.

¹ Follansbe v. Kilbreth, 17 Ill. 522; s.c. 65 Am. Dec. 691.

² See: *Ante*, c. XXV., "Equitable estates—Uses."

³ Orleans v. Chatham, 19 Mass. (2 Pick.) 29;

Price v. Sisson, 13 N. J. Eq. (2 Beas.) 168, 174;

Bush's Appeal, 33 Pa. St. 85;

Burgess v. Wheate, 1 Eden 223;

Cholmondeley v. Clinton, 2 Jac. & W. 148;

Banks v. Sutton, 2 Pr. Wms. 713;

2 Co. Litt. (19th ed.) 290b;

2 Pom. Eq. Jur., § 989;

1 Prest. Est. 189;

2 Spence Eq. Jur. 785;

1 Spence Eq. Jur. 497.

See: *Ante*, §§ 1763, 1764.

⁴ Lewis v. Hawkins, 90 U. S. (23 Wall.) 119; bk. 23 L. ed. 113;

Croxall v. Sherrerd, 72 U. S. (5

Wall.) 268; bk. 18 L. ed. 572.

An equitable estate-tail may be barred in the same manner as

an estate-tail at law.

Croxall v. Sherrerd, 72 U. S. (5 Wall.) 268; bk. 18 L. ed. 572.

⁵ Nicoll v. Ogden, 29 Ill. 323; s.c. 81 Am. Dec. 311;

Croxall v. Sherrerd, 72 U. S. (5 Wall.) 268; bk. 18 L. ed. 572.

Executory trust is constituted and *cestuis que trust* have no equitable title to land where by a declaration of trust executed by them they provide that the trustee shall not convey it to them until after partition, and then in severalty, or that he shall sell it and divide the proceeds among them; and dower cannot attach to property thus held.

Nicoll v. Ogden, 29 Ill. 323; s.c. 81 Am. Dec. 311.

⁶ Dodson v. Ball, 60 Pa. St. 492; s.c. 100 Am. Dec. 586;

Rife v. Geyer, 59 Pa. St. 393; s.c. 98 Am. Dec. 351.

Where land is devised to trustee with directions to give the income thereof to the testator's son for life, or to permit the son to himself collect the income, the trustee takes the legal estate which is not divested by this permission to the son, and the latter's estate is only an equitable one.

the legal estate in the trustee, to enable him to perform the duties devolved on him by the donor, and gives the *cestui que trust* only a right in equity to enforce the performance of the trust.¹ But an interest in lands conveyed by a trust deed to one for life or in fee is an immediate vested interest, though to take effect in possession at the death of another, and subject to be divested by the reserved power in such other of disposing of the lands by will.²

Where a woman and her children are the beneficiaries in a trust deed, if nothing appears on the face of the instrument to indicate a contrary intention, the estate will vest in the woman and her children then born and in one *en ventre sa mère* as tenants in common, and no title will vest in her children afterwards begotten.³

SEC. 1787. **Same—Enforcement of trusts.**—Where trusts, or powers in the nature of trusts, are required to be executed by the trustee in favor of particular persons, and they fail in being so executed by casualty or accident, equity will interpose and grant relief;⁴ and the beneficiaries under the trust deed may maintain an action for the enforcement of the trust and the recovery of that portion of the trust property or fund to which they may be entitled.⁵ To entitle a person to adopt and enforce a

Rife v. Geyer, 59 Pa. St. 393; s.c. 98 Am. Dec. 351.

¹ Dodson v. Ball, 60 Pa. St. 492; s.c. 100 Am. Dec. 536.

See: Green v. Green, 90 U. S. (23 Wall.) 486; bk. 23 L. ed. 75.

Where one conveyed real estate to a trustee, for the separate use of his wife and children during her life in absolute right, as if she was a *feme sole* and free from any right and control of her husband, and in trust to convey said premises in such manner and to such purposes as said wife by her will may direct, and, in the absence of such direction, after her death to her heirs at law, the conveyance was held to create only an equitable life estate in her; and, there being

no directions in her will, it executed the legal estate in her heirs.

Green v. Green, 90 U. S. (23 Wall.) 486; bk. 23 L. ed. 75.

² Bowen v. Chase, 94 U. S. 812; bk. 24 L. ed. 184.

³ Kay v. Scates, 37 Pa. St. 31; s.c. 78 Am. Dec. 399.

⁴ Stewart v. Stokes, 33 Ala. 494; s.c. 73 Am. Dec. 429;

Gibbs v. Marsh, 43 Mass. (2 Met.) 243;

Osgood v. Franklin, 2 John. Ch. (N. Y.) 1; s.c. 7 Am. Dec. 513; Withers v. Yeadon, 1 Rich. (S. C.) Eq. 325;

1 Story Eq. Jur. (13th ed.), § 98.

⁵ Lexington Life, F. & M. Ins. Co. v. Page, 17 B. Mon. (Ky.) 412; s.c. 66 Am. Dec. 165.

See: Repplier v. Buck, 5 B. Mon. (Ky.) 98;

trust, it is not necessary that he should have any right or title to the property, other than that which springs out of the transaction itself.¹ An agreement, without consideration, to execute a trust *in futuro* will not be enforced;² but where the trust is actually undertaken and commenced, equity will enforce it.³ In all cases where the legal title passes to the trustee a court of equity will enforce the trust, even where the purchase-money was paid by the trustee himself and the trust is declared to be for his children;⁴ and a trust in land, either with or without full consideration, created in favor of an insolvent, in the absence of fraud, can be enforced in equity by the beneficiary against the trustee,⁵ on the ground that a voluntary trust, assumed without consideration and undertaken to be executed, will be enforced for the preservation of rights depending thereon, even in those cases though the party would not be compelled to undertake the trust.⁶

In an action by one of several *cestuis que trust*, to declare and enforce an implied trust in relation to land, all the persons who are entitled to, or claimed to be entitled to, a portion of the trust estate are proper parties defendant.⁷ But where property is conveyed to trustees

Kimball v. Morton, 5 N. J. Eq. (1 Halst.) 26; s.c. 53 Am. Dec. 621.

¹ Garvey v. Jarvis, 46 N. Y. 310, 317, aff'g 54 Barb. (N. Y.) 179; Sweet v. Jacocks, 6 Paige Ch. (N. Y.) 359;

Marriot v. Marriot, 1 Str. 660, 673;

Mestaer v. Gillespie, 11 Ves. 621, 638; s.c. 8 Rev. Rep. 261;

Strickland v. Aldridge, 9 Ves. 516; s.c. 7 Rev. Rep. 292.

² Hoffman v. Mackall, 5 Ohio St. 124; s.c. 64 Am. Dec. 637.

³ Switzer v. Skiles, 8 Ill. (3 Gilm.) 529; s.c. 44 Am. Dec. 723.

⁴ Dennison v. Goehring, 7 Pa. St. 175; s.c. 47 Am. Dec. 505.

⁵ Switzer v. Skiles, 8 Ill. (3 Gilm.) 529; s.c. 44 Am. Dec. 723;

Lexington Life, F. & M. Ins. Co. v. Page, 17 B. Mon. (Ky.) 412; s.c. 66 Am. Dec. 165;

Baker v. Evans, 1 Winst. (N. C.) Eq. 109; s.c. 86 Am. Dec. 456.

⁶ Cooper v. McCunn, 16 Ill. 435, 443;

Switzer v. Skiles, 8 Ill. (3 Gilm.) 529; s.c. 44 Am. Dec. 723.

⁷ Jenkins v. Frink, 30 Cal. 586; s.c. 89 Am. Dec. 134.

See: Switzer v. Skiles, 8 Ill. (3 Gilm.) 529; s.c. 44 Am. Dec. 723;

Rothwell v. Dewees, 2 Blackf. (Ind.) 613, 618;

Venable v. Beauchamp, 3 Dana (Ky.) 321; s.c. 28 Am. Dec. 74;

Burhans v. Van Zandt, 7 N. Y. 523;

Van Horne v. Fonda, 5 John. Ch. (N. Y.) 388, 406;

Armour v. Alexander, 10 Paige Ch. (N. Y.) 571, 572;

Rupp v. Orr, 31 Pa. St. 517;

Faulkner v. Davis, 18 Gratt. (Va.) 651; s.c. 98 Am. Dec. 698;

Flagg v. Mann, 2 Sum. C. C. 486, 490; s.c. 8 Fed. Cas.

If suit be brought to enforce trust to sell created by deed,

and their heirs forever on trusts declared in the deed, the heirs of the grantor have no interest in the subject, and are not to be regarded until all the interests are satisfied, and in case a suit is brought for the execution of the trust they have neither legal nor equitable interests, and are neither proper nor necessary parties to the suit.¹

Where a person comes into possession of trust property with notice of the trust, a court of equity will enforce trust against him in the same manner, and with like effect, as against the original trustee.²

SEC. 1788. **Same—Same—When enforced.**—A trust differs essentially from a contract, and will be enforced when the latter cannot;³ and although a trust, like a contract, must have a consideration to support it,⁴ yet a voluntary consideration will be sufficient if it is created and declared in conformity with the statute of frauds.⁵ In those cases, however, where the duty of the trustee is purely discretionary, the court will not compel him to execute it;⁶ because where a discretion is given to the trustee the court will not interfere in any way, except to prevent an unreasonable exercise of it, which could not have been contemplated by the testator because of its injury to the beneficiary.⁷ Equity will follow a trust fund so long as

and all persons in being who are interested in the object of the suit are convened before the courts as parties, it is competent for the court to decree accordingly; and any title acquired under such decree is good, not only against those persons, but all others who may afterwards come into being and become interested in the trust.

Faulkner v. Davis, 18 Gratt. (Va.) 651; s.c. 98 Am. Dec. 698.

¹ *Faulkner v. Davis*, 18 Gratt. (Va.) 651; s.c. 98 Am. Dec. 698.

² *Lathrop v. Bampton*, 31 Cal. 17; s.c. 89 Am. Dec. 141.

³ *Crawford's Appeal*, 61 Pa. St. 52; s.c. 100 Am. Dec. 609.

See: *Vance v. Vance*, 1 Beav. 605;

Jones v. Lock, L. R. 1 Ch. 25; s.c. 35 L. J. Ch. 117; 11 Jur.

N. S. 913;

Ex parte Pye, 18 Ves. 140; s.c.

11 Rev. Rep. 173.

⁴ *Trough's Estate*, 75 Pa. St. 115, 118;

Crawford's Appeal, 61 Pa. St. 52; s.c. 100 Am. Dec. 609.

⁵ *Lane v. Ewing*, 31 Mo. 75; s.c. 77 Am. Dec. 632;

Thompson v. Branch, 1 Meigs (Tenn.) 390; s.c. 33 Am. Dec. 153.

Compare: Haines v. O'Connor, 10 Watts (Pa.) 813; s.c. 36 Am. Dec. 180.

⁶ *Stanley v. Colt*, 72 U. S. (5 Wall.) 168; bk. 18 L. ed. 502.

⁷ *Leavitt v. Beirne*, 21 Conn. 1;

Starr v. Moulton, 97 Ill. 525;

Vallette v. Bennett, 69 Ill. 632;

Littlefield v. Cole, 33 Me. 552;

Morton v. Southgate, 28 Me. 41;

Phelps v. Harris, 51 Miss. 789;

Haydell v. Hurck, 5 Mo. App. 267;

Luige v. Luchesi, 12 Nev. 306;

Zabriskie's Exrs. v. Wetmore, 26 N. J. Eq. (11 C. E. Gr.) 18;

its identity exists,¹ or when it can be shown that it is the product of the original property of the *cestui que trust*; and the right of reclamation attaches to it until detached by the superior equity of a *bona fide* purchaser for a valuable consideration without notice;² but the right of pursuing it fails when the means of ascertainment fail.³ In case of breach of trust the *cestui que trust* may elect to hold the original or substituted property, when he can identify the trust fund, either in its original or in a substituted form, or he may hold the trustee personally liable;⁴ but in those cases where he cannot identify the property, he must rely on the personal liability of the trustee.⁵

SEC. 1789. **Same—Rights and powers of.**—It has already been pointed out that the relative rights of the trustee and his *cestui que trust* are different in active and passive trusts.⁶ In a passive trust the rights of the *cestui que trust* are equivalent to legal ownership, the trustee having the bare legal title and being compellable in equity to do with respect to such title whatever is necessary for the beneficial enjoyment of the property by the *cestui*

Arnold v. Gilbert, 3 Sandf. Ch. (N. Y.) 531;

Rammelsburg v. Mitchell, 29 Ohio St. 22;

Pulpress v. African Church, 48 Pa. St. 204;

Goddard v. Brown, 12 R. I. 31;

Mauser v. Dix, 8 DeG. M. & G. 371;

Costabadie v. Costabadie, 6 Hare 410;

Prendergast v. Prendergast, 3 H. L. Cas. 195;

Brophy v. Bellamy, L. R. 8 Ch. 798; s.c. 43 L. J. Ch. 183; 29 L. T. 380;

Bankes v. Le Despencer, 11 Sim. 508.

¹ Lathrop v. Bampton, 31 Cal. 17; s.c. 89 Am. Dec. 141.

See: Carpenter v. McBride, 3 Fla. 292; s.c. 52 Am. Dec. 379;

Jackson v. Matsdorf, 11 John. (N. Y.) 91; s.c. 52 Am. Dec. 355.

Following trust fund consisting of money, it is not necessary to

identify individual pieces or coins, but it is sufficient to show a separate and independent fund or value, readily distinguishable from all other funds.

Lathrop v. Bampton, 31 Cal. 17; s.c. 89 Am. Dec. 141.

² See: Post, § 1805.

³ Lathrop v. Bampton, 31 Cal. 17; s.c. 89 Am. Dec. 141;

Duncan v. Jaudon, 82 U. S. (15 Wall.) 165; bk. 21 L. ed. 142.

Where a trustee, holding stock declared on its face to be in trust for his *cestui que trust*, pledged the same for a loan of money to himself, the *cestui que trust* may compel the lender to pay the proceeds of such stock so pledged and sold by him.

Duncan v. Jaudon, 82 U. S. (15 Wall.) 165; bk. 21 L. ed. 142.

⁴ See: Post, § 1819.

⁵ Lathrop v. Bampton, 31 Cal. 17; s.c. 89 Am. Dec. 141.

⁶ See: Ante, §§ 1765, 1766.

que trust, even to making a transfer to him of such legal title.¹ This, however, can only be compelled by a decree in a court of equity. A court of law, we have already seen, would eject the *cestui que trust* at the suit of the trustee ;² but a court of equity would grant the possession to the *cestui que trust*, where such possession is consistent with the trust.³ In such a case, where there are other persons interested in the estate, a court of equity may impose such conditions and restrictions as may be necessary for their protection.⁴

SEC. 1790. *Same—Same—To call for legal title.*—The *cestui que trust* has a right to call upon the trustee of a passive trust for the legal title, in those cases where it is not inconsistent with the trust and is for the benefit of the equitable estate. A bill in equity to compel a conveyance of the legal title by the trustee may be sustained, although no demand for the title was made before suit was brought. In such case, however, the complainant will be subjected to costs,⁵ because it is a general rule in equity procedure that a *cestui que trust* coming into a court of equity to assert legal title must allege that the trustee has refused the use of his name in an action at law.⁶ In those cases where a nominal trust operates to

¹ See : *Post*, § 1790.

² See : *Ante*, § 1765.

³ *Williamson v. Wilkins*, 14 Ga. 416 ;

Stewart v. Chadwick, 8 Iowa 463, 469 ;

Heard v. Baird, 40 Miss. 793, 800 ;

Presley v. Stribling, 24 Miss. 527 ;

Stevenson v. Lesley, 70 N. Y. 512 ;

Battle v. Petway, 5 Ired. (N. C.)

L. 576 ; s.c. 44 Am. Dec. 59 ;

Shankland's Appeal, 47 Pa. St. 113 ;

Harris v. McElroy, 45 Pa. St. 216 ;

Guphill v. Isbell, 1 Bailey (S. C.)

L. 230 ; s.c. 19 Am. Dec. 675 ;

2 *Lewin on Trusts* (8th ed.), 470, 480.

See : *Cholmondeley v. Clinton*, 1 Car. 102 ;

Watts v. Ball, 1 Pr. Wms. 108.

⁴ *Williamson v. Wilkins*, 14 Ga. 416 ;

Gillis v. McKay, 4 Dev. (N. C.) L. 172 ;

Battle v. Petway, 5 Ired. (N. C.) L. 576 ; s.c. 44 Am. Dec. 59 ;

Shankland's Appeal, 47 Pa. St. 113 ;

Harris v. McElroy, 45 Pa. St. 216.

The courts say in *Battle v. Petway*, *supra*, that "as it was said in *Gillis v. McKay*, 4 Dev. (N. C.) L. 172, 'the principle is that the legal estate is not to be divested out of the trustee, unless it may be done without affecting any rightful purpose for which it was created ;' and, therefore, that if others had an equity in the same property, that is, in the debtor's particular share, the act did not operate on it."

⁵ *Forbes v. Hall*, 34 Ill. 159 ; s.c. 85 Am. Dec. 301.

⁶ *Doggett v. Hart*, 5 Fla. 215 ; s.c. 58 Am. Dec. 464.

cloud title and embarrass alienation, a conveyance will be decreed in accordance with the practice of courts of chancery.¹ But a *cestui que trust* cannot call for legal title, when, from the nature of the trust, his ownership is not immediate and absolute, and when it would defeat, or put in his power to endanger and defeat, a legitimate ulterior limitation of the trust;² and where a trustee conveys his legal title to his *cestui que trust* in violation of the will creating the trust, it is a breach thereof, and the conveyance is absolutely void.³

SEC. 1791. **Same—Same—Same—When reconveyance presumed.**—There are cases where a reconveyance of the legal title from the trustee to the beneficiary will be presumed, where the legal title has been vested, either in fee or for a limited time;⁴ and this presumption is not always founded on a belief that the conveyance has actually been made.⁵ The circumstances requisite to raise a presumption of reconveyance by the trustee to the persons beneficially interested are as follows: First, a duty on the part of the trustee to convey; for where he is under no such obligation the jury will not be directed to presume a conveyance to the *cestui que trust*.⁶

See : Kuhn v. Newman, 26 Pa. St.

227 ;

Rush v. Lewis, 21 Pa. St. 72 ;

Motteux v. The London Assurance Co., 1 Atk. 545.

¹ Kay v. Scates, 37 Pa. St. 31 ; s.c. 78 Am. Dec. 399.

² Battle v. Petway, 5 Ired. (N. C.) L. 576 ; s.c. 44 Am. Dec. 59.

Where legacy is given to A, with a limitation over upon his death, B cannot compel A to convey the legal title to him.

Battle v. Petway, 5 Ired. (N. C.) L. 576 ; s.c. 44 Am. Dec. 59.

³ Rife v. Geyer, 59 Pa. St. 393 ; s.c. 98 Am. Dec. 351.

⁴ Matthews v. Ward's Lessee, 10 Gill & J. (Md.) 443 ;

Jackson v. Pierce, 2 John. (N. Y.) 221 ;

Dutch Church v. Mott, 7 Paige Ch. (N. Y.) 77 ;

Moore v. Jackson, 4 Wend. (N. Y.) 59, rev'g 6 Cow. (N. Y.) 706 ;

Aikin v. Smith, 1 Sneed (Tenn.

304, 305.

Roe v. Reade, 8 Durnf. & E. (8 T. R.) 118 ;

Goodtitle v. Jones, 7 Durnf. & E. (7 T. R.) 47 ;

Doe d. Bowerman v. Sybourn, 7 Durnf. & E. (7 T. R.) 2 ; s.c. 4 Rev. Rep. 363 ;

England d. Sybourn v. Slade, 4 Durnf. & E. (4 T. R.) 682 ; s.c. 2 Rev. Rep. 498 ;

1 Perry on Trusts (4th ed), § 439.

⁵ Hilary v. Walker, 12 Ves. 239 ;

2 Perry on Trusts (4th ed), § 349.

⁶ Beach v. Beach, 14 Vt. 28 ; s.c. 39 Am. Dec. 204 ;

Langley v. Snelyd, 1 Sim. & S. 45 ;

Goodson v. Ellison, 3 Russ. 583.

Thus in the case of a plain trust, where the trustees were directed to convey to a devisee on his attaining twenty-one, the jury may be directed to presume a conveyance at any time afterwards, though considerably less than twenty years.

Secondly, there must exist circumstances from which a reconveyance by the trustee may be reasonably presumed. We have already seen that length of time of itself does not afford grounds for such presumption, yet it is an important circumstance to be considered, and may, in connection with other circumstances, be sufficient to justify a presumption of conveyance.¹ The third circumstance for the presumption of a conveyance is that it is necessary to prevent the title from being defeated.²

Lade v. Holford, Bull & P. 110 ;
England d. Sybourn v. Slade, 4
Durnf. & E. (4 T. R.) 682 ; s.c.
2 Rev. Rep. 498.

See: Doe d. Bowerman v. Sybourn, 7 Durnf. & E. (7 T. R.)
2 ; s.c. 4 Rev. Rep. 363 ;

Wilson v. Allen, 1 Jac. & W. 611 ;
Hillary v. Waller, 12 Ves. 239.

In those cases where the beneficial owner has dwelt on the property for a long period and managed it as though he had possession of the legal title, it will be presumed that a conveyance has been executed to him by the trustee.

Noel v. Bewley, 3 Sim. 103.

In all cases where the estate was originally conveyed to a trustee for a specified purpose, as soon as that purpose is accomplished it becomes the duty of the trustee to reconvey, and that conveyance is presumed to have been made.

Nicoll v. Walworth, 4 Den. (N. Y.) 385 ;

Doe v. Wrighte, 2 Barn. & Ald. 710 ;

Bartlett v. Downes, 3 Barn. & C. 616 ; s.c. 10 Eng. C. L. 281 ;

Doe d. Bowerman v. Sybourn, 7 Durnf. & E. (7 T. R.) 2 ; s.c. 4 Rev. Rep. 363 ;

Emery v. Grocock, 6 Madd. 54 ;
Cooke v. Soltan, 2 Sim. & S. 154 ;

Hillary v. Waller, 12 Ves. 239.

Mere length of time affords no ground, however, for the presumption of a conveyance from the trustee to the *cestui que trust* (Flournoy v. Johnson, 7 B. Mon. (Ky.) 694 ; Doe d. Egremont v. Langdon, 12 Ad. & E. N. S. (12 Q. B.) 719 ; s.c. 64 Eng. C. L. 710 ; Keene d. Byron v. Deardon, 8 East 248 ; s.c. 9 Rev.

Rep. 425 ; Goodson v. Ellison, 3 Russ. 583 ; 1 Perry on Trusts (4th ed.) § 349, except where there are other circumstances which render it morally certain that the original purposes for which the trust was created have been satisfied, in which case the court will presume a conveyance.

Emery v. Grocock, 6 Madd. 54 ;
Hillary v. Waller, 12 Ves. 239.

¹ Doe d. Egremont v. Langdon, 12 Ad. & E. N. S. (12 Q. B.) 711 ;
s.c. 64 Eng. C. L. 710, 719 ;

Keene d. Byron v. Deardon, 8 East 248 ; s.c. 9 Rev. Rep. 425 ;

Goodson v. Ellison, 3 Russ. 583 ;
Hillary v. Waller, 12 Ves. 239.

Thus it is held in the case of Keene d. Byron v. Deardon, *supra*, that possession and receipt of rents, issues, and profits of the estate, though for above twenty years after the creation of the trust without any interference of the trustees, did not show his possession to be adverse to their title, so as to bar their ejectment against his grantees ; such possession and receipt being consistent with and secured to him by the deed of trust.

² Doe d. Egremont v. Langdon, 12 Ad. & E. N. S. (12 Q. B.) 710, 719 ; s.c. 64 Eng. C. L. 710 ;

Tenney d. Whinnett v. John, 10 Bing. 75 ; s.c. 25 Eng. C. L. 44 ;

Doe d. Hammond v. Cooke, 6 Bing. 174 ; s.c. 19 Eng. C. L. 86.

Lord Denman's view—Egremont v. Langdon.—In Doe d. Egremont v. Langdon, *supra*, Lord DENMAN says that "it was formerly considered that old terms assigned to continue the inheritance might, when set up to de-

SEC. 1792. **Same—Same—To maintain ejectment.**—It has already been pointed out that the trustee has the right to the legal estate ;¹ also that the general rule is that all possessory actions, and actions for the protection of the legal title, must be brought by the trustee, who is the custodian of such estate, and entitled to the possession of the land. In those states, however, where there are no courts of equity, and the *cestui que trust* is entitled, under the trust, to the enjoyment of the possession of the land, he may maintain an ejectment in his own name to recover the trust estate, either against a stranger or the trustee.² In some of the states, as in Florida,³ North Carolina,⁴ Virginia,⁵ and perhaps others, a *cestui que trust* may maintain ejectment upon a demise in his own name, though the legal estate be still in the trustee, in a

feat the title of the person for the protection of whose estate they were assigned, be presumed to have been surrendered (Doe d. Burdett v. Wrighte, 2 Barn. & Ald. 710), in which all the previous cases are cited and considered. But it has subsequently been held, and we think rightly, that the surrender of a term to attend the inheritance is not to be presumed from mere lapse of time, or unless there be express evidence to warrant such presumption. (Doe d. Blacknell v. Plowman, 2 Barn. & Ad. 573 ; s.c. 22 Eng. C. L. 241.) Several cases are cited in Sugden on Vendors and Purchasers, in which Lord ELDON expressed a strong opinion that to presume the surrender of a term to attend the inheritance would in most cases defeat the object intended by the assignment of such terms. It may therefore be taken that, after the decision of Doe d. Blacknell v. Plowman, 2 Barn. & Ad. 573 ; s.c. 22 Eng. C. L. 241, down to the passing of the statute 8 & 9 Vict., c. 112, the surrender of a term to attend the inheritance was not to be presumed from mere lapse of time ; and that the omission of a demise in the declaration by the person entitled to the

term would defeat an ejectment by the beneficial owner." Chief Justice TINDAL's view—Doe d. Hammond v. Cooke.—In Doe d. Hammond v. Cooke, 6 Bing. 174 ; s.c. 19 Eng. C. L. 86, Chief Justice TINDAL says that "no case can be put down in which any presumption has been made, except where a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form. In such case, where the possession is shown to have been consistent with the existence of the fact directed to be presumed, and in such cases only, has it ever been allowed."

¹ See : *Ante*, § 1765.

² Kennedy v. Fury, 1 U. S. (1 Dall.) 72 ; bk. 1 L. ed. 42.

See : Wescott v. Edmunds, 68 Pa. St. 34 ;

School Directors v. Dunkleberger, 6 Pa. St. 29 ;

Peebles v. Reading, 8 Serg. & R. (Pa.) 484 ;

Presbyterian Church v. Johnston, 1 Watts & S. (Pa.) 9.

³ Doggett v. Hart, 5 Fla. 215 ; s.c. 58 Am. Dec. 464.

⁴ Murray v. Blackledge, 71 N. C. 492.

⁵ Hopkins v. Ward, 6 Munf. (Va.) 38.

case where the purposes of the deed have been satisfied, and also in the cases of resulting trusts. Where a *cestui que trust* brings ejectment, the jury is permitted to presume that a regular surrender has been made by the trustee of his estate, thereby clothing the *cestui que trust* with the legal title, and enabling him to recover in the action, in the following cases: (1) Where the purposes of the trust estate have been satisfied; (2) where the beneficial occupation of the estate by the possessor induces a supposition that a conveyance of the legal estate has been made to the party beneficially interested; and (3) where the trust is so plain that a court of equity would not hesitate to make a conveyance to the *cestui que trust*.¹

SEC. 1793. **Same—Estoppel of.**—Where the trustee has made an irregular sale of the trust property the beneficiaries of the trust may acquiesce in the confirmation of such sale by acts which will preclude them from afterwards calling the same into question; but such acts, to amount in equity to a confirmation of the sale, must have been done with a full knowledge on their part of their legal and equitable rights which are affected thereby, and of the defects of the title so confirmed.² And a *bona fide* purchaser without notice will be protected against a secret trust in favor of a third person, where such third person, by his own voluntary act, has con-

¹ Doggett v. Hart, 5 Fla. 215; s.c. 58 Am. Dec. 464.

² Mulford v. Minch, 11 N. J. Eq. (3 Stock.) 16; s.c. 64 Am. Dec. 472.

See: Shaw v. Spencer, 100 Mass. 382; s.c. 97 Am. Dec. 107; 1 Am. Rep. 115;

Crocker v. Crocker, 31 N. Y. 507; s.c. 88 Am. Dec. 291.

New Jersey doctrine—Mulford v. Minch.—In *Mulford v. Minch*, *supra*, the court say that they “deem it unnecessary, for the determination of this case, to review the numerous authorities upon the question as to the character of the acts which the court will construe as acts of acquiescence and confirmation

of such titles as the one we are considering. A large number of them may be found collected in the case of *Butler v. Haskell*, 4 Desau. (S. C.) Eq. 708. One principle is well settled by all the authorities, and that is, no act will be held as an act of confirmation by a court of equity unless it was done with a knowledge of his legal and equitable rights by the party whose rights it is sought to conclude by it. A title needs no confirmation, unless it has some defects which render it subject to the rights of others who claim adversely to the person holding the legal title.”

ferred the apparent right of property upon the vendor.¹ A *cestui que trust*, having the right to repudiate any purchase of his trustee, is not entitled to relief where he has been silent for three years, and permitted his trustee to go on and make payments for the property purchased.² But such *cestui que trust* will not be estopped from impeaching deeds given by him to his trustee, by reason of having taken a legacy under his will, which were not made a charge on the particular property derived under the deeds; neither does an election arise under such circumstances.³

SEC. 1794. Of third parties—Creditors of beneficiary.—The distinction between active and passive trusts and the rights attending them has already been pointed out.⁴ Where the trust is merely a passive one, the trust estate is liable to be seized and sold at judicial sale for the debts of the *cestui que trust*; ⁵ and in most of the states all interests in an equitable estate are by statute made subject to liability for the debts of the beneficiary. This may now be regarded as the settled rule both in this country and England.⁶ But a trust may be so limited

¹ *Crocker v. Crocker*, 31 N. Y. 507; s.c. 88 Am. Dec. 291.

See: *Brewster v. Lime*, 42 Cal. 147;

Weaver v. Barden, 49 N. Y. 290, 298, rev'g 3 Lans. (N. Y.) 338;

Ballard v. Burgett, 40 N. Y. 318, 324, aff'g 47 Barb. (N. Y.) 646;

Bostwick v. Dry Goods Bank, 67 Barb. (N. Y.) 449, 451;

Rawls v. Deshler, 3 Keyes (N. Y.) 578; s.c. 4 Abb. App. (N. Y.)

12, 20, aff'g 28 How. (N. Y.) Pr. 66;

State Bank v. Cox, 11 Rich. (S. C.) Eq. 344; s.c. 78 Am. Dec. 458;

Carmichael v. Buck, 10 Rich. (S. C.) L. 332; s.c. 70 Am. Dec. 226.

Owner of stock certificates, fraudulently pledged by one holding them as trustee, is not estopped to assert his claim of ownership by his conduct in standing by, after having notified the pledgee of his claim and demanded his stock, and without protest

allowing the pledgee to pay an assessment upon the stock which has become due.

Shaw v. Spencer, 100 Mass. 382; s.c. 97 Am. Dec. 107; 1 Am. Rep. 115.

² *Follansbe v. Kilbreth*, 17 Ill. 522; s.c. 65 Am. Dec. 691.

³ *Smith v. Townshend*, 27 Md. 368; s.c. 92 Am. Dec. 637.

⁴ See: *Ante*, §§ 1693, *et seq.*, 1789.

⁵ *McGoon v. Scales*, 76 U. S. (9 Wall.) 23; bk. 19 L. ed. 545; *Nichol v. Levy*, 72 U. S. (5 Wall.) 433; bk. 18 L. ed. 596; *Smith v. Orton* (U. S.), 18 L. ed. 62.

⁶ *Kennedy v. Nunan*, 52 Cal. 326; *Johnson v. Connecticut Bank*, 21 Conn. 148, 159; *Miller v. Davidson*, 8 Ill. 518; s.c. 44 Am. Dec. 715;

Winslow v. Minnesota & P. R. Co., 4 Minn. 313; s.c. 77 Am. Dec. 519;

Hutchins v. Heywood, 50 N. H. 391; *Lyford v. Thurston*, 16 N. H. 399, 408;

as to practically withdraw the trust estate from the creditors of the *cestui que trust*,¹ giving the rents, issues, profits, and produce of the trust estate, and the use of the same, to the beneficiary during life, in such a manner that it shall not be subject to alienation, either by voluntary act on his part, or *in invitum* by his creditors.² Thus where the trust is executory, and its duration is discretionary with the trustee; or where, by the terms of the instrument creating the trust estate, it is to cease upon an attempted involuntary conveyance, or upon the insolvency of the *cestui que trust*, and the like, this will prevent the sale of the estate for the payment of the debts of the beneficiary, even though there be no limitation over.³ To this rule, however, there is a

Woodruff v. Johnson, 8 N. J. Eq. (4 Halst.) 729; s.c. 55 Am. Dec. 247;

Campbell v. Foster, 35 N. Y. 361, aff'g 16 How. (N. Y.) Pr. 275;

Bramhall v. Ferris, 14 N. Y. 41; s.c. 67 Am. Dec. 113;

Kip v. Bank of New York, 10 John. (N. Y.) 63;

Foote v. Colvin, 3 John. (N. Y.) 216; s.c. 3 Am. Dec. 478;

Jackson v. Walker, 4 Wend. (N. Y.) 462;

Bush's Appeal, 33 Pa. St. 85;

Taylor v. Mayo, 110 U. S. 330; bk. 28 L. ed. 163;

Pratt v. Colt, 2 Freem. 139;

Forth v. Duke of Norfolk, 4 Madd. 503.

A trustee is personally bound by the contracts which he makes as trustee, even when designating himself as such, unless he stipulates that he is not to be personally responsible, but that the other party is to look solely to the trust estate.

Taylor v. Mayo, 110 U. S. 330; bk. 28 L. ed. 163.

Cestuis que trust need not be joined in action by creditor to reach trust property in the hands of trustees who have the control of, and whose duty it is to protect, the property. In such case, the defense of the trustees is the defense of the *cestuis que trust*, and their presence in court is not necessary to the protection of their interest.

Winslow v. Minn. & P. R. Co., 4 Minn. 313; s.c. 77 Am. Dec. 519.

Creditor need not have judgment at law to maintain bill against trustee for creditors of the debtor to prevent the trustee from abusing the trust and appropriating the trust fund to himself or to the debtor, where such bill is filed on behalf of the plaintiff, and all other creditors who choose to come in with him under the decree and prove their debts.

Miller v. Davidson, 8 Ill. 518; s.c. 44 Am. Dec. 715.

¹ See: *Ante*, § 1743.

² *Spindle v. Shreve*, 111 U. S. 542; bk. 28 L. ed. 512;

Morsell v. First Nat. Bank of Washington, 91 U. S. 357; bk. 23 L. ed. 436;

Nichol v. Levy, 72 U. S. (5 Wall.) 433; bk. 18 L. ed. 596.

³ *Hill v. McRae*, 27 Ala. 175;

Easterly v. Keney, 36 Conn. 18;

Leavitt v. Beirne, 21 Conn. 1, 8;

Rowan's Creditors v. Rowan's Heirs, 2 Duv. (Ky.) 412;

Pope's Exrs. v. Elliott, 8 B. Mon. (Ky.) 56;

McIlvaine v. Smith, 42 Mo. 45;

s.c. 97 Am. Dec. 295;

Frazier v. Barnum, 19 N. J. Eq. (4 C. E. Gr.) 316; s.c. 97 Am. Dec. 666;

Bramhall v. Ferris, 14 N. Y. 41;

s.c. 67 Am. Dec. 113;

Hallett v. Thompson, 5 Paige Ch. (N. Y.) 583;

limitation so far as the creator of the trust is concerned. A man is not permitted to create a trust in his own favor by so limiting it that his creditors cannot reach it for the payment of his debts,¹ because such a transaction would be a palpable fraud upon the creditors.² The rule extends only to the settlement of a trust by friends and relatives who desire thereby to secure means of support for the beneficiary, free from the liability of his debts.³ The limitations to all trusts of the kind above described are to be determined by the law of the jurisdiction which is the *situs* of the property, in case of real estate, and in case of personalty, by the law of the place where the trust was created or is to be administered, according to circumstances.⁴

Dick v. Pitchford, 1 Dev. & B. (N. C.) Eq. 480;

Keyser v. Mitchell, 67 Pa. St. 473;

Rife v. Geyer, 59 Pa. St. 393; s.c. 98 Am. Dec. 351;

Shankland's Appeal, 47 Pa. St. 113;

Barnett's Appeal, 46 Pa. St. 399, 402;

Shryock v. Waggoner, 28 Pa. St. 430;

Eyrick v. Hetrick, 13 Pa. St. 488, 491;

Norris v. Johnstone, 5 Pa. St. 287;

Fisher v. Taylor, 2 Rawle (Pa.) 33;

Ashurst v. Givens, 5 Watts & S. (Pa.) 323;

Johnston v. Zane's Trustees, 11 Gratt. (Va.) 552;

Markham v. Guerrant, 4 Leigh (Va.) 279;

Nichols v. Eaton, 91 U. S. 716; bk. 23 L. ed. 254;

Nichols v. Levy, 72 U. S. (5 Wall.) 433; bk. 18 L. ed. 596.

¹ Woodruff v. Johnson, 8 N. J. Eq. (4 Halst.) 729; s.c. 55 Am. Dec. 247.

See: Disborough v. Outcalt, 1 N. J. Eq. (1 Saxt.) 298.

A person cannot create trusts in his own favor to the prejudice of his creditors, by investing his individual property in a building on the land held in trust; and the rents and profits of such

building will be applied in satisfaction of the creditors' judgment.

Woodruff v. Johnson, 8 N. J. Eq. (4 Halst.) 729; s.c. 55 Am. Dec. 247.

² Woodruff v. Johnson, 8 N. J. Eq. (4 Halst.) 729; s.c. 55 Am. Dec. 247;

Disborough v. Outcalt, 1 N. J. Eq. (1 Saxt.) 298.

³ Ashhurst's Appeal, 77 Pa. St. 464; Mackason's Appeal, 42 Pa. St. 330;

Brooks v. Pearson, 27 Beav. 181; Phipps v. Lord Ennismore, 4

Russ. 131;

Lester v. Garland, 5 Sim. 205.

See: Hill v. McRae, 27 Ala. 175; Johnston v. Zane's Trustees, 11

Gratt. (Va.) 552;

Markham v. Guerant, 4 Leigh (Va.) 279.

⁴ Spindle v. Shreve, 111 U. S. 542; bk. 28 L. ed. 512.

In Illinois, legal title to lands being in trustees for the purpose of serving the requirements of an active trust, a judgment creditor has no lien on the equitable estate, and can acquire none at law on the lands, but can obtain one only by filing a bill in equity for that purpose.

Brandies v. Cochrane, 112 U. S. 344; bk. 28 L. ed. 760;

Spindle v. Shreve, 111 U. S. 542; bk. 28 L. ed. 512.

Not only are equitable estates liable to judicial sale for the payment of debts, but execution creditors can, by suit in equity, compel preferred creditors to close a trust upon which property was granted, and distribute the proceeds.¹ And where the estate is either indebted to the trustee, or would be if he should pay the demand, and the trustee is insolvent or non-resident, the trust estate may be reached directly by a proceeding in chancery.²

SEC. 1795. **Same—For performance of trust.**—In some of the states in this country, as well as in England, where the trustee is vested with the power of sale, the trust property is subject to a constructive trust in the hands of the purchaser, which compels the latter to see to the proper application of the purchase-money. The courts in this country are not harmonious upon this subject. In many this doctrine is limited to cases where the trust is special, and the sale is for a particular purpose. It is thought that where the trust is a general one, the purchaser will not be liable for any misappropriation of the trust funds arising from the sale, for the reason that it would be impossible for him to secure a proper application thereof.³ In all cases where the trustee pledges the trust property to secure his own debt the act is *prima facie* unauthorized, and any one taking such security is bound at his peril to ascertain whether the trustee has power to pledge it.⁴ Where a trustee commits a breach of trust by loaning trust assets or proceeds of the trust estate to a third person, the

¹ Dubose v. Dubose, 7 Ala. 235; s.c. 42 Am. Dec. 588;

Norton v. Phelps ("Hewitt v. Phelps"), 105 U. S. 393; bk. 26 L. ed. 1072.

See: Palk v. Clinton, 12 Ves. 48, 59; s.c. 8 Rev. Rep. 283.

² Norton v. Phelps ("Hewitt v. Phelps"), 105 U. S. 393; bk. 26 L. ed. 1072.

³ Duffy v. Calvert, 6 Gill (Md.) 487; Andrews v. Sparhawk, 30 Mass. (13 Pick.) 393; Stall v. Cincinnati, 16 Ohio St. 169;

Davis v. Christian, 15 Gratt. (Va.) 11;

Potter v. Gardner, 25 U. S. (12 Wheat.) 498; bk. 6 L. ed. 706; Spalding v. Shalmer, 1 Vern. 301; Dunch v. Kent, 1 Vern. 260.

⁴ Shaw v. Spencer, 100 Mass. 382; s.c. 97 Am. Dec. 107; 1 Am. Rep. 115.

See: Loring v. Salisbury, 125 Mass. 138, 151;

Fisher v. Brown, 104 Mass. 259, 261;

Eastman v. Cooper, 32 Mass. (15 Pick.) 276, 290.

latter is bound to indemnify the trustee; and if he has the trust property in specie, a court of equity will compel him to restore it to the trustee from whom he borrowed it.¹

SECTION XII.—SALE AND ASSIGNMENT OF PROPERTY.

- SEC. 1796. When may be made—Generally.
- SEC. 1797. Same—Upon demand of beneficiary.
- SEC. 1798. Same—Power of trustee to sell.
- SEC. 1799. Same—Same—Notice of sale under trust.
- SEC. 1800. Same—Conveyance in contravention of trust.
- SEC. 1801. Same—Same—Liability of trustee.
- SEC. 1802. Same—Setting aside sale—Inadequacy of price.
- SEC. 1803. Purchaser or assignee takes subject to trust.
- SEC. 1804. Same—Following property.
- SEC. 1805. Same—Purchaser without notice.
- SEC. 1806. Same—Purchaser with notice.
- SEC. 1807. Purchase by trustee—Sale voidable.
- SEC. 1808. Same—Legal or actual fiduciary relations.
- SEC. 1809. Same—Purchase from *cestui que trust*.
- SEC. 1810. Same—Purchase at sale of co-trustee.
- SEC. 1811. Same—Purchase at sheriff's sale.
- SEC. 1812. Same—Purchase through third person.
- SEC. 1813. Same—Purchase voidable only.
- SEC. 1814. Same—Same—Who may apply to set aside sale.
- SEC. 1815. Same—Rights and title of purchaser.

SECTION 1796. **When may be made—Generally.**—Real estate, the subject of a trust, may be sold and assigned under certain conditions and for certain purposes. We have already seen that the trustee holds the legal title to the estate,² and such title may be transferred by sale under an execution levied against him,³ and the pur-

¹ Abbot's *Exr. v. Reeves*, 49 Pa. St. 494; s.c. 88 Am. Dec. 510.

² See: *Ante*, § 1786.

³ *Giles v. Palmer*, 4 Jones (N. C.) L. 386; s.c. 69 Am. Dec. 756.

See: *Moore v. Byers*, 65 N. C. 240, 243;

Parmer v. Giles, 5 Jones (N. C.) Eq. 75, 79.

Where the trust is a mere naked one, and the trustee has no beneficial interest therein, the better

opinion is thought to be that an execution sale against the trustee will be inoperative.

Matthews v. Ward, 10 Gill & J. (Md.) 443;

Houston v. Nowland, 7 Gill & J. (Md.) 480, 493;

Smith v. McCann, 65 U. S. (24 How.) 398; bk. 16 L. ed. 714.

See: *Baker v. Copenbarger*, 15 Ill. 103; s.c. 58 Am. Dec. 600;

chaser will succeed to all the rights of the defendant in execution ; that is, will acquire the interest the latter had, whatever that may be, in the state it was in at the time the execution was levied.¹ This is on the well-recognized principle that the legal title "always may be bound to the extent of the beneficial interest covered by it."² But where the land is held by the defendant as a trustee, the purchaser may be enjoined from taking possession by the *cestui que trust*.³ In those cases where the instrument creating a trust authorizes the trustees to carry on a business and contract debts therein, and gives a right of indemnity from the trust estate for the personal liability incurred thereby, when the time arrives for terminating the trust, a creditor of such trustees may

Elliott v. Armstrong, 2 Blackf. (Ind.) 198 ;

Bostick v. Keizer, 4 J. J. Marsh. (Ky.) 597 ; s.c. 20 Am. Dec. 237 ;

Hunt v. Townshend, 31 Md. 336 ;

Hancock v. Titus, 39 Miss. 224 ;

Campfield v. Johnson, 5 N. J. Eq. (1 Halst.) 245 ;

Mallory v. Clark, 9 Abb. Pr. (N. Y.) 358 ; s.c. 20 How. Pr. 418 ;

Manly v. Hunt, 1 Ohio 257.

Torts of the trustee will not render

liable the funds or property held

for a charitable object.

Fire Ins. Patrol v. Boyd, 120 Pa.

St. 624 ; s.c. 15 Atl. Rep. 553 ;

1 L. R. A. 714.

Broker's commission for securing a

loan for the benefit of the trust will

not be chargeable to the trust

estate, under a contract of em-

ployment by the trustee, who

agreed that he should be paid

from the trust fund, but did not

make it a specific lien thereon

or stipulate that he should not

be personally liable, where the

trustee or his estate is insolvent.

Johnson v. Leman, 131 Ill. 609 ;

s.c. 23 N. E. Rep. 435 ; 7 L. R.

A. 656.

Same—The death of a trustee who has

employed a broker to perform

services for the trust estate will

not render the estate liable, if

it was not liable when the con-

tract was made.

Johnson v. Leman, 131 Ill. 609 ;

s.c. 23 N. E. Rep. 435 ; 7 L. R.

A. 656, *et seq.*

The power of a chancellor, under a

statute, to grant an order to C,

as trustee, to sell or mortgage,

for trust purposes, certain prop-

erty in which C himself has a

life interest, gave no jurisdic-

tion to grant an order to trans-

fer such property in payment

of C's debts ; and a sale under

such an order was absolutely

void.

Williamson v. Ball, 49 U. S. (8

How.) 566 ; bk. 12 L. ed. 1200 ;

Williamson v. Berry, 49 U. S. (8

How.) 495 ; bk. 12 L. ed. 1170.

¹ *Barney v. Patterson*, 6 Har. & J.

(Md.) 182, 204, 205 ;

Rutherford v. Green, 2 Ired. (N.

C.) Eq. 121 ;

Giles v. Palmer, 4 Jones (N. C.)

L. 386 ; s.c. 69 Am. Dec. 756.

See : *Stump v. Henry*, 6 Md. 201 ;

s.c. 61 Am. Dec. 300 ;

Bowie v. O'Neale, 5 Har. & J.

(Md.) 226 ;

Whipple v. Farrar, 3 Mich. 436 ;

s.c. 64 Am. Dec. 99 ;

Den ex d. Lyerly v. Wheeler, 11

Ired. (N. C.) L. 288 ; s.c. 53 Am.

Dec. 414 ;

Gingrich v. Foltz, 19 Pa. St. 38 ;

s.c. 57 Am. Dec. 631.

² *Drysdale's Appeal*, 15 Pa. St.

457.

³ *Tally v. Reed*, 74 N. C. 463, 469,

470 ;

Blackmer v. Phillips, 67 N. C.

340, 343 ;

Giles v. Palmer, 4 Jones (N. C.)

L. 386 ; s.c. 69 Am. Dec. 756.

bring suit in equity on behalf of himself and of other similar creditors to reach the trust fund for the satisfaction of his debt, without first recovering a judgment at law.¹ The land is also liable for the debts of the beneficiary under certain circumstances.²

Trust estates may also be transferred under and in accordance with the statute,³ under and in accordance with the terms of the instrument creating the trust estate,⁴ and upon demand of the beneficiary.⁵

SEC. 1797. Same—Upon demand of beneficiary.—We have

¹ *Mason v. Pomeroy*, 151 Mass. 164; s.c. 24 N. E. Rep. 202; 7 L. R. A. 771.

A trust to carry on a business, with power to contract debts, is given to three trustees, who carry on the business for a time, and in so doing contract debts, and then two of the trustees retire from the trust, and the other trustee continues the business and contracts more debts in good faith and for the benefit of the business; upon the termination of the trust and the winding up of the business the creditors whose claims accrued during the management of the three trustees have no equity to priority in payment over the other creditors, in the absence of provisions to that effect in the statutes or in the instrument constituting the trust.

Mason v. Pomeroy, 151 Mass. 164; s.c. 24 N. E. Rep. 202; 7 L. R. A. 771.

² See: *Ante*, § 1794.

The limitation in a devise for a charity, forbidding a sale or disposal of the property, cannot be separated from others requiring the trustees to lease it and apply the proceeds to the use of the charity so as to make the former a condition, for a breach of which a forfeiture was incurred; but all are, instead, limitations creating a trust.

Stanley v. Colt, 72 U. S. (5 Wall.) 119; bk. 18 L. ed. 502.

³ See: *Anderson v. McGowan*, 42 Ala. 280;

Kidwell v. Brnmagin, 32 Cal.

436, 437;

Shields v. Smith, 8 Bush (Ky.) 601;

Dunning v. Ocean National Bank; 61 N. Y. 497;

Roome v. Phillips, 27 N. Y. 357, 363;

Conklin v. Egerton, 21 Wend. (N. Y.) 430, 431, 439;

Hester v. Hester, 2 Ired. (N. C.) Eq. 330;

Evans v. Chew, 71 Pa. St. 47;

Bailey v. Brown, 9 R. I. 79;

Brown v. Armistead, 6 Rand. (Va.) 594;

Stanley v. Colt, 72 U. S. (5 Wall.) 119; bk. 18 L. ed. 502;

Barr v. Gratz's Heirs, 8 U. S. (4 Wheat.) 213; bk. 4 L. ed. 553.

Under the Kentucky statute of February 16, 1808, chap. 453, a deed from a surviving trustee, under a decree in equity, is valid without approval of the court.

Barr v. Gratz's Heirs, 8 U. S. (4 Wheat.) 213; bk. 4 L. ed. 553.

A state act authorizing the trustees of a charity to sell lands and to invest the proceeds,—although the lands were devised with a limitation forbidding the sale or disposal of the property,—appropriating the interest to the use of the society in the same manner as the rents or income of said property were by the will required to be appropriated, is valid.

Stanley v. Colt, 72 U. S. (5 Wall.) 119; bk. 18 L. ed. 502.

⁴ *Wormley v. Wormley*, 21 U. S. (8 Wheat.) 421; bk. 5 L. ed. 651.

⁵ See: *Ante*, § 1790; *Post*, § 1797.

already seen that where the trust is a mere passive one, and the trustee is invested with no duty except that of acting as a simple reservoir of the title, to convey the same upon demand, the legal title must be transferred to the *cestui que trust* whenever he calls for the same.¹ This rule is thought to apply to every species of trust where a decree in chancery requiring such conveyance is not inconsistent with the express terms of the trust. The tendency of the modern decisions is to give to the *cestui que trust* full power of disposal of the estate, whenever this can be done without violating either the express or implied purpose for which the trust was created, and without doing manifest injury to any one interested therein. And in those cases where there is no prohibition against alienation in the instrument creating the trust, the joining of the trustee and *cestui que trust* in a deed of conveyance destroys the trust estate and passes the absolute title.² In all those cases, however, in which the trustee is required to exercise a proprietary authority over the property, he is regarded in equity as its owner so far as is necessary for the performance of the trust, and to that extent the rights and powers of the *cestui que trust* are curtailed.³ Where the duties for which an active trust was created have been performed, the trust becomes a passive one, and in those cases where not executed by the statute of uses, a court of equity will direct a conveyance by the trustee in accordance with the directions of the *cestui que trust*.⁴

¹ See : *Ante*, § 1790.

² *Arrington v. Cherry*, 10 Ga. 429 ;
Stewart v. Chadwick, 8 Iowa 463,
 489 ;
Battle v. Petway, 5 Ired. (N. C.)
 L. 576 ; s.c. 44 Am. Dec. 59 ;
arnett's Appeal, 46 Pa. St. 399 ;
Harris v. McElroy, 45 Pa. St.
 216 ;
Vaux v. Parke, 7 Watts & S. (Pa.)
 19 ;
 1 *Lewin on Trusts* (8th ed.), 470.

³ *Bowditch v. Andrew*, 90 Mass. (8
 Allen) 339 ;
Smith v. Harrington, 86 Mass. (4
 Allen) 566 ;
Douglass v. Cruger, 80 N. Y. 15 ;

McCoster v. Brady, 1 Barb. Ch.
 (N. Y.) 329 ;

William's Appeal, 83 Pa. St. 377 ;
Culbertson's Appeal, 76 Pa. St.
 145 ;

Barnett's Appeal, 46 Pa. St. 399 ;
 1 *Lewin on Trusts* (8th ed.), 470 ;
 1 *Spence Eq. Jur.* 496, 497.

⁴ *Waring v. Waring*, 10 B. Mon.
 (Ky.) 331 ;

Leonard's Lessee v. Diamond, 31
 Md. 536 ;

Welles v. Castles, 69 Mass. (3
 Gray) 323 ;

Sherman v. Dodge. 28 Vt. 26 ;
 1 *Perry on Trusts* (4th ed.), § 351.

SEC. 1758. **Same—Power of trustee to sell.**—A power to sell the trust estate may be given in direct terms, no particular form is necessary to give such power: or the power may be implied from the manifest purpose of the testator in creating the trust, in those cases where a sale of the property is necessary in order to enable the trustee to carry out the directions of the trust.¹ As where there is a direction to divide certain lands among designated heirs in a specified way, where this cannot be done without a sale of the trust property;² or where the trustee is required to hold the capital for a remainderman;³ or there is a bequest of an annuity out of the lands;⁴ or there is a devise of the residue of property in trust to pay the income thereof to the wife of the testator, and the balance remaining at her death to the testator's heirs;⁵ or a devise in trust to pay the income to designated heirs half-yearly:⁶ or a devise in trust of a particular sum to be invested and re-invested, the income to be paid to the devisee during life, and the trust fund to the children of such devisee;⁷ or where there is any other active duty imposed upon the trustee which requires a sale of the trust property in order to discharge the trust.⁸

¹ *Winston v. Jones*, 6 Ala. 550, 554;
Rankin v. Rankin, 36 Ill. 293;
s.c. 57 Am. Dec. 205;

South Scituate Savings Bank v.
Ross, 93 Mass. (11 Allen) 442,
443;

Going v. Emery, 33 Mass. (13
Pick.) 107; s.c. 26 Am. Dec.
645;

Fluke v. Fluke, 16 N. J. Eq. (1
C. E. Gr.) 478;

Kearney v. Maccomb, 16 N. J. Eq.
(1 C. E. Gr.) 189;

Mapps v. Tyler, 43 Barb. (N. Y.)
421;

Craig v. Craig, 3 Barb. Ch. (N.
Y.) 76;

State v. Cincinnati, 16 Ohio St. 169;

Clark v. Riddle, 11 Serg. & R.
(Pa.) 311;

Williamson v. Suydam, 73 U. S.
(6 Wall.) 723; bk. 18 L. ed
967;

Scott v. Stewart, 27 Beav. 369;

Hamilton v. Buckminster, L. R.
3 Eq. 323;

Wood v. White, 4 Myl. & Cr. 481.

Compare: Seeger's Exrs. v.
Seeger, 21 N. J. Eq. (6 C. E.
Gr.) 90.

² See: *Winston v. Jones*, 6 Ala. 550;
Jones v. Jones, 13 N. J. Eq. (3
Beas.) 236.

³ *Moran v. Bank of Commerce*, 90
Mo. 452.

⁴ *Ex parte Elliott*, 5 Whart. (Pa.)
524; s.c. 34 Am. Dec. 572.

⁵ *Livingston v. Murray*, 39 How.
Pr. (N. Y.) 102.

⁶ *Belcher v. Belcher*, 23 N. J. Eq.
(11 Stew.) 126.

⁷ *Purdie v. Whitney*, 37 Mass. (20
Pick.) 25.

See: *Nugent v. Cloon*, 117 Mass.
219, 221;

Parker v. Converse, 71 Mass. (3
Gray) 336, 341;

Goodrich v. Procter, 67 Mass. (1
Gray) 567, 570;

Gould v. Lamp, 52 Mass. (11 Met.)
84; s.c. 45 Am. Dec. 187;

Gibbs v. Marsh, 43 Mass. (2 Met.)
243, 254.

⁸ *Winston v. Jones*, 6 Ala. 550;

SEC. 1799. **Same—Same—Notice of sale under trust.**—A power to sell, either with or without the aid of the court, may be conferred upon a trustee.¹ Where a power to sell the trust estate is given to the trustee, on the execution of such power the notice provided for in the instrument creating the trust should be given,² and should contain such facts as would reasonably apprise the public of the place, time, and terms of sale, and the property to be sold. But mere omissions and inaccuracies in these respects, not calculated to mislead, and working no prejudice, will not be regarded;³ because where the power conferred in a deed of trust has not been executed in accordance with the essential conditions thereof, the sale and deed will be held to be void, both at law and in equity.⁴ Yet it is thought that where the trustee does not strictly comply with the directions for selling contained in the instrument creating the trust, he may, nevertheless, give a valid title, being personally responsible for such breach of trust.⁵

Rankin v. Rankin, 36 Ill. 293;
s.c. 87 Am. Dec. 205;

Mapps v. Tyler, 43 Barb. (N. Y.)
421;

Craig v. Craig, 3 Barb. Ch. (N.
Y.) 76;

Clark v. Riddle, 11 Serg. & R.
(Pa.) 311;

Scott v. Steward, 27 Beav. 369.

¹ *Leffler v. Armstrong*, 4 Iowa 482;
s.c. 68 Am. Dec. 672.

But in such cases the conditions
upon the execution of the
power must be strictly com-
plied with in order to render
the sale valid.

Benham v. Rowe, 2 Cal. 387; s.c.
56 Am. Dec. 342;

Niles v. Ransford, 1 Mich. 338;
s.c. 51 Am. Dec. 95;

Powers v. Kueckhoff, 41 Mo. 425
s.c. 97 Am. Dec. 281;

Carson v. Blakey, 6 Mo. 273; s.c.
35 Am. Dec. 440.

² *Singleton v. Scott*, 11 Iowa 589, 598;
Powers v. Kueckhoff, 41 Mo.

425; s.c. 97 Am. Dec. 281;
Minuse v. Cox, 5 John. Ch. (N.
Y.) 441; s.c. 9 Am. Dec. 313.

³ *Powers v. Kueckhoff*, 41 Mo. 425;
s.c. 97 Am. Dec. 281.

See: *Beattie v. Butler*, 21 Mo.

313; s.c. 64 Am. Dec. 234;

Gray v. Shaw, 14 Mo. 341.

Where the deed empowers the
trustee to sell at public auction
at the court-house, in a certain
town and county, and the
notice states that the sale will
be for cash, at the court-house
door in such town, but without
naming the county, or stating
that it will be at public auction,
the notice is sufficient until it
is shown that injury results
therefrom.

Powers v. Kueckhoff, 41 Mo. 425;
s.c. 97 Am. Dec. 281.

⁴ *Dana v. Farrington*, 4 Minn. 433;
Eitelgeorge v. Mutual House

Building Association, 69 Mo.
52, 55;

Powers v. Kueckhoff, 41 Mo. 425;
s.c. 97 Am. Dec. 281;

Thornburg v. Jones, 36 Mo. 514;
Stine v. Wilkson, 10 Mo. 75;

King v. Duntz, 11 Barb. (N. Y.) 192;
Miller v. Hull, 4 Den. (N. Y.) 104;

Sherwood v. Reade, 7 Hill (N. Y.)
431, rev'g 8 Paige Ch. (N. Y.) 633;

Jackson v. Clark, 7 John. (N. Y.)
217.

⁵ *Minuse v. Cox*, 5 John. Ch. (N. Y.)
441; s.c. 9 Am. Dec. 313.

SEC. 1800. Same—Conveyance in contravention of trust.—A conveyance by a trustee, in violation of the trust, does not, as a general rule, transfer any title; yet such conveyance cannot be impeached by a stranger to the trust,¹ for the reason that the law interferes at the instance of no man.² Such a conveyance carries with it the absolute title at law, defeasible in equity by the party injured by the trustee's breach of trust.³ Where a trustee in a trust deed is authorized to sell for cash he cannot sell on credit, and if he does sell on time the sale may be set aside as void;⁴ but in the absence of an express direction to sell for cash, a sale by the trustee upon credit may be an act of good faith and the proper exercise of sound discretion, according to the circumstances.⁵ Where a trustee is given a power of sale he is guilty of a breach of trust in selling the trust property under disadvantageous circumstances, which it is in his power to avoid.⁶

SEC. 1801. Same—Same—Liability of trustee.—A trustee who violates his trust in a sale of trust property is liable

See: *Rodriguez v. Hefferman*, 5 John. Ch. (N. Y.) 417, 429;

Taylor v. Benham, 46 U. S. (5 How.) 233, 272; bk. 12 L. ed. 130, 149.

Public sale without notice.—If a trustee sell without giving public notice, when he is directed to give such notice, the sale is valid as to a purchaser, the trustee being held responsible for a deficiency, if any.

Minuse v. Cox, 5 John. Ch. (N. Y.) 441; s.c. 9 Am. Dec. 313.

Same—At discretion of trustee.—Where land is given to a trustee to sell the same "at auction or otherwise, in whole or in parcels, on giving three weeks' notice thereof," he can sell the same at private sale; the direction as to notice has only a reference to a sale at public auction.

Minuse v. Cox, 5 John. Ch. (N. Y.) 441; s.c. 9 Am. Dec. 313.

¹ See: *Post*, § 1814.

² *Hunt v. Crawford*, 3 Pa. St. 426; *Lodge v. Simonton*, 2 Pa. St. 439;

Coxe v. Blanden, 1 Watts (Pa.) 533; s.c. 26 Am. Dec. 83;

Bayard v. Colefax, 4 Wash. C. C. 38; s.c. *Coxe* Dig. 272; 2 Fed. Cas. 1060.

³ *Taylor v. King*, 6 Munf. (Va.) 358; s.c. 8 Am. Dec. 746.

See: *Coxe v. Blanden*, 1 Watts (Pa.) 533; s.c. 26 Am. Dec. 83.

⁴ *Cassell v. Ross*, 33 Ill. 244; s.c. 85 Am. Dec. 270.

⁵ *Hoffman v. Mackall*, 5 Ohio St. 124; s.c. 64 Am. Dec. 637.

⁶ *Hunt v. Bass*, 2 Dev. (N. C.) Eq. 292; s.c. 24 Am. Dec. 274.

See: *Denny v. Palmer*, 5 Ired. (N. C.) L. 610;

Johnston v. Eason, 3 Ired. (N. C.) Eq. 330.

Thus it is said in *Hunt v. Bass*, *supra*, that where there is no absolute necessity for an immediate sale, it is a breach of his duty to bring it on at a disadvantage, unless it was in the contemplation of all the parties to sell at all events, subject to the cloud on the title.

to the *cestui que trust* for the utmost value of the property sold; but in those cases where the actual value of the property sold can be clearly ascertained, that value will be the measure of indemnity.¹ A trustee in a trust deed can convey the absolute title at law to a purchaser, whether the trust has been performed or not; but the conveyance is defeasible in equity by the party injured, because of the breach of trust on the part of the trustee,² and the trustee will be liable for any damages resulting therefrom. It is a general principle that trustees are liable for parting with the dominion of trust property and permitting it to be squandered; and this is true even in those cases where the deed to them does not specify the trust upon which it is made.³

SEC. 1802. **Same—Setting sale aside—Inadequacy of price.**—Where a trustee is authorized to sell trust property, the fact that the price which the property brought at the trustee's sale was grossly inadequate will not, of itself, invalidate the sale and justify its being set aside, unless the inadequacy is such as to shock the conscience, or raise a presumption of fraud⁴ or unfair-

¹ Ringgold v. Ringgold, 1 Har. & G. (Md.) 11; s.c. 18 Am. Dec. 250.

² Taylor v. King, 6 Munf. (Va.) 358; s.c. 8 Am. Dec. 746.

³ Kinloch v. F'On, 1 Hill (S. C.) Eq. 190; s.c. 26 Am. Dec. 196.

⁴ Inadequacy of price presumption of fraud only where so great as to afford strong evidence.

Butler v. Haskell, 4 Desau. (S. C.) L. 651.

See: Udall v. Kenney, 3 Cow. (N. Y.) 590;

Eyre v. Potter, 56 U. S. (15 How.) 42; bk. 14 L. ed. 592;

Wright v. Stanard, 2 Brock. C. C. 311; s.c. Fed. Cas. No. 18094;

Surget v. Byers, 1 Hempst. C. C. 715; s.c. Fed. Cas. No. 13629;

Follett v. Rose, 3 McL. C. C. 332; s.c. Fed. Cas. No. 4900.

Setting aside sale—Inadequacy of consideration—Carpenter v. Robinson.—It is said in the case of Carpenter v. Robinson, 1 Holmes C. C. 67; s.c. 5 Fed. Cas. 111, that there must be con-

clusive proof of gross inadequacy of consideration to warrant holding a purchaser of trust property from a trustee authorized to sell, liable in equity to account for and pay the proceeds thereof to the *cestui que trust*, on the ground of fraudulent collusion with the trustee in the purchase, where this is claimed upon inference of fraud from inadequacy of consideration only, and without direct evidence of actual fraud.

In the case of Hunter v. Fisher, 29 Fed. Rep. 801, 809, the court say that "property, worth then and now many thousands of dollars, should be sold for \$100, seems impossible, but more impossible is it that a court of equity should establish the title on the facts of this case."

Clark v. Eaton ("Clark v. Trust Co."), 100 U. S. 149, 152; bk. 25 L. ed. 573;

Eyre v. Potter, 56 U. S. (15 How.) 42, 60; bk. 14 L. ed. 592;

ness ;¹ neither will a sale under a trust deed be set aside in equity simply because the property was not sold in separate parcels, except there be fraud in the proceeding, or some one has been prejudiced by the sale *en masse* ;² or where the land sold is in several parcels, in which case sale in a lump will be ground for setting aside the sale and ordering a resale,³ unless it is shown that the sale in a lump was more advantageous to the beneficiaries than if it had been made in separate parcels.⁴

- Erwin v. Parham, 53 U. S. (12 How.) 197 ; bk. 13 L. ed. 952.
 Hubbard v. Jarrell, 23 Md. 66 ;
 Clark v. Eaton ("Clark v. Trust Co."), 100 U. S. 149 ; bk. 25 L. ed. 573 ;
 Cooper v. Galbraith, 3 Wash. C. C. 546 ; s.c. 6 Fed. Cas. 472.
Mere inadequacy of price is not alone sufficient to vitiate a contract of sale.
 See : Garnett v. Macon, 6 Call (Va.) 308 ; s.c. 2 Brock. C. C. 185 ; Fed. Cas. No. 5245 ;
 January v. Martin, 1 Bibb (Ky.) 586 ;
 Beard v. Campbell, 2 A. K. Marsh. (Ky.) 125, 127 ; s.c. 12 Am. Dec. 362 ;
 Stewart v. State, 2 Har. & G. (Md.) 114 ;
 Hubbard v. Coolidge, 42 Mass. (1 Met.) 84, 93 ;
 Udall v. Kenney, 3 Cow. (N. Y.) 590 ;
 Seymour v. Delancy, 3 Cow. (N. Y.) 445 ;
 Osgood v. Franklin, 2 John. Ch. (N. Y.) 1 ; s.c. 14 John. (N. Y.) 527 ; 7 Am. Dec. 513 ;
 Knobb v. Lindsay, 5 Ohio 47 ;
 Whitefield v. McLeod, 2 Bay (S. C.) L. 380 ;
 Butler v. Haskell, 4 Desau. (S. C.) L. 651 ;
 Bunch v. Hurst, 3 Desau. (S. C.) L. 273, 292 ; s.c. 5 Am. Dec. 551 ;
 Gregory v. Duncan, 2 Desau. (S. C.) L. 637 ;
 White v. Flora, 2 Tenn. 430 ;
 Eyre v. Potter, 56 U. S. (15 How.) 42 ; bk. 14 L. ed. 592 ;
 Wright v. Stannard, 2 Brock. C. C. 311 ; s.c. Fed. Cas. No. 18094 ;
 Barrett v. Gomesserra, Bunb. 94 ;
 Collier v. Brown, 1 Cox 428 ; s.c. 1 Rev. Rep. 70 ;
 Griffith v. Spratley, 1 Cox 383 ;
 Young v. Clark, Prec. Ch. 538 ;
 Lowther v. Lowther, 13 Ves. 95 ;
 Burrowes v. Lock, 10 Ves. 470 ; s.c. 8 Rev. Rep. 33, 856 ;
 Mortlock v. Buller, 10 Ves. 292 ; s.c. 7 Rev. Rep. 417 ;
 Coles v. Trecothick, 9 Ves. 234 ; s.c. 7 Rev. Rep. 167 ;
 Underwood v. Hithcox, 1 Ves. 279 ;
 Western v. Russell, 3 Ves. & B. 187 ; s.c. 13 Rev. Rep. 178 ;
 1 Story Eq. Jur. (13th ed.), § 244.
² Fairman v. Peck, 87 Ill. 156, 163 ;
 Prather v. Hill, 36 Ill. 402, 404 ;
 Gillespie v. Smith, 29 Ill. 473 ; s.c. 81 Am. Dec. 328.
³ Williams v. Allison, 33 Iowa 278, 289 ;
 Penn v. Clemons, 19 Iowa 372, 379 ;
 White v. Watts, 18 Iowa 76 ;
 Lay v. Gibbons, 14 Iowa 377 ; s.c. 81 Am. Dec. 487 ;
 Bradford v. Limpus, 13 Iowa 424 ;
 Singleton v. Scott, 11 Iowa 589 ;
 Boyd v. Ellis, 11 Iowa 97 ;
 Grapengether v. Fejervary, 9 Iowa 163 ; s.c. 74 Am. Dec. 336.
⁴ Grapengether v. Fejervary, 9 Iowa 163 ; s.c. 74 Am. Dec. 336.
 See : Gillespie v. Smith, 29 Ill. 473 ; s.c. 81 Am. Dec. 328 ;
 Heaton v. Fryberger, 38 Iowa 185, 195 ;
 Williams v. Allison, 33 Iowa 278, 289 ;
 White v. Watts, 18 Iowa 78 ;
 Lay v. Gibbons, 14 Iowa 377 ; s.c. 81 Am. Dec. 487.

SEC. 1803. **Purchaser or assignee takes subject to trust.**—In all sales of property by a trustee the rule of *caveat emptor* applies,¹ and a purchaser of trust property takes it subject to the trust attached thereto, if he has notice of the trust, even though he pays full value.² And it has been held that the trust may be enforced against a purchaser without knowledge thereof, where he still retains the possession of the lands; but otherwise where he has parted with the property.³ A legatee who takes an estate subject to a trust, takes it as a trustee for the beneficiary;⁴ and the assignee of a trustee takes the estate subject to the trust, and will be compelled to execute it at the instance of the *cestui que trust*.⁵ And where a trustee holds land in trust to convey a specified portion thereof to a certain devisee upon request, and where no request is made for the conveyance to sell the whole and account to a devisee named for a specified part of the proceeds of such sale, on the death of the trustee, without a request made for a conveyance, the lands will descend to his representatives charged with the same trust.⁶ But should the trustee sell the trust estate before his death, a purchaser acquires a good title, discharged of the trust.⁷

SEC. 1804. **Same—Following property.**—It is a well-set-

¹ Sutton v. Sutton, 7 Gratt. (Va.) 234; s.c. 56 Am. Dec. 109.

² Lathrop v. Bampton, 31 Cal. 17; s.c. 89 Am. Dec. 141;

Talbott's Exrs. v. Bell's Heirs, 5 B. Mon. (Ky.) 320; s.c. 43 Am. Dec. 126;

Bunting v. Ricks, 2 Dev. & B. (N. C.) Eq. 130; s.c. 32 Am. Dec. 699;

Lodge v. Simonton, 2 Pen. & W. (Pa.) 439; s.c. 23 Am. Dec. 36, 47;

Smith v. Daniel, 2 McC. (S. C.) Eq. 143; s.c. 16 Am. Dec. 641;

Heth v. Richmond, F. & P. R. Co., 4 Gratt. (Va.) 482; s.c. 50 Am. Dec. 88.

See: Warwick v. Warwick, 31 Gratt. (Va.) 76;

Dunlop v. Harrison's Exr., 14 Gratt. (Va.) 251, 254.

³ Smith v. Daniel, 2 McC. (S. C.) Eq. 143; s.c. 16 Am. Dec. 641.

See: Post, § 1805.

⁴ McCants v. Bee, 1 McC. (S. C.) Eq. 383; s.c. 16 Am. Dec. 610.

⁵ Pierce v. McKeehan, 3 Pa. St. 136; s.c. 45 Am. Dec. 635.

See: Bury v. Hartman, 8 Serg. & R. (Pa.) 175.

⁶ Paul v. Fulton, 32 Mo. 110; s.c. 82 Am. Dec. 124, 125.

⁷ Paul v. Fulton, 32 Mo. 110; s.c. 82 Am. Dec. 124, 125.

Where land held by a deceased trustee has been sold on credit by his administrator, the *cestui que trust* may be subrogated to the rights of the administrator, and the notes taken in payment will be canceled and the money will be ordered to be paid by the innocent purchaser to the *cestui que trust*.

Vandever's Admr. v. Freeman, 20 Tex. 333; s.c. 70 Am. Dec. 391.

tled principle of law that the vested interest of the *cestui que trust* cannot be impaired or destroyed by the voluntary act of the trustee, and that the trust will follow the land into the hands of the person to whom it has been conveyed by the trustee with a notice or knowledge of the trust;¹ or the *cestui que trust* may have his remedy against the trustee personally to recover for damages caused by his unauthorized act.² In those cases where the trust estate consists of a trust fund, if it be wrongfully converted into another species of property, as between the *cestui que trust* and trustee, and all parties claiming and the trustee, otherwise than by purchase for a valuable consideration without notice, it can be followed and subjected to the preferential rights of the *cestui que trust*, however much it may be changed or altered in its nature or character; and all the fruits of such trust property, whether in the original or in an altered state, continue to be subject to or affected by the trust.³ But this doctrine is to be limited to cases where

¹ *Sheperd v. McEvers*, 4 John. Ch. (N. Y.) 136; s.c. 8 Am. Dec. 561.

Trust funds may be followed into lands through the purchase of which they have been applied by the trustee in breach of his trust, and the *cestui que trust* may elect either to hold the unfaithful trustee personally responsible or to claim the lands to be sold for his indemnity and look to the trustee for the deficiency.

Ferris v. Van Vechten, 73 N. Y. 119; s.c. 6 Week. Dig. 555;

Sheperd v. McEvers, 4 John. Ch. (N. Y.) 136; s.c. 8 Am. Dec. 561.

See: *Dodge v. Manning*, 1 N. Y. 298;

Oliver v. Piatt, 44 U. S. (3 How.) 333; bk. 11 L. ed. 622;

Lane v. Dighton, Amb. 409;

Thornton v. Stokill, 19 Jur. 751;

Taylor v. Plumer, 3 Maule & S. 562;

2 Story Eq. Jur. (13th ed.), § 1258, *et seq.*

² *Huckabee v. Billingsly*, 16 Ala. 414; s.c. 50 Am. Dec. 183.

³ *Coles v. Allen*, 64 Ala. 98;

Tilford v. Torrey, 53 Ala. 120;

Pindall v. Trevor, 30 Ark. 249;

Lathrop v. Bampton, 31 Cal. 17;

Wells v. Robinson, 13 Cal. 133, 140, 141;

Dodge v. Cole, 97 Ill. 338; s.c. 37 Am. Rep. 111;

Cookson v. Richardson, 69 Ill. 137;

Derry v. Derry, 74 Ind. 560;

Tracy v. Kelley, 52 Ind. 535;

McDonough v. O'Neil, 113 Mass. 92;

Taylor v. Mosely, 57 Miss. 544;

Hastings v. Drew, 76 N. Y. 9, 16;

Holden v. New York & Erie Bank, 72 N. Y. 286;

Newton v. Porter, 69 N. Y. 133, 136-140; s.c. 25 Am. Rep. 152;

Bartlett v. Drew, 57 N. Y. 587;

Swinburne v. Swinburne, 28 N. Y. 568;

Schlaefel v. Corson, 52 Barb. (N. Y.) 510;

Newton v. Taylor, 32 Ohio St. 399;

Barrett v. Bamber, 81 Pa. St. 247;

Burks v. Burks, 63 Tenn. (7 Baxt.) 353;

Broyles v. Nowlin, 59 Tenn. (3 Baxt.) 191;

the identity of the fund can be traced, and is not to be extended to cases where it has been so mingled with

Veile v. Blodgett, 49 Vt. 270 ;
 Hubbard v. Burrell, 41 Wis. 365 ;
 Central Nat. Bank of Baltimore
 v. Connecticut Mut. L. Ins. Co.,
 104 U. S. 54 ; bk. 26 L. ed. 693 ;
 United States v. State Nat. Bank
 of Boston, 96 U. S. 30 ; bk. 24
 L. ed. 647 ;
 Bayne v. United States, 93 U. S.
 642 ; bk. 23 L. ed. 997 ;
 Duncan v. Jaudon, 82 U. S. (15
 Wall.) 165 ; bk. 21 L. ed. 142 ;
 May v. Le Claire, 78 U. S. (11
 Wall.) 217 ; bk. 20 L. ed. 50 ;
 Oliver v. Piatt, 44 U. S. (3 How.)
 333 ; bk. 11 L. ed. 622 ;
 Friedland v. Johnson, 2 Woods
 C. C. 675 ; s.c. Fed. Cas. No.
 5117 ;
 Lane v. Dighton, Ambl. 409, 411,
 413 ;
Ex parte Dumas, 1 Atk. 232, 233 ;
 Rolfe v. Gregory, 4 DeG. J. & S.
 576 ;
 Ernest v. Croysdill, 2 DeG. F. &
 J. 175 ;
 Barnes v. Addy, L. R. 9 Ch. 244 ;
 s.c. 43 L. J. Ch. 513 ; 30 L. T.
 4 ; 22 W. R. 505 ;
Re Hallett's Estate, Knatchbull v.
 Hallett, L. R. 13 Ch. Div. 696 ;
 s.c. 49 L. J. Ch. 415 ; 42 L. T.
 421 ; 36 Moak Eng. Rep. 779 ;
 Nant-y-Glo & B. Ironworks Co.
 v. Grave, L. R. 12 Ch. Div. 738 ;
 s.c. 38 L. J. 345 ; 26 W. R. 504 ;
Ex parte Cooke, L. R. 4 Ch. Div.
 123 ; s.c. 19 Moak Eng. Rep.
 714 ;
 Taylor v. Plumer, 3 Maul. & S.
 562, 574, 576 ; s.c. 2 Rose 415 ;
 Mansell v. Mansell, 2 Pr. Wms.
 678 ;
 Grigg v. Cocks, 4 Sim. 438 ;
 Lewis v. Madocks, 17 Ves. Jr. 48,
 49, 51, 58 ; s.c. 11 Rev. Rep. 18 ;
 Lench v. Lench, 10 Ves. Jr. 511,
 517 ;
 Fox v. Mackreth, 1 Lead. Cas.
 Eq. 115 ; s.c. 4th Am. ed. 188,
 212, 237 ;
 2 Pom. Eq. Jur. 626.

Commingle trust fund with private property.—In Philadelphia Nat. Bank v. Dowd, 38 Fed. Rep. 172 ; s.c. 2 L. R. A. 480, the court laid down the following rule : "If the property cannot

be identified, by reason of the trust money being mingled with that of the trustee, then the *cestui que trust* is entitled to a charge on the new investment to the extent of the trust money traceable into it. This will be done even if the money is mingled with that of the trustee in a bank account, or in a bag or other mass of money."

Discussing: Harford v. Lloyd, 20 Beav. 310 ;

Hallett's Estate, Knatchbull v. Hallett, L. R. 13 Ch. Div. 696 ; s.c. 49 L. J. Ch. 415 ; 42 L. T. 421 ; 36 Moak Eng. Rep. 779 ;
Ex parte Hardcastle, 44 L. T. N. S. 523 ; s.c. 29 W. R. 615 ;
 Docker v. Somes, 2 Myl. & K. 264 ;

Whitecomb v. Jacob, 1 Salk. 160.
 In discussing the right to follow money into a new form into which it could be specially traced the court in the above case say : "But it is immaterial whether or not the bank stood in the relation of a fiduciary to the plaintiff, because, on the facts stated in the bill, it appears that the money collected cannot be traced into any specific investment or fund, but has been indistinguishably mingled with the general assets of defendant's bank. Such an opinion would have been very generally expressed without hesitation prior to 1879, when the English Court of Appeals rendered its decision in *Re* Hallett's Estate, Knatchbull v. Hallett, L. R. 13 Ch. Div. 696 ; s.c. 49 L. J. Ch. 415 ; 42 L. T. 421 ; 36 Moak Eng. Rep. 779. I do not consider it at all in conflict with the opinion of Sir GEORGE JESSELL in that case. But it is in conflict with several cases since decided in this country, most of which refer to Knatchbull v. Hallett. I look upon these cases as introducing a new principle into an old and well-known doctrine of equity, un-

other moneys or property that it can no longer be specifically separated.¹

sound in theory, and which, with the greatest deference to the courts deciding them, I do not feel at liberty to follow in advance of any adjudication by the Supreme Court. The cases are *Peak v. Ellicott*, Assignee, 30 Kan. 156; s.c. 1 Pac. Rep. 499; *Harrison v. Smith*, 83 Mo. 210; s.c. 53 Am. Rep. 571; *People v. City Bank of Rochester*, 96 N. Y. 32; *Continental Nat. Bank v. Weems*, 69 Tex. 489; s.c. 6 S. W. Rep. 802; and *McLeod v. Evans*, 66 Wis. 401; s.c. 28 N. W. Rep. 545. The facts in the case (*People v. City Bank*) are, briefly, as follows: Two notes made by the firm of Sartwell, Hough & Ford had been discounted by defendant, a state bank. Sartwell, Hough & Ford had money on deposit with the bank, and, wishing to anticipate payment, they drew checks for the amount of the notes, which were thereupon charged to their account, and the notes were entered upon the books of the bank as paid. In fact they had been sold. Thereafter, the bank having become insolvent, a receiver was appointed who refused to pay the notes. The case as constituted in the Court of Appeals was an appeal from an order directing the receiver to make such payment. It appeared that at the time a smaller amount of cash than the face of the notes was found in the bank. The court, DANFORTH, J., delivering the opinion (which is a brief one and does not put the matter upon any well-defined principle), held that the receiver must pay the notes in full, out of money received by him after the bank's failure—that is to say, out of its general assets. He cites *Re Le Blanc*, 75 N. Y. 598, affirmed in 14 Hun (N. Y.) 8; s.c. 4 Abb. (N. Y.) N.

C. 221; and *Libby v. Hopkins*, 104 U. S. 303; bk. 26 L. ed. 769, and says: 'These cases stand upon the ground of a specific appropriation of a particular fund for the payment of the claim brought in question. So does the one at bar.' If the facts of *People v. City Bank* showed the existence of a particular fund there could be no question of the soundness of the decision, but it would not be authority for the cases professing to follow it. The difficulty seems to be that while there once had been such a fund, it had been misappropriated, and neither existed nor could be followed when the bank's assets came to the receiver. *People v. City Bank* is followed in New York by two decisions of the general term: *McColl v. Fraser*, 40 Hun (N. Y.) 111, and *People v. Bank of Dansville*, 39 Hun (N. Y.) 187. In the latter, BARKER, J., says: 'If the identical moneys collected by the bank did not pass into the hands of the receiver, it makes no difference, for in some shape or form they went to swell the assets which fell into his hands.' In *Re Le Blanc*, 14 Hun (N. Y.) 8; s.c. 4 Abb. (N. Y.) N. C. 221, affirmed by the Court of Appeals without an opinion, and cited as authority by Judge DANFORTH, a particular fund passed into the hands of the receiver, which had been held by the corporation expressly for the payment of petitioner's claim; so the point in controversy did not arise. The New York case is followed by the Supreme Court of Wisconsin in *McLeod v. Evans*, two of the five judges dissenting. As the court puts its decision on an intelligible principle I will cite the reasoning of the prevailing opinion. COLE, Ch. J., says: 'The conclusion is irresistible * * *

¹ *Philadelphia Nat. Bank v. Dowd*, 38 Fed. Rep. 172; s.c. 2 L. R.A. 480.

SEC. 1805. **Same—Purchaser without notice.**—It is thought that a purchaser without notice, who has acquired the legal title to land held in trust, and pays his money without notice of the trust, will be protected in equity even against the *cestui que trust*; ¹ because by obtaining the legal title the purchaser has the law in his favor, and having purchased and paid his money without notice, has equal equity with the *cestui que trust*.² But where a *bona fide* purchaser from a trustee finds that the sale has been made in violation of the trust, it is his duty to withhold the payment of the purchase-money from the time of the discovery of the fraud. The defect of the vendor's title, in such a case, will be a good defense in a suit by him for the purchase-money; ³ but a subsequent purchaser of trust property cannot be protected as an innocent purchaser, unless his plea or answer

that the proceeds of the trust property found its way into Hodges' hands and were used by him either to pay off his debts or to increase his assets.

* * * It is not to be supposed that the trust fund was dissipated altogether and did not fall into the mass of the assignor's property; and the rule in equity is well established that so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. * * *

*We do not understand that it is necessary to trace the trust fund into some specific property. * * * If it can be traced into the estate of the defaulting agent or trustee this is sufficient.*' The sentences which I have italicized contain a modification of the equitable doctrine of following trust property necessarily, as I suppose, underlying the decision of *People v. City Bank*, and adopted by the Supreme Courts of Missouri and Kansas in the cases cited from the reports of those states. *Continental Nat. Bank v. Weems*, 69 Tex. 489; s.c. 6 S. W. Rep. 802, is placed upon the same doctrine of

equity, but without as wide a departure from the form in which it is usually enunciated."

¹ *Wyse v. Dandridge*, 35 Miss. 672; s.c. 72 Am. Dec. 149;

Crocker v. Crocker, 31 N. Y. 507; s.c. 88 Am. Dec. 291;

Rife v. Geyer, 59 Pa. St. 393; s.c. 98 Am. Dec. 351;

Beck v. Uhrich, 13 Pa. St. 636; s.c. 53 Am. Dec. 507;

Loughmiller v. Harris, 2 Heisk. (Tenn.) 559.

Chattels attached to real estate come under this rule.

Wentworth v. Wentworth, 2 Minn. 277; s.c. 72 Am. Dec. 97.

A chancellor will not charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge.

Wilson v. Wall, 73 U. S. (6 Wall.) 83; bk. 18 L. ed. 727.

² *Wyse v. Dandridge*, 35 Miss. 672; s.c. 27 Am. Dec. 149;

Henderson v. Warmack, 27 Miss. 830;

Lusk v. McNamar, 24 Miss. 58;

Bank of England v. Tarleton, 23 Miss. 173, 182;

2 Bl. Com. 446;

2 Fonbl. Eq., bk. 2, c. 7, § 1.

³ *Beck v. Uhrich*, 13 Pa. St. 636; s.c. 53 Am. Dec. 507;

Dunn v. Leidy, 3 Phila. (Pa.) 359.

contain explicit averments that he purchased for a valuable consideration, without notice, and that he has taken a conveyance of the legal title.¹ Where the trustee is authorized to sell, a *bona fide* purchaser who pays the purchase-money is not bound to look to its application.²

SEC. 1806. **Same—Purchaser with notice.**—We have already seen³ that a purchaser of trust property, with knowledge of the trust, takes the same subject to the trust,⁴ and is considered as a trustee for the *cestui que trust*.⁵ This is on the principle that trusts are not only enforced against those persons who are rightfully possessed of the trust property as trustees, but against all persons who come into possession of the property bound by the trust, with notice of such trust.⁶ And to make the purchaser of a legal title a trustee, it is not necessary that he should have notice as to the particular *cestui que trust*; it is sufficient if he has notice that the person from whom he buys is but a naked trustee; he is then

¹ *Smitheal v. Gray*, 1 Humph. (Tenn.) 491; s.c. 34 Am. Dec. 664.

See: *High v. Battle*, 10 Yerg. (Tenn.) 335.

² *Potter v. Gardner*, 25 U. S. (12 Wheat.) 498; bk. 6 L. ed. 706.

³ See: *Ante*, §§ 1803, 1804.

⁴ *Carpenter v. McBride*, 3 Fla. 292, 293; s.c. 52 Am. Dec. 379;

Lagow v. Badollet, 1 Blackf. (Ind.) 416; s.c. 12 Am. Dec. 258;

Jackson v. Matsdorf, 11 John. (N. Y.) 91; s.c. 6 Am. Dec. 355;

Shepherd v. McEvers, 4 John. Ch. (N. Y.) 136; s.c. 8 Am. Dec. 561;

Maples v. Medlin, 1 Murph. (N. C.) 219; s.c. 3 Am. Dec. 687;

Scott v. Gallagher, 14 Serg. & R. (Pa.) 333; s.c. 16 Am. Dec. 508;

Kinloch v. I'On, 1 Hill (S. C.) Eq. 190; s.c. 26 Am. Dec. 196;

Smith v. Daniel, 2 McC. (S. C.) Eq. 143; s.c. 16 Am. Dec. 641;

McCants v. Bee, 1 McC. (S. C.) Eq. 383; s.c. 16 Am. Dec. 610;

Mechanics' Bank of Alexandria

v. Seton, 26 U. S. (1 Pet.) 299; bk. 7 L. ed. 152.

Secret trust.—Purchase with notice of secret trust must be made out by clear proof of actual notice, or of facts which put the party upon such inquiry as if pursued with ordinary diligence would have led him to the knowledge of such trust.

Wilson v. McCullough, 23 Pa. St. 440; s.c. 62 Am. Dec. 347.

⁵ *Carpenter v. McBride*, 3 Fla. 292; s.c. 52 Am. Dec. 379;

Talbot's Exrs. v. Bell's Heirs, 5 B. Mon. (Ky.) 320; s.c. 43 Am. Dec. 126;

Heth v. Richmond, F. & P. R. Co., 4 Gratt. (Va.) 482; s.c. 50 Am. Dec. 88;

Turner v. Street, 2 Rand. (Va.) 404, 408; s.c. 14 Am. Dec. 792;

Mechanics' Bank of Alexandria v. Seton, 26 U. S. (1 Pet.) 299;

bk. 7 L. ed. 152;

Adair v. Shaw, 1 Sch. & Lef. 262.

⁶ *Carpenter v. McBride*, 3 Fla. 292; s.c. 52 Am. Dec. 379;

Adair v. Shaw, 1 Sch. & Lef. 262.

bound to inquire and find out the *cestui que trust*.¹ And even actual knowledge of the existence of a trust is not required to render a person liable who acts together with a dishonest trustee, in a matter constituting a misapplication of the trust property.² In those cases where, upon the face of the title-papers, the purchaser has full means of acquiring complete knowledge of the title, he will be deemed to have constructive notice thereof.³ Thus where all parties to a contract for the sale of lands knew they were dealing with a trust fund devoted to a specific public purpose, the utmost good faith was demanded on the part of the purchaser.⁴ A purchaser without actual notice of facts which would create a constructive trust ought not to be treated as if he had notice, unless the circumstances are such as to enable the court to say not only that he might have acquired, but also that he ought to have acquired it, except for his gross negligence.⁵ Notice by *cestui que*

¹ *Maples v. Medlin*, 1 Murph. (N. C.) L. 219; s.c. 3 Am. Dec. 687.

See: *Brewster v. Sime*, 42 Cal. 139;

Shaw v. Spencer, 100 Mass. 382; s.c. 97 Am. Dec. 107; 1 Am. Rep. 115;

Duncan v. Jaudon, 82 U. S. (15 Wall.) 165; bk. 21 L. ed. 142;

Caballero v. Henty, L. R. 9 Ch. 447; s.c. 43 L. J. Ch. 635;

Taylor v. Stibbert, 2 Ves. Jr. 437, 440; s.c. 2 Rev. Rep. 278, 280.

² *Bunting v. Ricks*, 2 Dev. & Bat. (N. C.) Eq. 130; s.c. 32 Am. Dec. 699.

Co-operation of a stranger with a trustee in an act amounting to a breach of the trust will render him liable for the loss occasioned thereby if he had such notice of the existence of the trust as was sufficient, ordinarily, to awaken distrust, or put him upon inquiry.

Bunting v. Ricks, 2 Dev. & B. (N. C.) Eq. 130; s.c. 32 Am. Dec. 699.

³ *Connecticut Gen. Life Ins. Co. v. Eldredge*, 102 U. S. 545; bk. 26 L. ed. 245;

Oliver v. Piatt, 44 U. S. (3 How.) 333; bk. 11 L. ed. 622.

⁴ *American Emigrant Co. v.*

Wright County ("Emigrant Co. v. County of Wright"), 97 U. S. 339; bk. 24 L. ed. 912.

Wherever the purchaser is affected with notice of the facts which in law constitute the breach of trust, the sale is void as to him.

Hallett v. Collins, 51 U. S. (10 How.) 174; bk. 13 L. ed. 376;

Wormley v. Wormley, 21 U. S. (8 Wheat.) 421; bk. 5 L. ed. 651.

Purchaser of corporate stock with notice of trust in favor of third person takes nothing as against the *cestui que trust*.

Crocker v. Crocker, 31 N. Y. 507; s.c. 88 Am. Dec. 291.

Term "trustee" in stock certificates issued to holders in his name "as trustee" is sufficient to put persons on inquiry as to the holder's right to pledge them for his own debt, and a pledgee taking them without inquiry does so at his peril.

Shaw v. Spencer, 100 Mass. 382; s.c. 97 Am. Dec. 107; 1 Am. Rep. 115.

⁶ *Wilson v. Wall*, 73 U. S. (6 Wall.) 83; bk. 18 L. ed. 727.

A mere denial of all knowledge of fraud will not avail the purchaser,

trust that he is owner of land is sufficient notice to a subsequent purchaser.¹

SEC. 1807. *Purchase by trustee—Sale voidable.*—A trustee cannot become a purchaser, either directly or indirectly,² of the trust property, upon a sale thereof,³ as long

if the transaction is such as a court of equity cannot sanction. *Wormley v. Wormley*, 21 U. S. (8 Wheat.) 421; bk. 5 L. ed. 651.

¹ *Morrison v. Kelly*, 22 Ill. 610; s.c. 74 Am. Dec. 169.

² See: *Post*, § 1812.

³ *Saltmarsh v. Beene*, 4 Port. (Ala.) 283; s.c. 30 Am. Dec. 525, 529; *Brannan v. Oliver*, 2 Stew. (Ala.) 47; s.c. 19 Am. Dec. 37; *Worthy v. Johnson*, 8 Ga. 236; s.c. 52 Am. Dec. 399; *Pearson v. Taylor*, 37 Iowa 332; *Sypher v. McHenry*, 18 Iowa 235, 237; *Buell v. Buckingham*, 16 Iowa 293; *Bank of Old Dominion v. Dubuque & P. R. Co.*, 8 Iowa 277; s.c. 74 Am. Dec. 302; *Robertson v. Western M. & F. Ins. Co.*, 19 La. 227; s.c. 36 Am. Dec. 673; *Scott's Exrs. v. Gorton's Exrs.*, 14 La. 115; s.c. 33 Am. Dec. 578; *Florence v. Adams*, 2 Rob. (La.) 556; s.c. 38 Am. Dec. 226; *Pratt v. Thornton*, 28 Me. 355; s.c. 48 Am. Dec. 492; *Murdoch's Case*, 2 Bland Ch. (Md.) 461; s.c. 20 Am. Dec. 381; *Richardson v. Jones*, 3 Gill & J. (Md.) 163; s.c. 22 Am. Dec. 293; *Davis v. Simpson*, 5 Har. & J. (Md.) 147; s.c. 9 Am. Dec. 500; *Singstack v. Harding*, 4 Har. & J. (Md.) 186; s.c. 7 Am. Dec. 669; *Dorsey v. Dorsey*, 3 Har. & J. (Md.) 410; s.c. 6 Am. Dec. 506; *Scott v. Freeland*, 15 Miss. (7 Smed. & M.) 409; s.c. 45 Am. Dec. 310; *Grumley v. Webb*, 44 Mo. 444; s.c. 100 Am. Dec. 304; *State v. McKay*, 43 Mo. 594; *Thornton v. Irwin*, 43 Mo. 153; *Jacques v. Edgell*, 40 Mo. 76, 77;

Boardman v. Florez, 37 Mo. 559; *Jamison v. Glascock*, 29 Mo. 191; *Remick v. Butterfield*, 31 N. H. 70; s.c. 64 Am. Dec. 316; *Lovell v. Briggs*, 2 N. H. 218, 221; *Jewett v. Miller*, 10 N. Y. 402; s.c. 61 Am. Dec. 751; *Hunt v. Bass*, 2 Dev. (N. C.) Eq. 292; s.c. 24 Am. Dec. 274; *Keaton v. Cobb*, 1 Dev. (N. C.) Eq. 439; s.c. 18 Am. Dec. 595; *Chorpenning's Appeal*, 32 Pa. St. 315; s.c. 72 Am. Dec. 789; *McCants v. Bee*, 1 McC. (S. C.) Eq. 383; s.c. 16 Am. Dec. 616; *Field v. Arrowsmith*, 3 Humph. (Tenn.) 442; s.c. 39 Am. Dec. 185; *Tisdale v. Tisdale*, 2 Sneed (Tenn.) 596; s.c. 64 Am. Dec. 775; *Armstrong v. Campbell*, 3 Yerg. (Tenn.) 201; s.c. 24 Am. Dec. 556; *Bailey's Admx. v. Robinsons*, 1 Gratt. (Va.) 4; s.c. 42 Am. Dec. 540; *Buckles v. Lafferty's Legatees*, 2 Rob. (Va.) 292; s.c. 40 Am. Dec. 752.

Trustee may purchase interest of his cestui que trust when its sale by public officer is inevitable.

Chorpenning's Appeal, 32 Pa. St. 315; s.c. 72 Am. Dec. 789.

Trustee is not permitted by Court of Chancery to buy the trust fund for his own benefit, without the consent of the beneficiary, which must be clearly proved. If he does, he still holds subject to the trust.

Field v. Arrowsmith, 3 Humph. (Tenn.) 442; s.c. 39 Am. Dec. 185.

Rule that trustee cannot purchase trust property for his own account forbids that a receiver, who has bought in on foreclosure of a mortgage property of which he held equity of redemption as receiver, should be allowed to hold the property as

as the fiduciary relation continues ;¹ for the reason that he cannot at one and the same time be both vendor and vendee, and thus represent in his own person two opposite and conflicting interests.² It has been said that a purchase by the trustee of the trust property is void, both as to himself and as to others jointly interested with him in the purchase ;³ but it is thought that this is too broad a statement of the principle, and that it is not universally true that such a purchase is voidable at all times and under all circumstances.⁴ Thus in a case where a purchase of the trust estate, at a fair price, is made by a trustee who is also a *cestui que trust*, for

against a *cestui que trust* who elects to claim the benefit of the purchase.

Jewett v. Miller, 10 N. Y. 402 ; s.c. 61 Am. Dec. 751.

The law does not presume that such a transaction will always be impressed with fraud, but it furnishes an inducement to fraud, and affords opportunities to persons, who should always act with the most conscientious and scrupulous good faith, to abuse their trust ; and therefore a total disability is enjoined, to take away all temptation.

¹ *Pratt v. Thornton*, 28 Me. 355 ; s.c. 48 Am. Dec. 492.

See : *Ante*, § 1705.

² *Michoud v. Girod*, 45 U. S. (4 How.) 503 ; bk. 11 L. ed. 1076 ; *Wormley v. Wormley*, 21 U. S. (8 Wheat.) 421 ; bk. 5 L. ed. 651.

³ *Hunt v. Bass*, 2 Dev. (N. C.) Eq. 292 ; s.c. 24 Am. Dec. 274.

⁴ *Van Dyke v. Jones*, 1 Del. Ch. 93 ; s.c. 12 Am. Dec. 76. The court say : " There is another rule in equity relied on by the complainants, that is, that a trustee cannot be a purchaser of the estate of which he is a trustee, and that this is a general rule of public policy depending not upon the circumstances of the case, but upon general principles, that, however honest the circumstances of any individual case may be, the general interests of justice require the purchase to be

avoided in every case. But, notwithstanding the extent which is given to this rule in English decisions, it is not there without some limitation. In *Whelpdale v. Cookson*, 1 Ves. Sr. 9, Lord HARDWICKE said that if a majority of the creditors agreed to allow it, that is, a purchase by a trustee made for him by another person, he should not be afraid to make the precedent ; and in *Campbell v. Walker*, 5 Ves. Jr. 678 ; s.c. 5 Rev. Rep. 135, the master of the rolls, afterwards Lord ALVANLEY, said that any trustee purchasing trust property is liable to have the purchase set aside, if, in any reasonable time, the *cestui que trust* chooses to say that he is not satisfied with it. In that case it was referred to the master to inquire whether it was for the benefit of the plaintiffs that the premises should be resold. Also, in *Morse v. Royal*, 12 Ves. Jr. 335 ; s.c. 8 Rev. Rep. 272, a purchase made by a trustee was established under circumstances. So that the proposition is not universally true, that, at all times and under all circumstances, a sale made by a trustee to himself is void, and the broad rule, which now seems to prevail in England, required years to bring it to its present maturity." See : *Sugden on Vendors*, 391, 394, 399.

the purpose of saving the property from loss, it will be sustained.¹ But the general rule undoubtedly is that the trustee cannot hold trust property for his own benefit, even in those cases where he purchases such property at a sheriff's sale without his instrumentality,² but will hold the same for the benefit of the *cestui que trust* at his election, expressed within a reasonable time.³ In such a case, however, the trustee will be entitled to be reimbursed for his expenditures and permanent improvements.⁴ It has been said to be immaterial whether the trustee designed to buy for himself or for the purpose of quieting his title as trustee;⁵ because, no matter what his intention might be, the law will protect the *cestui que trust* against the acts of the trustee.⁶

¹ Munro v. Allaire, 2 Cai. Cas. (N. Y.) 183; s.c. 2 Am. Dec. 330.

² Spindler v. Atkinson, 3 Md. 409; s.c. 56 Am. Dec. 755.

³ Wiswall v. Stewart, 32 Ala. 433; s.c. 70 Am. Dec. 549;

Charles v. Dubose, 29 Ala. 367;

Scott v. Freeland, 15 Miss. (7 Smed. & M.) 409; s.c. 45 Am. Dec. 310;

Hawley v. Cramer, 4 Cow. (N. Y.) 716;

Jackson v. Walsh, 14 John. (N. Y.) 407;

Davoue v. Fanning, 2 John. Ch. (N. Y.) 252.

See: Jewett v. Miller, 10 N. Y. 402; s.c. 61 Am. Dec. 751.

A trustee cannot claim adversely to those for whom he acquires and holds the property.

Union Pac. R. Co. v. Durant, 95 U. S. 576; bk. 24 L. ed. 391.

All gains made by a trustee, by a wrongful appropriation of the trust fund, shall go to the *cestui que trust*, and all losses shall be borne by the trustee.

Oliver v. Piatt, 44 U. S. (3 How.) 333; bk. 11 L. ed. 622.

⁴ Wiswall v. Stewart, 32 Ala. 433; s.c. 70 Am. Dec. 549;

McClanahan v. Henderson, 2 A. K. Marsh. (Ky.) 388; s.c. 12 Am. Dec. 412;

Pratt v. Thornton, 28 Me. 355; s.c. 48 Am. Dec. 492;

Spindler v. Atkinson, 3 Md. 409;

s.c. 56 Am. Dec. 755;

Rotch v. Morgan, 105 Mass. 431;

Yeackel v. Litchfield, 95 Mass. (13 Allen) 417, 419;

People v. Merchants' Bank, 35 Hun (N. Y.) 100;

Duncomb v. New York, H. & N. R. Co., 22 Hun (N. Y.) 133, 135;

Green v. Winter, 1 John. Ch. (N. Y.) 27; s.c. 7 Am. Dec. 475;

Dilworth v. Sinderling, 1 Binn. (Pa.) 488; s.c. 2 Am. Dec. 469;

McMeekin v. Edmonds, 1 Hill (S. C.) Eq. 288; s.c. 26 Am. Dec. 203;

Myers v. Myers, 2 McC. (S. C.) Eq. 214; s.c. 16 Am. Dec. 648.

See: McLaughlin v. Barnum, 31 Md. 425;

Mason v. Martin, 4 Md. 124;

Jones v. Jones, 4 Gill (Md.) 87;

Terwilliger v. Brown, 59 Barb. (N. Y.) 9, aff'g 44 N. Y. 237;

Abbott v. American Hard Rubber Co., 33 Barb. (N. Y.) 578, 579; s.c. 21 How. (N. Y.) Pr.

193, aff'g 11 Abb. (N. Y.) Pr. 204; s.c. 20 How. (N. Y.) Pr.

199;

Cumberland C. & I. Co. v. Sherman, 30 Barb. (N. Y.) 570;

Hawley v. Cramer, 4 Cow. (N. Y.) 717, 735.

⁵ Casey v. Inloes, 1 Gill (Md.) 430, 493; s.c. 39 Am. Dec. 658.

⁶ Spindler v. Atkinson, 3 Md. 409; s.c. 56 Am. Dec. 755.

SEC. 1808. **Same—Legal or actual fiduciary relations.**—The general rule is that any person occupying legal or actual fiduciary relations to another person, where the one exercises a control over the other, and such other reposes in him trust and confidence, courts of equity will interpose as a protection against overweening confidence, independent of any ingredients of positive fraud, as a matter of public policy,¹ because no person can be permitted to purchase an interest where he has a duty to perform that is inconsistent with the character of purchaser.² The doctrine that persons holding fiduciary relations are incompetent to purchase property held by them in trust is not confined to trustees, or to a particular class of persons, such as guardians, solicitors, and the like, but is a rule of universal application to all persons coming within the principle that no party can be permitted to purchase an interest where he has a duty to perform inconsistent with the character of a purchaser.³ And where lands have been purchased by one holding such confidential relation, a resale will be ordered by the

- ¹ *Highberger v. Stiffler*, 21 Md. 338; s.c. 83 Am. Dec. 593.
 See: *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 565; s.c. 84 Am. Dec. 298;
Wilcox v. Smith, 26 Barb. (N. Y.) 316, 352;
Conger v. Ring, 11 Barb. (N. Y.) 356, 364;
Munro v. Allaire, 2 Cai. Cas. (N. Y.) 183; s.c. 2 Am. Dec. 330;
Hawley v. Cramer, 4 Cow. (N. Y.) 717, 734;
Holridge v. Gillespie, 2 John. Ch. (N. Y.) 30;
Colburn v. Morton, 3 Keyes (N. Y.) 296, 300; s.c. 1 Abb. App. Dec. (N. Y.) 378, 392; 36 How. (N. Y.) Pr. 150; 5 Abb. (N. Y.) Pr. N. S. 308;
Iddings v. Bruen, 4 Sandf. Ch. (N. Y.) 223, 263;
Wormley v. Wormley, 21 U. S. (8 Wheat.) 421, 441; bk. 5 L. ed. 651, 656.
² *Van Dyke v. Johns*, 1 Del. Ch. 93; s.c. 12 Am. Dec. 76;
Robbins v. Butler, 24 Ill. 387;
Casey v. Casey, 14 Ill. 112;
Grider v. Payne, 9 Dana (Ky.) 188, 190;
Ricketts v. Montgomery, 15 Md. 46;
Davis v. Simpson, 5 Har. & J. (Md.) 147; s.c. 9 Am. Dec. 500;
Singstack v. Harding, 4 Har. & J. (Md.) 186; s.c. 7 Am. Dec. 669;
Dorsey v. Dorsey, 3 Har. & J. (Md.) 410; s.c. 6 Am. Dec. 506;
Ames v. Port Huron L. D. B. Co., 11 Mich. 139; s.c. 83 Am. Dec. 731;
Winn v. Dillon, 27 Miss. 494;
Jamison v. Glascock, 29 Mo. 191;
Hoitt v. Webb, 36 N. H. 158;
Torrey v. Bank of Orleans, 9 Paige Ch. (N. Y.) 649;
Van Epps v. Van Epps, 9 Paige Ch. (N. Y.) 237;
Hill v. Frazier, 22 Pa. St. 320;
Collins v. Smith, 1 Head (Tenn.) 251;
Moore v. Hilton, 12 Leigh (Va.) 1;
Michoud v. Girod, 45 U. S. (4 How.) 503; bk. 11 L. ed. 1076.
³ *Maryland F. I. Co. v. Dalrymple*, 25 Md. 242; s.c. 89 Am. Dec. 779.

court.¹ Thus a trustee appointed by a court of equity to sell real estate cannot buy at such sale, either on his own account or as the agent of a third person.² The reason

See; *Brittin v. Handy*, 20 Ark. 381; s.c. 73 Am. Dec. 497;

Korns v. Shaffer, 27 Md. 83, 90.

¹ *Buckles v. Lafferty's Legatees*, 2 Rob. (Va.) 292; s.c. 40 Am. Dec. 759.

The manner of making resale and of taxing the account with such purchaser stated by the court.

Buckles v. Lafferty's Legatees, 2 Rob. (Va.) 292; s.c. 40 Am. Dec. 752.

Pledgor and pledgee come within this rule, which rests upon grounds of public policy, and is enforced without regard to the question of *bona fide* in the particular case.

Maryland F. I. Co. v. Dalrymple, 25 Md. 242; s.c. 89 Am. Dec. 779.

² *Imboden v. Hunter*, 23 Ark. 622; s.c. 79 Am. Dec. 116;

Bryson v. Rayner, 25 Md. 424;

North Baltimore Building Association v. Caldwell, 25 Md. 420; s.c. 90 Am. Dec. 67;

Hoffman Steam Coal Co. v. Cumberland Coal & I. Co., 16 Md. 456; s.c. 77 Am. Dec. 311;

Graves v. Waterman, 63 N. Y. 657, 658, rev'g 4 Hun (N. Y.) 687;

Jewett v. Miller, 10 N. Y. 402; s.c. 61 Am. Dec. 751;

Chapin v. Weed, 1 Clarke Ch. (N. Y.) 464, 466;

Tisdale v. Tisdale, 2 Sneed (Tenn.) 596; s.c. 64 Am. Dec. 775;

Armstrong v. Campbell, 3 Yerg. (Tenn.) 201, 336;

Ex parte Lacey, 6 Ves. 625, 627; s.c. 6 Rev. Rep. 9.

See: *De Caters v. Le Ray De Chaumont*, 3 Paige Ch. (N. Y.) 178.

This is on the general principle that any contract made in fraud of the law, or against public policy, is void and will be set aside as a matter of course.

Davoue v. Fanning, 2 John. Ch. (N. Y.) 252.

See: *Boynton v. Hubbard*, 7 Mass. 112, 118;

Hawley v. Cramer, 4 Cow. (N. Y.) 732;

Fellows v. Fellows, 4 Cow. (N. Y.) 682; s.c. 15 Am. Dec. 412;

Thompson v. Davies, 13 John. (N. Y.) 112;

Jackson v. Merrill, 6 John. (N. Y.) 185, 194; s.c. 5 Am. Dec. 213;

Troup v. Wood, 4 John. Ch. (N. Y.) 228, 254;

Lawrence v. Dale, 3 John. Ch. (N. Y.) 23, 29;

Brown v. Lynch, 1 Paige Ch. (N. Y.) 147;

Wormley v. Wormley, 21 U. S. (8 Wheat.) 421; bk. 5 L. ed. 651;

McLean v. Lafayette Bank, 3 McLean C. C. 587, 588; s.c. Fed. Cas. No. 8888;

Piatt v. Oliver, 2 McLean C. C. 267-269, 313; s.c. Fed. Cas. No. 11115;

Tufts v. Tufts, 3 Wood & M. C. C. 456, 491; s.c. Fed. Cas. No. 14233;

Bexwell v. Christie, Cowp. 395;

1 Story Eq. Jur. (13th ed.) 290-293;

Story Eq. Pl. (8th ed.), § 318.

But before such sale will be avoided the illegality must be technically set up.

Davoue v. Fanning, 2 John. Ch. (N. Y.) 252.

See: *Harrington v. Brown*, 22 Mass. (5 Pick.) 519;

Latham v. Lawrence, 11 N. J. L. (6 Halst.) 322, 385;

Brown v. Lynch, 1 Paige Ch. (N. Y.) 147;

Finlay v. King, 28 U. S. (3 Pet.) 346, 364; bk. 7 L. ed. 701, 708;

Tufts v. Tufts, 3 Wood. & M. C. C. 456, 491; s.c. Fed. Cas. No. 14233;

Stratford v. Twynam, Jacob 418;

Smith v. Clarke, 12 Ves. 477; s.c. 8 Rev. Rep. 359.

The court can with as little effect examine how far the trustee has made an undue use of information acquired by him in the course of his duty in the one case as in the other.

North Baltimore Building Association v. Caldwell, 25 Md. 420; s.c. 90 Am. Dec. 67;

Ex parte Lacey, 6 Ves. 625, 627; s.c. 6 Rev. Rep. 9.

for this rule is, among other things, because the trustee's appearance at the auction sale, professedly as a bidder, would tend to operate as a discouragement to others, who, seeing the vendor ready to purchase at or above the real value, would feel a reluctance to enter into the competition, and so the sale would be chilled.¹ It is a general rule that one undertaking to act for another cannot act for himself in the same matter ; but it is not universally true that a trustee cannot purchase the trust estate ; circumstances may arise to render it necessary to protect the interests of the *cestuis que trust*.² Thus one who assumes management and control of land of another thereby constitutes himself the trustee of the owner, and can do nothing prejudicial to the interests of such owner while such relations exist. He cannot acquire title to the land at tax sale for a delinquency which occurred while he had control, although the fiduciary relation may have ceased at the time of the sale.³ And agents dealing with their principals for property in regard to which they stand in a fiduciary relation, by reason of having had its care, and having collected the rents, paid the taxes, and the like, are bound to make to the principal the fullest disclosure of all the matters connected with such property, within their knowledge, which it is important for the principal to know, in order to treat understandingly. Consequently, if the agent, by concealment of such facts and information, obtains the property at a greatly

See: *Hawley v. Kramer*, 4 Cow. (N. Y.) 734 ;

Davoue v. Fanning, 2 John. Ch. (N. Y.) 252 ;

Ex parte Bennett, 10 Ves. 381 ;
s.c. 8 Rev. Rep. 1.

¹ *Ex parte Lacey*, 6 Ves. 625, 627 ;
s.c. 6 Rev. Rep. 9.

² *Spindler v. Atkinson*, 3 Md. 409 ;
s.c. 56 Am. Dec. 755.

See : *Ante*, § 1807.

³ *Morris v. Joseph*, 1 W. Va. 256 ;
s.c. 91 Am. Dec. 386.

See : *Parkist v. Alexander*, 1 John. Ch. (N. Y.) 394 ;

Sweet v. Jacocks, 6 Paige Ch. (N. Y.) 355 ; s.c. 31 Am. Dec. 252 ;

Lees v. Nuttall, 2 Myl. & K. 819 ;

s.c. Taml. 282.

This is on the well-settled principle that where a person undertakes to act as an agent for another he cannot be permitted to deal in the matter of that agency upon his own account and for his own benefit. And if he takes a conveyance in his own name of an estate which he undertakes to obtain for another, he will in equity be considered as holding it in trust for his principal.

Parkist v. Alexander, 1 John. Ch. (N. Y.) 394 ;

Lees v. Nuttall, 2 Myl. & K. 819 ;
s.c. Taml. 282.

inadequate price, the sale will be set aside. And a sale by the agent, of property so obtained, to one taking with full knowledge of the facts, will likewise be set aside.¹

SEC. 1809. **Same—Purchase from cestui que trust.**—We have heretofore seen that because of the close and intimate relations subsisting between a trustee and his *cestui que trust*, all dealings between them are carefully scrutinized by the courts.² A purchase of the trust property by the trustee from the *cestui que trust*, like a purchase of the trust property by the trustee at public sale, is not absolutely void but voidable.³ Such a sale will not only be set aside for fraud, but upon a very slight showing of advantage taken, or bad faith on the part of the trustee; yet when it is clear that the *cestui que trust* intended that the trustee should buy, and there is no fraud, concealment, or advantage taken by the trustee of information acquired by him as such, the purchase will be upheld and enforced.⁴ But it is maintained in some cases that to support a purchase by a trustee from his *cestui que trust* of part of trust property, the trustee must divest himself of his character as trustee, and enter into a new and distinct contract with the *cestui que trust*; and it must appear that the latter has the fullest information concerning the transaction and the trust, and that no advantage is taken by the purchaser of information acquired by him in the character of trustee.⁵

SEC. 1810. **Same—Purchase at sale of co-trustee.**—The general rule is that a trustee will not be permitted to purchase at his own sale,⁶ neither will he be permitted to purchase at the sale of a co-trustee; and if he should purchase at such a sale, or becomes interested in such a

¹ *Norris v. Tayloe*, 49 Ill. 17; s.c. 95 Am. Dec. 568.

See: *Smith v. Townshend*, 27 Md. 368; s.c. 92 Am. Dec. 637.

² See: *Ante*, § 1766, *et seq.*

³ See: *Post*, § 1813.

⁴ *Buell v. Buckingham*, 16 Iowa 284; s.c. 85 Am. Dec. 516.

⁵ *Smith v. Townshend*, 27 Md. 368; s.c. 92 Am. Dec. 637.

See: *Davcoe v. Fanning*, 2 John.

Ch. (N. Y.) 252;

Fox v. Mackreth, 2 Bro.C. C.400; *Morse v. Royal*, 12 Ves. 355, 373; s.c. 8 Rev. Rep. 338;

Coles v. Trecothick, 9 Ves. 234; s.c. 7 Rev. Rep. 167;

Ex parte Lacey, 6 Ves. 626; s.c. 6 Rev. Rep. 9;

1 Story Eq. Jur. (13th ed.), §§ 321, 322, *et seq.*

⁶ See: *Ante*, § 1807.

purchase, the *cestui que trust* may have the purchase set aside and the property re-sold.¹

SEC. 1811. **Same—Purchase at sheriff's sale.**—It has been said that a trustee may purchase at a sheriff's sale property held in trust under a deed void as to the grantor's creditors, and that he must be treated as the purchaser of the grantor's entire interest at the date of the deed, in the absence of fraud on his part in connection with such sale.² But the general rule is that a purchase by a trustee at a sheriff's sale will be voidable as against the *cestui que trust*, no matter whether such purchase be for himself or for the purpose of quieting his title as trustee.³ A purchase of the trust estate at sheriff's sale by a fraudulent trustee, pending litigation between himself and his *cestui que trust*,

¹ *Scott v. Freeland*, 15 Miss. (7 Smed. & M.) 409; s.c. 45 Am. Dec. 310.

See: *Tatum v. McLellan*, 50 Miss. 21;

Jones v. Smith, 33 Miss. 215, 268;

White v. Trotter, 22 Miss. (14 Smed. & M.) 30, 44; s.c. 53 Am. Dec. 112;

Davoue v. Fanning, 2 John. Ch. (N. Y.) 252;

Michoud v. Girod, 45 U. S. (4 How.) 503; bk. 11 L. ed. 1076.

Where trustee purchases at sale by his co-trustees, the court may either order a resale or set aside the sale entirely, and order the purchase-money refunded.

Scott v. Freeland, 15 Miss. (7 Smed. & M.) 409; s.c. 45 Am. Dec. 310.

² *Spindler v. Atkinson*, 3 Md. 409; s.c. 56 Am. Dec. 755.

In such case he will get only such title as the grantor had at the time of the sale.

See: *Doe ex d. Hosier v. Hall*, 2 Ind. 556; s.c. 54 Am. Dec. 460;

Scott v. Purcell, 7 Blackf. (Ind.) 66; s.c. 39 Am. Dec. 453;

McGee v. Ellis, 4 Litt. (Ky.) 244; s.c. 14 Am. Dec. 124;

Halley v. Oldham, 5 B. Mon. (Ky.) 233; s.c. 41 Am. Dec. 262;

Martin v. Martin, 7 Md. 368, 378; s.c. 61 Am. Dec. 364;

Polk v. Gallant, 2 Dev. & B. (N. C.) Eq. 395; s.c. 34 Am. Dec.

410, 411;

Oviatt v. Brown, 14 Ohio 285; s.c. 45 Am. Dec. 539;

Snavely v. Wagner, 3 Pa. St. 275; s.c. 45 Am. Dec. 640;

Chahoon v. Hollenback, 16 Serg. & R. (Pa.) 425; s.c. 16 Am. Dec. 587;

Friendly v. Sheetz, 9 Serg. & R. (Pa.) 156; s.c. 11 Am. Dec. 691;

Smith v. Painter, 5 Serg. & R. (Pa.) 223; s. c. 9 Am. Dec. 344;

Tower's Appropriation, 9 Watts & S. (Pa.) 103; s.c. 42 Am. Dec. 319;

Foult v. McFarlane, 1 Watts & S. (Pa.) 297; s.c. 37 Am. Dec. 467;

Murphy v. Higginbottom, 2 Hill (S. C.) L. 397; s.c. 27 Am. Dec. 395;

Davis v. Murray, 2 Mills (S. C.) L. 143; s.c. 13 Am. Dec. 661;

Bush v. Bush, 3 Strobb. (S. C.) Eq. 131; s.c. 51 Am. Dec. 675;

Vance's Heirs v. McNairy, 3 Yerg. (Tenn.) 171; s.c. 24 Am. Dec. 553;

Henderson v. Overton, 2 Yerg. (Tenn.) 394; s.c. 24 Am. Dec. 492;

Sanborn v. Kittredge, 20 Vt. 632; s.c. 50 Am. Dec. 58.

³ *Spindler v. Atkinson*, 3 Md. 409; s.c. 56 Am. Dec. 755.

See: *Casey v. Inloes*, 1 Gill (Md.) 430, 483; s.c. 39 Am. Dec. 658.

confers no title, and the sheriff's deed can stand only as a security for what was advanced upon the execution.¹

SEC. 1812. **Same—Purchase through third person.**—We have already seen that a trustee cannot purchase the trust property at his own sale directly,² neither will he be permitted to purchase through an agent,³ and if he does purchase, either directly or indirectly, the sale will be set aside on the proper and reasonable application of the parties beneficially interested.⁴ This doctrine applies to purchases by parties acting in any fiduciary capacity, which imposes upon them the obligation of obtaining the best terms for the vendor, or which has enabled them to acquire a knowledge of the property.⁵ Thus where an agreement is entered into by a commissioner appointed by the orphans' court, to sell real estate, by which the property to be sold is to be purchased by another person, and afterwards divided between them, it will not be enforced in equity.⁶ But in a case where there was no understanding or agreement between the purchaser at a public sale and the trustee making the same, and no collusion between them, and no fraud in fact, and the duties of

¹ *Keaton v. Cobb*, 1 Dev. (N. C.) Eq. 439; s.c. 18 Am. Dec. 595.

² See: *Ante*, § 1507.

³ *Davis v. Simpson*, 5 Har. & J. (Md.) 147; s.c. 9 Am. Dec. 500. See: *Richardson v. Jones*, 3 Gill & J. (Md.) 163; s.c. 22 Am. Dec. 293;

Armstrong v. Campbell, 3 Yerg. (Tenn.) 201; s.c. 24 Am. Dec. 556.

⁴ *Saltmarsh v. Beene*, 4 Port. (Ala.) 283; s.c. 30 Am. Dec. 525;

Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co., 16 Md. 456; s.c. 77 Am. Dec. 311; *Richardson v. Jones*, 3 Gill & J. (Md.) 163; s.c. 22 Am. Dec. 293;

Davis v. Simpson, 5 Har. & J. (Md.) 147; s.c. 9 Am. Dec. 500; *Armstrong v. Campbell*, 3 Yerg. (Tenn.) 201; s.c. 24 Am. Dec. 556;

Kearney v. Taylor, 56 U. S. (15 How.) 494; bk. 14 L. ed. 787.

Where a guardian of minor children, and commissioners who

decided that property ought to be sold, subsequently became interested in a company which purchased the property, it does not constitute constructive fraud, so as to vitiate the sale of the property.

Kearney v. Taylor, 56 U. S. (15 How.) 494; bk. 14 L. ed. 787.

Trustee cannot purchase at his own sale, either in person or by another; and if such purchase be made it is fraudulent. And in case of a purchase by the trustee's agent, who immediately conveys the property to the trustee, it is not necessary to make the agent a party to an action to set aside such sale.

Davis v. Simpson, 5 Har. & J. (Md.) 147; s.c. 9 Am. Dec. 500.

⁵ *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456; s.c. 77 Am. Dec. 311.

⁶ *Saltmarsh v. Beene*, 4 Port. (Ala.) 283; s.c. 30 Am. Dec. 525.

the trustee have since ended, and the sale has been confirmed by the court, the circumstances that, years afterwards, the trustee bought the property from the purchaser, in good faith, and for a fair price paid to him, does not vitiate and annul the public sale.¹

SEC. 1813. **Same—Purchase voidable only.**—We have already seen that a trustee will not be permitted to purchase the trust estate or otherwise deal with it so as to make a profit to himself.² Yet a purchase by the trustee of the property of his *cestui que trust*, whether made at public or private sale, is not absolutely void, but voidable only at the election of the *cestui que trust*, within a reasonable time.³ In other words, the trustee is not prohibited from purchasing, but if he does, it will be for the benefit of the *cestui que trust*, who may, within a reasonable time, have a resale, or the trustee may be held to his purchase.⁴

SEC. 1814. **Same—Same—Who may apply to vacate sale.**—The rule forbidding a trustee from becoming the purchaser of trust property is for the beneficiary's protection, and not for that of the trustee;⁵ consequently objection can be taken only by the *cestui que trust*.⁶ A purchase by the trustee is valid against all the world except the beneficiary,⁷ who may set it aside within a reasonable

¹ *Stephen v. Beall*, 89 U. S. (22 Wall.) 329; bk. 22 L. ed. 786.

² See: *Ante*, § 1807, *et seq.*

³ *Harrison v. McHenry*, 9 Ga. 164; s.c. 52 Am. Dec. 435.

See: *Alexander v. Alexander*, 46 Ga. 283, 291;

Grubbs v. McGlawn, 39 Ga. 672, 674;

Worthy v. Johnson, 8 Ga. 236, 241, 242; s.c. 52 Am. Dec. 399;

Buell v. Buckingham, 16 Iowa 284; s.c. 85 Am. Dec. 516;

Davoue v. Fanning, 2 John. Ch. (N. Y.) 252.

⁴ *Brackenridge v. Holland*, 2 Blackf. (Ind.) 377; s.c. 20 Am. Dec. 123.

⁵ *Richardson v. Jones*, 3 Gill & J. (Md.) 163; s.c. 22 Am. Dec. 293.

⁶ *Richardson v. Jones*, 3 Gill & J.

(Md.) 163; s.c. 22 Am. Dec. 293;

Wilson v. Troup, 2 Cow. (N. Y.) 195; s.c. 14 Am. Dec. 458.

See: *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 567; s.c. 84 Am. Dec. 298.

Equity will not vacate such sale on application by the trustee or the agent through whom the purchase was made.

Richardson v. Jones, 3 Gill & J. (Md.) 163; s.c. 22 Am. Dec. 293.

⁷ *Buell v. Buckingham*, 16 Iowa 284; s.c. 85 Am. Dec. 516;

Olcott v. Tioga R. Co., 27 N. Y. 546, 567; s.c. 84 Am. Dec. 298;

Clarke v. Swaile, 2 Eden 534;

Morse v. Royal, 12 Ves. 355; s.c. 8 Rev. Rep. 338.

time,¹ or ratify it if he prefers, and such ratification, if made with full knowledge of all the circumstances, will render the purchase valid as to the *cestui que trust*.² Unreasonable delay on the part of the beneficiary in expressing his dissent, and taking steps to have the sale set aside, will imply an election on his part to treat the sale as valid, and a confirmation may be justly inferred after the lapse of time;³ and where a *cestui que trust* acquiesces for a long time in an improper purchase by the trustee, equity will not assist him to set aside the sale.⁴

SEC. 1815. Same—Rights and title of purchaser.—At common law a trustee to whom land has been conveyed in trust for another is regarded as the owner of the land; and a conveyance thereof by him passes to the grantee

See: *Robertson v. Western M. & F. Ins. Co.*, 19 La. 227; s.c. 36 Am. Dec. 673;

Florance v. Adams, 2 Rob. (La.) 556; s.c. 38 Am. Dec. 226;

Mulford v. Minch, 11 N. J. Eq. (3 Stock.) 16; s.c. 64 Am. Dec. 472.

¹ *Van Dyke v. Johns*, 1 Del. Ch. 93; s.c. 12 Am. Dec. 76;

Harrison v. McHenry, 9 Ga. 164; s.c. 52 Am. Dec. 435;

Jennison v. Hopgood, 24 Mass. (7 Pick.) 1; s.c. 19 Am. Dec. 258;

Scott v. Freeland, 15 Miss. (7 Smed. & M.) 409; s.c. 45 Am. Dec. 310.

The *cestui que trust* must make his election to set aside such purchase within a reasonable time.

Harrison v. McHenry, 9 Ga. 164; s.c. 52 Am. Dec. 435.

² *Robertson v. Western M. & F. Ins. Co.*, 19 La. 227; s.c. 36 Am. Dec. 673;

Florance v. Adams, 2 Rob. (La.) 556; s.c. 38 Am. Dec. 226.

See: *McCants v. Bee*, 1 McC. (S. C.) Eq. 383; s.c. 16 Am. Dec. 610;

Harrison v. McHenry, 9 Ga. 164; s.c. 52 Am. Dec. 435;

Jennison v. Hopgood, 24 Mass. (7 Pick.) 1; s.c. 19 Am. Dec. 258.

Ratification of an illegal purchase has been said to make it none the

less illegal and void.

See: *Harrison v. McHenry*, 9 Ga. 164; s.c. 52 Am. Dec. 435;

Newsom v. Hart, 14 Mich. 233, 237.

³ *Van Dyke v. Johns*, 1 Del. Ch. 93; s.c. 12 Am. Dec. 76;

Brown v. Weaver, 28 Ga. 377;

Harrison v. McHenry, 9 Ga. 164; s.c. 52 Am. Dec. 435;

Worthy v. Johnson, 8 Ga. 236; s.c. 52 Am. Dec. 399;

Jennison v. Hopgood, 24 Mass. (7 Pick.) 1; s.c. 19 Am. Dec. 258;

Tatum v. McLellan, 50 Miss. 2;

Jones v. Smith, 33 Miss. 215, 268;

Scott v. Freeland, 15 Miss. (7 Smed. & M.) 409; s.c. 45 Am. Dec. 310;

Lyon v. Lyon, 8 Ired. (N. C.) Eq. 201, 210;

Todd v. Moore, 1 Leigh (Va.) 457.

Beneficiary must move within a reasonable time to set aside the sale; what time is reasonable and when the sale regarded as confirmed depends upon the circumstances of each case.

Flanders v. Flanders, 23 Ga. 249;

Ives v. Ashley, 97 Mass. 198;

Musselman v. Eshleman, 10 Pa. St. 394;

Green v. Sargeant, 23 Vt. 466.

⁴ *Van Dyke v. Johnson*, 1 Del. Ch. 93; s.c. 12 Am. Dec. 76;

Price v. Byrn, 5 Ves. 681.

the legal estate in his hands,¹ notwithstanding the fact that the *cestui que trust* is regarded in equity as the

¹ *Gale v. Mensing*, 20 Mo. 461 ; s.c. 64 Am. Dec. 197.

See : *Kerr v. White*, 52 Ga. 362, 368 ;

Prather v. McDowell, 8 Bush (Ky.) 46 ;

Thatcher v. St. Andrew's Church, 37 Mich. 264 ;

Den ex d. Canoy v. Troutman, 7 Ired. (N. C.) L. 155 ;

Bank of United States v. Benning, 4 Cr. C. C. 81 ; s.c. 2 Fed. Cas. 686 ;

1 *Lewin on Trusts* (5th ed.), 184 ; 1 *Perry on Trusts* (8th ed.), § 321.

This is true even though the conveyance is made in violation of the trust under which the property is held, where the grantee has no notice of the trust.

Koester v. Burke, 81 Ill. 436 ;

Dawson v. Hayden, 67 Ill. 52 ;

Hannibal & St. Jo. R. Co. v. Green, 68 Mo. 169, 177 ;

Gale v. Mensing, 20 Mo. 466 ; s.c. 64 Am. Dec. 197 ;

Bank of United States v. Benning, 4 Cr. C. C. 81 ; s.c. 2 Fed. Cas. 686.

Actual notice of the trust on the part of the grantee renders the property subject to the trust in his hands.

Carpenter v. McBride, 3 Fla. 292 ; s.c. 52 Am. Dec. 379 ;

Kent v. Plumb, 57 Ga. 207 ;

Ryan v. Doyle, 31 Iowa 53 ;

Gray v. Ulrich, 8 Kan. 112 ;

Talbot's Exrs. v. Bell's Heirs, 5 B. Mon. (Ky.) 320 ; s.c. 43 Am. Dec. 126 ;

Isom v. First National Bank, 52 Miss. 902 ;

Ham v. Ham, 58 N. H. 70 ;

Jackson v. Matsdorf, 11 John. (N. Y.) 91 ; s.c. 6 Am. Dec. 955 ;

Shepherd v. McEvers, 4 John. Ch. (N. Y.) 136 ; s.c. 8 Am. Dec. 561 ;

Sadler's Appeal, 87 Pa. St. 154 ;

Coble v. Nonemaker, 78 Pa. St. 501 ;

Smith v. Daniel, 2 McC. (S. C.) Eq. 143 ; s.c. 16 Am. Dec. 641 ;

Heth v. Richmond, F. & P. R. R. Co., 4 Gratt. (Va.) 482 ; s.c. 50 Am. Dec. 88.

Constructive notice of the trust raised by anything which appears either by description of parties, by recital, by reference, or otherwise, on the face of any deed which forms an essential link in the chain of instruments through which he must derive his title.

Corbitt v. Clenny, 52 Ala. 480 ;

Dudley v. Witter, 46 Ala. 664 ;

Burch v. Carter, 44 Ala. 115 ;

Witter v. Dudley, 42 Ala. 616 ;

Johnson v. Thweatt, 18 Ala. 741 ;

Stidham v. Matthews, 29 Ark. 650 ;

Sigourney v. Munn, 7 Conn. 11 ;

Chicago, R. I. & P. R. Co. v.

Kennedy, 70 Ill. 350 ;

Morrison v. Kelly, 22 Ill. 610 ; s.c. 74 Am. Dec. 169 ;

Merrick v. Wallace, 19 Ill. 486 ;

Doyle v. Teas, 5 Ill. (4 Scam.) 202 ;

McConnel v. Reed, 5 Ill. (4 Scam.) 117 ; s.c. 38 Am. Dec. 124 ;

Brannon v. May, 42 Ind. 92 ;

Croskey v. Chapman, 26 Ind. 333 ;

Wiseman v. Hutchinson, 20 Ind. 40 ;

Mueller v. Engeln, 12 Bush (Ky.) 441 ;

Johnston v. Gwathmey, 4 Litt. (Ky.) 318 ;

Green v. Early, 39 Md. 223 ;

Hagthorpe v. Hook, 1 Gill & J. (Md.) 270 ;

White v. Foster, 102 Mass. 375 ;

Baker v. Mather, 25 Mich. 51 ;

Case v. Erwin, 18 Mich. 434 ;

Fitzhugh v. Barnard, 12 Mich. 104, 105 ;

Coy v. Coy, 15 Minn. 119 ;

Major v. Buckley, 51 Mo. 227 ;

Acer v. Westcott, 46 N. Y. 384 ; s.c. 7 Am. Rep. 355 ;

Gilbert v. Peteler, 38 N. Y. 165, aff'g 38 Barb. (N. Y.) 488 ;

Howard Ins. Co. v. Halsey, 8 N. Y. 271 ; s.c. 59 Am. Dec. 478 ;

Frost v. Beekman, 1 John. Ch. (N. Y.) 288 ;

Kerr v. Kitchen, 17 Pa. St. 433 ;

Sergeant v. Ingersoll, 15 Pa. St. 343 ;

Christmas v. Mitchell, 3 Ired. (N. C.) Eq. 535 ;

Merrill v. Watson, 1 Tenn. Ch. 342 ;

absolute owner ;¹ the purchaser taking only such right and interest as the trustee has power to convey.² Any one purchasing at a trustee's sale made under the trust deed is bound at his peril to examine the title he is purchasing, and must see that all precedent conditions of the sale are complied with by the trustee. Without this he cannot protect himself by insisting that he is a purchaser in good faith without notice, and the sale may be set aside. The rule is believed to be different, however, with a remote purchaser.³ While sales and titles founded on powers of sale contained in trust deeds are not avoided for slight reason, yet where the power has not been executed in accordance with essential conditions, the sale and deed will be held to be utterly void at law and in equity.⁴ It is said that a purchaser from trustee, who sells in his own right, need not pay purchase-money, though he has accepted a deed and given his bonds ; but

Willis v. Gay, 48 Tex. 463 ; s.c.

26 Am. Rep. 328 ;

Wood v. Krebbs, 30 Gratt. (Va.) 708 ;

Burwell v. Fauber, 21 Gratt. (Va.) 446 ;

Pringle v. Dunn, 37 Wis. 449 ; s.c. 19 Am. Rep. 772 ;

Brush v. Ware, 40 U. S. (15 Pet.) 93, 114 ; bk. 10 L. ed. 672 ;

Rafferty v. Mallory, 3 Biss. C. C. 362 ; s.c. Fed. Cas. No. 11526 ;

Mertins v. Jolliffe, Amb. 311 ;

Coppin v. Pernyhough, 2 Bro. Ch. 291 ;

Coles v. Sims, 5 DeG. M. & G. 1 ;

Wilson v. Hart, L. R. 1 Ch. App.

463 ; s.c. 35 L. J. Ch. 569 ; 12

Jur. N. S. 460 ; 14 L. T. 499 ;

Pilcher v. Rawlins, L. R. 11 Eq. 53 ;

Clements v. Wells, L. R. 1 Eq. 200 ; s.c. 35 L. J. Ch. 265 ; 13

L. T. 548 ;

Malpas v. Ackland, 3 Russ. 273 ;

Davies v. Thomas, 2 You. & C. 234 ;

2 Pom. Eq. Jur., § 626.

¹ *Huckabee v. Billingsly*, 16 Ala. 414 ; s.c. 50 Am. Dec. 183.

² *Rives v. Dudley*, 3 Jones (N. C.) Eq. 126 ; s.c. 67 Am. Dec. 231.

We have already seen that a trustee cannot denude himself of the character of trustee until

after he has performed the duties with which he is charged, has been discharged by the court, or relieved by consent of the parties.

See : *Huckabee v. Billingsly*, 16 Ala. 414 ; s.c. 50 Am. Dec. 183 ;

Cruger v. Halliday, 11 Paige Ch. (N. Y.) 314 ;

Chalmer v. Bradley, 1 Jac. & W. 51, 68 ;

Wilkinson v. Rarry, 4 Russ. 272.

Consequently where a trustee conveys the estate, thereby transferring to another all the interest he has in the land, he does not thereby transmit to such other the trust or power given to him, although the estate remains subject to the execution of such trust or power where taken with notice.

Thatcher v. Candee, 3 Keyes (N. Y.) 157 ; s.c. 33 How. (N. Y.) Pr. 145 ;

Bradford v. Belfield, 2 Sim. 264 ;

Cole v. Wade, 16 Ves. 27, 47 ; s.c. 10 Rev. Rep. 129 ;

Crewe v. Dicken, 4 Ves. 97 ;

1 Perry on Trusts (4th ed.), § 274.

³ *Cassell v. Ross*, 33 Ill. 244 ; s.c. 85 Am. Dec. 270.

⁴ *Powers v. Kueckhoff*, 41 Mo. 425 ; s.c. 97 Am. Dec. 281.

as to unpaid purchase-money, he is a volunteer.¹ A judgment creditor purchasing at trustee's sale cannot require the trustee to credit the surplus of his judgment, but he must pay to the trustee the purchase price in full before he can require a deed, and he must move as any other person would be required to do to subject said surplus fund to the payment of his claim.²

A trustee having a right to sell the legal estate of the trust property, it follows that he may also contract to sell the same, and this contract will be enforced,³ or damages awarded for its breach, the same as in other cases of contract to sell real property. A money compensation may be decreed in all those cases where, under the circumstances, it is more equitable.⁴

SECTION XIII.—ADVERSE POSSESSION.

SEC. 1816. Introductory.

SEC. 1817. In express trusts.

SEC. 1818. In implied trusts.

SEC. 1819. Statute of limitations—Express trusts.

SEC. 1820. Same—Constructive trusts.

SEC. 1821. Same—Running against trustee.

SECTION 1816. **Introductory.**—The possession of a trustee of the trust estate is considered as that of the person beneficially entitled ; consequently adverse possession between a trustee and his *cestui que trust* cannot exist where the trust is express.⁵ By asserting an adverse right to the trust property a trustee cannot divest himself of his trust character nor vest title in himself, until after the statute of limitations has run.⁶

¹ Beck v. Uhrich, 13 Pa. St. 636 ; s.c. 53 Am. Dec. 507.

² Cook v. Dillon, 9 Iowa 407 ; s.c. 74 Am. Dec. 354.

Innocent purchaser at trustee's sale under trust deed, without notice, will not be affected by a previous arrangement or agreement between the debtor and creditor.

Powers v. Kueckhoff, 41 Mo. 425 ; s.c. 97 Am. Dec. 281.

³ **Interest in trust estate may be conveyed**, and the person conveying will be equally compelled

to convey when he acquires title as if the title had been in him at the time of making such contract.

Buck v. Swazey, 35 Me. 41 ; s.c. 56 Am. Dec. 681.

⁴ See Heth v. Richmond, F. & P. R. Co., 4 Gratt. (Va.) 482 ; s.c. 50 Am. Dec. 88.

⁵ Miller v. Bingham, 1 Ired. (N. C.) Eq. 423 ; s.c. 36 Am. Dec. 58.

⁶ Moffatt v. Buchanan, 11 Humph. (Tenn.) 369 ; s.c. 54 Am. Dec. 41.

SEC. 1817. **In express trusts.**—Adverse possession cannot exist in favor of the trustee against his *cestui que trust*, in an express trust, so long as the fiduciary relation subsists; but an express trust is determined by act of the trustee whenever he denies the right of the *cestui que trust* and assumes the absolute ownership of the property he holds in trust, adversely to and within the knowledge of the *cestui que trust*. The statute of limitations will begin to run from the time of such disclaimer,¹ and suit must be prosecuted for the recovery within the time allotted by law or the claim will be barred; and this is true regarding trusts cognizable in equity as well as those cognizable in law.²

SEC. 1818. **In implied trusts.**—In the case of implied trusts the fiduciary relation existing between the trustee and his *cestui que trust* is ended, and the trustee holds the trust estate adversely from the time that he manifests an intention to claim and enjoy as his own the land subject to the trust.³

SEC. 1819. **Statute of limitations—Express trusts.**—Trusts falling exclusively within the jurisdiction of equity, the presumption from lapse of time of satisfaction, payment, or waiver does not apply,⁴ and the general rule is that as

¹ *Robertson v. Wood*, 15 Tex. 1; s.c. 65 Am. Dec. 140.

See: *Haynie v. Hall's Exrs.*, 5 Humph. (Tenn.) 290; s.c. 42 Am. Dec. 427;

Turner v. Smith, 11 Tex. 620;

Tinnen v. Mebane, 10 Tex. 246; s.c. 60 Am. Dec. 205.

Wilson v. Watkins, 28 U. S. (3 Pet.) 43, 47; bk. 7 L. ed. 596.

² *Tinnen v. Mebane*, 10 Tex. 246; s.c. 60 Am. Dec. 205. In this case the court say: "The rule that trusts are not affected by statutes of limitation was, in the earlier cases, very loosely expressed, and gave rise to erroneous decisions. Chancellor KENT, having been misled by them in the case of *Carter v. Murray*, 5 John. Ch. (N. Y.) 522, examined the subject very elaborately in the case of *Kane*

v. Bloodgood, 7 John. Ch. (N. Y.) 90; s.c. 11 Am. Dec. 417; and, in a review of the cases, laid down the rule that trusts, not affected by statutes of limitation, are those technical and continuing trusts not at all cognizable at law, but which fall within the peculiar and exclusive jurisdiction of courts of equity: *Id.* 111. All trusts which are cognizable at law are not withdrawn from the operation of the statute."

³ *De Cordova v. Smith*, 9 Tex. 129; s.c. 58 Am. Dec. 136.

See: *Anderson v. Stewart*, 15 Tex. 285, 290;

Tinnen v. Mebane, 10 Tex. 246; s.c. 60 Am. Dec. 205.

⁴ *Hightower v. Thornton*, 8 Ga. 486; s.c. 52 Am. Dec. 412.

between a trustee and his *cestui que trust*, in an express trust, the statute of limitations is not applicable and no length of time bars the right of the *cestui que trust*;¹

- ¹ *Pratt v. Thornton*, 28 Me. 355; s.c. 48 Am. Dec. 492.
 See: *Bryan v. Weems*, 29 Ala. 423; s.c. 65 Am. Dec. 407;
Tarleton v. Goldthwaite's Heirs, 23 Ala. 346; s.c. 58 Am. Dec. 296;
Pinkston v. Brewster, 14 Ala. 315;
Brinkley v. Willis, 22 Ark. 1;
Norton v. Ladd, 22 Conn. 203;
Perkins v. Cartwell, 4 Harr. (Del.) 270; s.c. 42 Am. Dec. 753;
Carter v. Bennett, 6 Fla. 283;
McCallam v. Carswell, 75 Ga. 25;
Simes v. Smith, 11 Ga. 195;
Keaton v. Greenwood, 8 Ga. 97;
Thomas v. Brinsfield, 7 Ga. 154;
McDonald v. Sims, 3 Kelly (Ga.) 383;
Chicago & Eastern Ill. R. Co. v. Hay, 119 Ill. 493; s.c. 10 N. E. Rep. 29;
Churchman v. City of Indianapolis, 110 Ind. 259; s.c. 11 N. E. Rep. 301;
Smith v. Calloway, 7 Blackf. (Ind.) 86;
Overstreet v. Bates, 1 J. J. Marsh. (Ky.) 367, 370;
Manion v. Tittsworth, 18 B. Mon. (Ky.) 582;
Wickliffe v. Lexington, 11 B. Mon. (Ky.) 155, 161;
Bohannon v. Streshley, 2 B. Mon. (Ky.) 437, 438;
Gordon v. Small, 53 Md. 550;
Weaver v. Leiman, 52 Md. 708, 710;
Cunningham v. McKindley, 22 Md. 149;
McDowell v. Goldsmith, 6 Md. 319; s.c. 61 Am. Dec. 305;
Young v. Mackall, 3 Md. Ch. 398;
White v. White, 1 Md. Ch. 53;
Callis v. Tolson, 6 Gill & J. (Md.) 80;
Davis v. Coburn, 128 Mass. 377;
Farnam v. Brooks, 26 Mass. (9 Pick.) 212.
Soggens v. Heard, 31 Miss. 426;
Gay v. Edwards, 30 Miss. 218;
Buckner v. Calcote, 28 Miss. 432, 575;
Prewett v. Buckingham, 28 Miss. 92;
Payne v. Bullard, 23 Miss. 88; s.c. 55 Am. Dec. 74;
Murdock v. Hughes, 15 Miss. (7 Smed. & M.) 219;
Thompson v. Lyon, 20 Mo. 155; s.c. 61 Am. Dec. 599;
Hill v. Bailey, 8 Mo. App. 85;
Mathes v. Bennett, 21 N. H. 204;
Shibla v. Ely, 6 N. J. Eq. (2 Halst.) 181;
Hubbell v. Medbury, 53 N. Y. 98, 101;
Paff v. Kenney, 1 Bradf. (N. Y.) 1;
Powell v. Murray, 2 Edw. Ch. (N. Y.) 636, 644;
Kane v. Bloodgood, 7 John. Ch. (N. Y.) 90; s.c. 11 Am. Dec. 417;
Coster v. Murray, 5 John. Ch. (N. Y.) 522;
Goodrich v. Pendleton, 3 John. Ch. (N. Y.) 384, 387;
Decouche v. Savotier, 3 John. Ch. (N. Y.) 190; s.c. 8 Am. Dec. 478;
Varick v. Edwards, 11 Paige Ch. (N. Y.) 289;
Anstice v. Brown, 6 Paige Ch. (N. Y.) 448, 488;
Clayton v. Cagle, 97 N. C. 300; s.c. 1 S. E. Rep. 523;
University of North Carolina v. Nat. Bank, 96 N. C. 280; s.c. 3 S. E. Rep. 359;
Edwards v. University, 1 Dev. & B. (N. C.) Eq. 325; s.c. 30 Am. Dec. 170;
Foscue v. Foscue, 2 Ired. (N. C.) Eq. 321;
Blount v. Robeson, 3 Jones (N. C.) Eq. 73;
Thompson v. Blair, 3 Murph. (N. C.) 583;
McCandless' Estate, 61 Pa. St. 9;
Glass v. Gilbert, 58 Pa. St. 266;
Flemming v. Culbert, 46 Pa. St. 496;
Kutz's Appeal, 40 Pa. St. 90;
Martin v. Jackson, 27 Pa. St. 504, 506; s.c. 67 Am. Dec. 489;
Zacharias v. Zacharias, 23 Pa. St. 425;
Fox v. Cash, 11 Pa. St. 207, 211;
Commonwealth v. Moltz, 10 Pa. St. 527; s.c. 51 Am. Dec. 499;
Walker v. Walker, 16 Serg. & R. (Pa.) 379;

for, from the privity existing between them, the possession of the trustee is the possession of the beneficiary, and for

- Johnston v. Humphrey*, 14 Serg. & R. (Pa.) 394;
Lyon v. Marclay, 1 Watts (Pa.) 271, 275;
Finney v. Cochran, 1 Watts & S. (Pa.) 112, 118; s.c. 37 Am. Dec. 450;
Wamburzee v. Kennedy, 4 Desau. (S. C.) L. 479;
Alexander v. Williams, 2 Hill (S. C.) Eq. 522;
Howard v. Aiken, 3 McC. (S. C.) Eq. 467;
Goodhue v. Barnwell, 1 Rice (S. C.) Eq. 198;
Presley v. Davis, 7 Rich. (S. C.) Eq. 105; s.c. 62 Am. Dec. 396;
Parris v. Cobb, 5 Rich. (S. C.) Eq. 432;
Long v. Cason, 4 Rich. (S. C.) Eq. 60;
Starke v. Starke, 3 Rich. (S. C.) Eq. 438;
Buchan v. James, 1 Speer (S. C.) Eq. 375;
Hopkins v. Hopkins, 4 Strobb. (S. C.) Eq. 207; s.c. 53 Am. Dec. 663;
Shelby v. Shelby, Cooke (Tenn.) 179; s.c. 5 Am. Dec. 686;
Williams v. Otey, 8 Humph. (Tenn.) 563; s.c. 47 Am. Dec. 632;
Haynie v. Hall's Exrs., 5 Humph. (Tenn.) 290; s.c. 42 Am. Dec. 427;
Armstrong v. Campbell, 3 Yerg. (Tenn.) 201; s.c. 24 Am. Dec. 556;
Pinston v. Ivey, 1 Yerg. (Tenn.) 296;
Fish v. Wilson, 15 Tex. 430;
Tinnen v. Mebane, 10 Tex. 246, 248; s.c. 60 Am. Dec. 205;
Kimball v. Ives, 17 Vt. 430;
North v. Barnum, 12 Vt. 206;
Evarts v. Nason, 11 Vt. 122;
Rix v. Smith, 8 Vt. 365;
Creigh v. Henson, 10 Gratt. (Va.) 231;
Anderson v. Burwell, 6 Gratt. (Va.) 405;
Redwood v. Riddick, 4 Munf. (Va.) 222;
Speidel v. Henrici, 120 U. S. 377; bk. 30 L. ed. 718;
Bacon v. Rives, 106 U. S. 99; bk. 27 L. ed. 69;
The Union Pac. R. Co. v. Durant, 95 U. S. 576; bk. 24 L. ed. 391;
Lewis v. Hawkins, 90 U. S. (23 Wall.) 119; bk. 23 L. ed. 113;
Seymour v. Freer, 75 U. S. (8 Wall.) 202, 203; bk. 19 L. ed. 306;
Hallett v. Collins, 51 U. S. (10 How.) 174; bk. 13 L. ed. 376;
Zeller v. Eckert, 45 U. S. (4 How.) 289; bk. 11 L. ed. 979;
Oliver v. Piatt, 44 U. S. (3 How.) 333; bk. 11 L. ed. 622;
Boone v. Chiles, 35 U. S. (10 Pet.) 177; bk. 9 L. ed. 388;
Prevost v. Gratz, 19 U. S. (6 Wheat.) 481; bk. 5 L. ed. 311;
Robinson v. Hook, 4 Mason C. C. 139; s.c. Fed. Cas. No. 11956;
Baker v. Whiting, 3 Sumn. C. C. 475, 486; s.c. 2 Fed. Cas. 495;
Shields v. Atkins, 3 Atk. 563;
Llewellyn v. Mackworth, Barn. 449;
Smith v. Acton, 26 Beav. 210;
McDonald v. McDonald, 1 Bligh 315;
Townshend v. Townshend, 1 Bro. Ch. 554;
Sheldon v. Wildman, 2 Ch. Ca. 26;
Heath v. Henly, 1 Ch. Ca. 26;
Harston v. Tenison, 20 Ch. Div. 109; s.c. 51 L. J. Ch. 645; 45 L. T. 777; 30 W. R. 376;
Massey v. O'Dell, 10 Ir. Eq. 22;
Blair v. Nugent, 9 Ir. Eq. 400;
Att'y-Gen. v. Exeter, Jac. 448;
Chalmer v. Bradley, 1 Jac. & W. 27, 68;
Makepeace v. Rogers, 11 Jur. N. S. 215;
Wedderburn v. Wedderburn, 2 Keen 749; s.c. 2 My. & C. 41; 22 Beav. 84;
Brittlebank v. Goodwin, L. R. 5 Eq. 545;
Butler v. Carter, L. R. 5 Eq. 276;
Lawton v. Ford, L. R. 2 Eq. 97;
Leed v. Beene, 23 L. T. R. 26;
Bell v. Bell, Ll. & G. t. Plunk. 66;
Hargreaves v. Mitchell, 6 Madd. 326;
Phillipo v. Munnings, 2 My. & C. 309;
Bennett v. Colley, 2 My. & K. 146;
Gough v. Bult, 16 Sim. 323; s.c. 17 L. J. Ch. 486; 12 Jur. 859;

that reason there can be no adverse title.¹ Adverse possession does not commence until the fiduciary relation is terminated, either by performance of the trust or act of the parties; an adverse possession by the trustee, with knowledge thereof on the part of the *cestui que trust*,² cannot arise so long as the relation of trustee and beneficiary continues unbroken; the possession of the trustee remains that of the *cestui que trust*, and there can be no adverse possession.³

SEC. 1820. **Same—Constructive trusts.**—In the case of constructive trusts, however, the rule is different, and

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| Young v. Waterpark, 13 Sim. 204; | 326; |
| Ward v. Arch, 12 Sim. 472; | Phillipo v. Munnings, Myl. & Cr. 309; |
| Hollis's Case, 2 Vent. 345; | Bennett v. Colley, 2 Myl. & K. 232; |
| Hammond v. Hicks, 1 Vern. 432; | Wilson v. Moore, 1 Myl. & K. 146; |
| Beckford v. Wade, 17 Ves. 87, 97; | Young v. Waterpark, 13 Sim. 323; |
| s.c. 11 Rev. Rep. 20; | Ward v. Arch, 12 Sim. 472; |
| Ormond v. Hutchinson, 13 Ves. 47; | Lord Hollis's Case, 2 Vent. 345; |
| Chedworth v. Edwards, 8 Ves. 46; | Hamond v. Hicks, 1 Vern. 432; |
| s.c. 6 Rev. Rep. 212; | Earl of Pomfret v. Windsor, 2 Ves. 484; |
| Hardwicke v. Vernon, 4 Ves. 411; | Nevarre v. Rutton, 1 Vin. Ab. 185; |
| s.c. 4 Rev. Rep. 244; | Norton v. Turvill, 2 Pr. Wms. 144. |
| Pomfret v. Winsor, 2 Ves. 484; | Whetstone v. Whetstone's Exrs., 75 Ala. 496; |
| Navarre v. Rutton, 1 Vin. Ab. 185; | Hastie & Silver v. Aiken, 67 Ala. 313, 316; |
| Norton v. Turville, 2 Pr. Wms. 144. | Janes v. Throckmorton, 57 Cal. 368; |
| ¹ Ante, § 1816. | Pace v. Payne, 73 Ga. 670; |
| See: Sheilds v. Atkins, 3 Atk. 563; | McCallam v. Carsell, 65 Ga. 25; |
| Llewellyn v. Mackworth, Barn. 449; | Walden v. Karr, 88 Ill. 49; |
| Smith v. Acton, 26 Beav. 210; | Russell v. Peyton, 4 Ill. App. 473; |
| Townshend v. Townshend, 1 Bro. C. C. 554; | Helm's Exrs. v. Rogers, 81 Ky. 568; |
| Heath v. Henly, 1 Ch. Cas. 26; | Haskell v. Hervey, 74 Me. 192; |
| Massey v. O'Dell, 10 Ir. Ch. Rep. 22; | Price v. Mulford, 36 Hun (N. Y.) 247; |
| Crawford v. Crawford, 1 Ir. Rep. Eq. 436; | University v. Bank, 96 N. C. 280; |
| Attorney-General v. Mayor of Exeter, Jac. 448; | Carpenter v. Canal Co., 35 Ohio St. 307, 317; |
| Chalmer v. Bradley, 1 Jac. & W. 67; | Bostwick v. Estate of Dickson, 65 Wis. 593; |
| Wedderburn v. Wedderburn, 3 Keen 749; s.c. 2 Myl. & Cr. 41; | Bacon v. Rives, 106 U. S. 99; bk. 27 L. ed. 69. |
| 22 Beav. 84; | ² Russell v. Peyton, 4 Ill. App. 473. |
| Bell v. Bell, Ll. & G. t. Plunkett 66; | See: McCarthy v. McCarthy, 74 Ala. 546; |
| Foxton v. Manchester & Liverpool District Banking Company, 44 L. T. N. S. 406; | 2 Perry on Trusts (4th ed.), § 683. |
| Hargreaves v. Mitchell, 6 Madd. | |

lapse of time will bar the right of the *cestui que trust*.¹ The court say, in the case of *Beckford v. Wade*,² that "it is certainly true that no time bars a direct trust ; but if it is meant to be asserted that a court of equity allows a man to make out a case of constructive trust at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be : so far from it, that, not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but, where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a court of equity to seek that relief."

SEC. 1821. **Same—Running against trustee.**—The general rule at the present time, both in this country and in England,³ is that the running of the statute of limitations against the trustee binds his *cestui que trust* also ;⁴

¹ *Andrew v. Wrigley*, 4 Bro. C. C. 125 ;

Townshend v. Townshend, 1 Bro. C. C. 550, 554 ;

Bonney v. Ridgard, 1 Cox 145 ;

Collard v. Hare, 2 Russ. & M. 675.

See : *Sturgis v. Morse*, 3 DeG. & J. 1 ;

Portlock v. Gardner, 1 Hare 594 ;

Cholmondeley v. Clinton, 2 Jac. & W. 190 ; s.c. aff'd 4 Bligh 3, 4 ; 2 Barn. & Ald. 625 ;

Rolfe v. Gregory, 11 Jur. N. S. 98 ; s.c. 4 DeG. J. & S. 576 ;

Bell v. Bell, Ll. & G. t. Plunkett 66 ;

Wedderburn v. Wedderburn, 4 Myl. & Cr. 53 ;

Att'y-Gen. v. Christ's Hospital, 3 Myl. & K. 344 ;

Ex parte Hasell, 3 You. & C. 617, 622 ; s.c. 3 Jur. 1101.

² 17 Ves. 87, 97 ; s.c. 11 Rev. Rep. 20.

³ In England, at an early day, it was held that "the forbearance of the trustees, in not doing what

it was their office to have done, should in no sort prejudice the *cestuis que trust*."

Lechmere v. Carlyle, 3 Pr. Wms. 215.

⁴ *Merriam v. Hassam*, 96 Mass. (14 Allen) 516 ; s.c. 92 Am. Dec. 795 ;

Bennett v. Garlock, 79 N. Y. 302 ; s.c. 35 Am. Rep. 517 ;

Leigh v. Smith, 3 Ired. (N. C.) Eq. 442 ; s.c. 42 Am. Dec. 182 ;

Smilie v. Biffie, 2 Pa. St. 52 ; s.c. 44 Am. Dec. 156.

See : *Fleming v. Gilmer*, 35 Ala. 62 ;

Bryan v. Weems, 29 Ala. 423 ; s.c. 65 Am. Dec. 407 ;

Mason v. Mason, 33 Ga. 435 ; s.c. 83 Am. Dec. 172 ;

Worthy v. Johnson, 10 Ga. 358 ; s.c. 54 Am. Dec. 393 ;

Coleman v. Walker, 3 Met. (Ky.) 65 ; s.c. 77 Am. Dec. 163 ;

Crook v. Glenn, 30 Md. 55 ;

Herndon v. Pratt, 6 Jones (N. C.) Eq. 327 ;

Pledger v. Easterling, 4 Rich. (S. C.) Eq. 101 ;

and the fact that the beneficiary is an infant does not in any way affect the application of the rule.¹

SECTION XIV.—RENUNCIATION OF TRUST.

SEC. 1822. Introductory.

SEC. 1823. Renunciation by trustee.

SEC. 1824. Same—Effect of refusal to act.

SEC. 1825. Renunciation by beneficiary.

SECTION 1822. **Introductory.**—A person cannot be constituted a trustee against his will ; consequently, where a person is appointed to this office in the will or instrument creating the trust estate, without his knowledge or consent, he can either accept or reject the trust as he sees fit.² No particular formality is necessary to show the

Long v. Cason, 4 Rich. (S. C.) Eq. 60 ;

Henson v. Kinard, 3 Strobb. (S. C.) Eq. 371 ;

Watkins v. Specht, 7 Coldw. (Tenn.) 585 ;

Williams v. Otey, 8 Humph. (Tenn.) 563 ; s.c. 47 Am. Dec. 632 ;

Woolridge v. Planters' Bank, 1 Sneed (Tenn.) 297 ;

Elmendorf v. Taylor, 23 U. S. (10 Wheat.) 152 ; bk. 6 L. ed. 289 ;

Crowther v. Crowther, 23 Beav. 305 ;

Pentland v. Stokes, 2 Brod. & B. 75 ;

Llewellyn v. Mackworth, 3 Eq. Cas. Abr. 579 ;

Cholmondeley v. Clinton, 2 Jac. & W. 190, 191 ; s.c. aff'd 4 Bligh 3, 4 ; 2 Barn. & Ald. 625 ;

Thomas v. Thomas, 2 Kay & J. 79 ;

Hovenden v. Annesley, 2 Sch. & Lef. 607, 629 ; s.c. 9 Rev. Rep. 119 ;

Allen v. Sayer, 2 Vern. 368 ;

Wych v. East India Co., 3 Pr. Wms. 309.

¹ Worthy v. Johnson, 10 Ga. 358 ; s.c. 54 Am. Dec. 393 ;

Pendergrast v. Foley, 8 Ga. 1 ;

Long v. Cason, 4 Rich. (S. C.) Eq. 60 ;

Goss v. Singleton, 2 Head (Tenn.) 67 ;

Williams v. Otey, 8 Humph. (Tenn.) 563 ; s.c. 47 Am. Dec.

632, 633 ;

Woolridge v. Planters' Bank, 1 Sneed (Tenn.) 297.

Appointee in trust may plead statute of limitations or not ; and if he fails to do so, those for whom he holds the property have no right to do so.

Leigh v. Smith, 3 Ired. (N. C.) Eq. 442 ; s.c. 42 Am. Dec. 182.

Conveyance by one of several trustees of an estate is manifestly defective, but an entry thereunder is sufficient to set the statute of limitations in motion against the trustees and the *cestui que trust*.

Smilie v. Biffle, 2 Pa. St. 52 ; s.c. 44 Am. Dec. 156.

Possession adverse both to trustee and *cestui que trust*, and the time which would bar the equitable right, where the trustee sells the trust estate to a purchaser for value, with warranty, and without any intimation in the deed of conveyance of a subsisting trust, and the vendee enters and occupies the estate, doing no act which recognizes in any manner the existence of the trust, and there is no fraud or concealment, and the *cestui que trust* is under no disability.
Merriam v. Hassam, 96 Mass. (14 Allen) 516 ; s.c. 92 Am. Dec. 795.

² Hearst v. Pujol, 44 Cal. 230 ;
Baldwin v. Porter, 12 Conn. 473 ;

acceptance of a trust, but acts fairly implying a consent are sufficient, as taking possession of the property assigned, and the like.¹ Where a trustee has once accepted and entered upon the execution of the trust, he cannot thereafter relinquish it without the direction of the court, or the consent of the *cestui que trust*.² An acceptance of the trust will be presumed in law until the contrary is shown.³ Particularly will this presumption prevail after a long lapse of time,⁴ in which the trustee has had notice of the appointment and has not disclaimed or renounced the trust, notwithstanding the fact that he may have done nothing towards its execution.⁵

- White v. Hampton, 13 Iowa 259 ;
 Lyle v. Burke, 40 Mich. 499 ;
 Flint v. Clinton Co., 12 N. H. 430 ;
 Scull v. Reeves, 3 N. J. Eq. (2 H. W. Gr.) 84 ; s.c. 29 Am. Dec. 694 ;
 Shepherd v. McEvers, 4 John. Ch. (N. Y.) 136 ; s.c. 8 Am. Dec. 561 ;
 Eyrick v. Hetrick, 13 Pa. St. 488 ;
 Cloud v. Calhoun, 10 Rich. (S. C.) Eq. 358 ;
 Goss v. Singleton, 2 Head (Tenn.) 67 ;
 Adams v. Adams, 88 U. S. (21 Wall.) 185 ; bk. 22 L. ed. 504 ;
 Armstrong v. Morrill, 81 U. S. (14 Wall.) 120 ; bk. 20 L. ed. 765 ;
 Lewis v. Baird, 3 McLean C. C. 56, 58 ; s.c. Fed. Cas. No. 8316 ;
 Urch v. Walker, 3 Myl. & Cr. 702 ;
 Mountford v. Cadogan, 17 Ves. 485 ; s.c. 11 Rev. Rep. 122.
Having promised or agreed beforehand to accept the trust will not prevent a declination to act.
 See : Smith v. Knowles, 2 Grant Cas. (Pa.) 413 ;
 Evans v. John, 4 Beav. 35 ;
 Crook v. Ingoldsby, 2 Ir. Eq. 375 ;
 Doyle v. Blake, 2 Sch. & Lef. 231, 239 ; s.c. 9 Rev. Rep. 76.
¹ Scull v. Reeves, 3 N. J. Eq. (2 H. W. Gr.) 84 ; s.c. 29 Am. Dec. 694.
² Brennan v. Willson, 71 N. Y. 502, 506, overruling
 Hedges v. Bungay, 16 Abb. (N. Y.) Pr. N. S. 313 ;
 Shepherd v. McEvers, 4 John. Ch. (N. Y.) 136 ; s.c. 8 Am. Dec. 561.
³ Penny v. Davis, 3 B. Mon. (Ky.) 313 ;
 Eyrick v. Hetrick, 13 Pa. St. 494 ;
 Wilt v. Franklin, 1 Binn. (Pa.) 502 ; s.c. 2 Am. Dec. 474 ;
 Read v. Robinson, 6 Watts & S. (Pa.) 329, 331 ;
 Furman v. Fisher, 4 Cold. (Tenn.) 626 ; s.c. 94 Am. Dec. 210 ;
 Goss v. Singleton, 2 Head (Tenn.) 67 ;
 Townson v. Tickell, 3 Barn. & Ald. 31, 36 ; s.c. 5 Eng. C. L. 28 ;
 Wise v. Wise, 2 Jon. & La. 412 ;
 Thompson v. Leach, Ven. 198 ;
 4 Kent Com. (13th ed.) 500.
 See : Merrills v. Swift, 18 Conn. 257 ; s.c. 46 Am. Dec. 315 ;
 Boody v. Davis, 20 N. H. 140 ; s.c. 51 Am. Dec. 210 ;
 Peavey v. Tilton, 18 N. H. 151 ; s.c. 45 Am. Dec. 365 ;
 Blight v. Schenck, 10 Pa. St. 285 ; s.c. 51 Am. Dec. 478 ;
 Doe ex d. Garnons v. Knight, 5 Barn. & C. 671 ; s.c. 11 Eng. C. L. 632 ;
 Stirling v. Vaughan, 11 East 619, 623 ; s.c. 2 Camp. 225 ; 11 Rev. Rep. 276.
⁴ As twenty years (Eyrick v. Hetrick, 13 Pa. St. 493 ; *In re Uniacke*, 1 Jon. & La. 1) or thirty-four years (*In re Needham*, 1 Jon. & La. 34).
⁵ See : Penny v. Davis, 3 B. Mon. (Ky.) 314 ;
 Read v. Robinson, 6 Watts & S. (Pa.) 338 ;
 Lewis v. Baird, 3 McLean C. C. 56, 65 ; s.c. Fed. Cas. No. 8316 ;

SEC. 1823. **Renunciation by trustee.**—We have already seen that where the trustee has either expressly or impliedly accepted the trust and entered upon its execution, that he cannot of his own motion abandon it, or refuse to perform his duties thereunder;¹ and a court, in the exercise of a sound discretion, may relieve the trustee from his obligations or compel him to serve, whichever will best subserve the interests of the beneficiary of the trust estate.² In a case where a voluntary deed of trust was delivered by the grantor to the trustee named therein, who communicated this fact to the *cestui que trust*, and promised to have the deed recorded, and to avoid executing the trust the trustee afterwards returned the deed to the grantor, who destroyed it, this was held to constitute a complete delivery to the *cestui que trust*, and an acceptance by the trustee of the duties imposed.³

SEC. 1824. **Same—Effect of refusal to act.**—It is not essential to the validity of a trust, created by the beneficial owner of the trust property, that there should be an acceptance or declaration of the trust by the trustee in whom the legal interest is vested;⁴ consequently if the trustee named refuses to act, the effect upon the trust will be the same as the death of the trustee after the acceptance and entrance upon his duties. A court of equity will not permit the trust to fail for want of a suitable trustee, but will select another to take his place. The refusal to act must amount to an absolute disclaimer

Wise v. Wise, 2 Jon. & La. 403-412.

¹ Shepherd v. McEvers, 4 John. Ch. (N. Y.) 136; s.c. 8 Am. Dec. 561;

Ross v. Barclay, 18 Pa. St. 179; s.c. 55 Am. Dec. 616;

Guphill v. Isbell, 1 Bailey (S. C.) L. 230; s.c. 19 Am. Dec. 675.

See: *Ante*, § 1822.

² Drane v. Gunter, 19 Ala. 731; Tainter v. Clark, 87 Mass. (5 Allen) 66;

Bowditch v. Banuelos, 67 Mass. (1 Gray) 220;

People v. Norton, 9 N. Y. 176; Gilchrist v. Stevenson, 9 Barb.

(N. Y.) 9;

Shepherd v. McEvers, 4 John. Ch. (N. Y.) 136; s.c. 8 Am. Dec. 561;

Cruger v. Halliday, 11 Paige Ch. (N. Y.) 314, 319;

In re Bernstein, 3 Redf. (N. Y.) 20;

Forshaw v. Higginson, 20 Beav. 485;

Greenwood v. Wakeford, 1 Beav. 576;

Wilkinson v. Parry, 4 Russ. 272.

³ Stone v. King, 7 R. I. 358; s.c. 84 Am. Dec. 557.

⁴ Stone v. King, 7 R. I. 358; s.c. 84 Am. Dec. 557.

of the trust, or, as we have already seen, his acceptance will be presumed, for the law supposes that the trust is beneficial to the trustee as well as to the *cestui que trust*, and that they both accept it. The disclaimer by the trustee need not be formal or in writing, a parol refusal to accept being sufficient both as to real and personal property.¹ It is immaterial when the disclaimer is made, provided that nothing has intervened to vest the estate in the trustee.² Thus it has been said that a disclaimer after sixteen years will be good, provided the delay can be so explained as to rebut all presumptions of acceptance.³ A mere oral declaration, however, will not bar the trustee from subsequently entering upon the performance of the trust, where another has not been appointed to his place.⁴

SEC. 1825. **Renunciation by beneficiary.**—It is a general

- ¹ *Roseboom v. Mosher*, 2 Den. (N. Y.) 61;
Commonwealth v. Mateer, 16 Serg. & R. (Pa.) 416;
Thompson v. Meek, 7 Leigh (Va.) 419;
Townson v. Tickell, 3 Barn. & Ald. 31; s.c. 5 Eng. C. L. 28;
Doe d. Smyth v. Smyth, 6 Barn. & C. 112; s.c. 13 Eng. C. L. 62;
Begbie v. Crook, 2 Bing. N. C. 69, 70; s.c. 2 Scott 128; 29 Eng. C. L. 442;
Miles v. Neave, 1 Cox 159;
Bonifant v. Greenfield, Cro. Eliz. 80;
Peppercorn v. Wayman, 5 DeG. & Sm. 230; s.c. 21 L. J. Ch. 827; 16 Jur. 794;
Doe v. Smith, 9 Dowl. & R. 136;
Foster v. Dawber, 1 Drew & Sm. 172;
Re Ellison's Trust, 2 Jur. N. S. 62;
Adams v. Taunton, 5 Madd. 435;
Rex v. Wilson, 5 Man. & R. 140;
Small v. Marwood, 4 Man. & R. 181, 190; s.c. 9 Barn. & C. 300; 17 Eng. C. L. 140;
Doe v. Harris, 16 Mees. & W. 517;
Bingham v. Clanmorris, 2 Moll. 253;
Norway v. Norway, 2 Myl. & K. 278;
Stacey v. Elph, 1 Myl. & K. 198;
Sherratt v. Bentley, 1 Russ. & M. 655;
Bray v. West, 9 Sim. 429;
Nicolson v. Wordsworth, 2 Swanst. 369;
Thompson v. Leach, 2 Ven. 198;
Smith v. Wheeler, 1 Ven. 128;
Shep. Touch. 282, 452.
² *Stacey v. Elph*, 1 Myl. & K. 195, 199.
³ *Noble v. Meymott*, 14 Beav. 471;
Doe v. Harris, 16 Mees. & W. 517.
⁴ *White v. Hampton*, 13 Iowa 259;
Putnam's Free School v. Fisher, 30 Me. 523, 526;
Tainter v. Clark, 54 Mass. (13 Met.) 220;
Lyle v. Burke, 40 Mich. 499;
Flint v. Clinton Co., 12 N. H. 430;
McCoster v. Brady, 1 Barb. Ch. (N. Y.) 329;
King v. Donnelly, 5 Paige Ch. (N. Y.) 46;
Judson v. Gibbons, 5 Wend. (N. Y.) 224;
Eyrick v. Hetrick, 13 Pa. St. 488;
Jones v. Maffett, 5 Serg. & R. (Pa.) 523;
Cloud v. Calhoun, 10 Rich. (S. C.) Eq. 358;
Goss v. Singleton, 2 Head (Tenn.) 77;
Adams v. Adams, 88 U. S. (21 Wall.) 185; bk. 22 L. ed. 504.

principle of law that a man is presumed to accept that which is for his benefit; and all estates granted in a deed or bequest being presumably beneficial,¹ the assent of the *cestui que trust* to a trust created in his favor will be presumed, and therefore the estate vested in his trustee is not overreached by the lien of a judgment obtained against the grantor, intermediate the creation of the trust estate and the acts of the beneficiary indicating his assent to the trust.² The beneficiaries under a deed of trust who repudiate and renounce it are entitled to nothing by virtue of the conveyance, while those who accept it are entitled to the benefit of its provisions.³

SECTION XV.—REVOCATION OF TRUST.

SEC. 1826. Voluntary trust—Power of revocation in deed.

SEC. 1827. Same—Revocation after acceptance.

SEC. 1828. Assignment for benefit of creditors.

SECTION 1826. Voluntary trust—Power of revocation in deed.—In regard to the power of the donor to revoke a voluntary deed in trust for the benefit of a third person, it is thought that such a trust will not be irrevocable if the donor did not intend to so make it;⁴ also that the power of revocation will be presumed to be reserved in case of a deed of trust constituting a gift, in the absence of proof of intention to make it irrevocable.⁵ The want of a power of revocation in a deed of trust is not fatal,⁶ but is a circumstance to be taken into account, and is of more or less weight according to the other circumstances of

¹ Ashley's Admr. v. Robinson, 29 Ala. 112; s.c. 65 Am. Dec. 387; Hempstead v. Johnston, 18 Ark. 123; s.c. 65 Am. Dec. 458; Wilt v. Franklin, 1 Binn. (Pa.) 502, 518; s.c. 2 Am. Dec. 474; Stone v. King, 7 R. I. 358; s.c. 84 Am. Dec. 557; Sharp v. Fly, 9 Baxt. (Tenn.) 23; Farquharson v. McDonald, 2 Heisk. (Tenn.) 404, 419; Skipworth v. Cunningham, 8 Leigh (Va.) 271; s.c. 31 Am. Dec. 642; Townson v. Tickell, 3 Barn. &

Ald. 31; s.c. 5 Eng. C. L. 62.

² Skipwith v. Cunningham, 8 Leigh (Va.) 271; s.c. 31 Am. Dec. 642.

³ Furman v. Fisher, 4 Cold. (Tenn.) 626; s.c. 94 Am. Dec. 210.

⁴ Ewing v. Wilson, 132 Ind. 223; s.c. 31 N. E. Rep. 64; 19 L. R. A. 767.

⁵ Ewing v. Wilson, 132 Ind. 223; s.c. 31 N. E. Rep. 64; 19 L. R. A. 767.

⁶ Reidy v. Small, 154 Pa. St. 505; s.c. 26 Atl. Rep. 602; 20 L. R. A. 362.

the case.¹ It has been said that where the deed confers a gratuity on the grantee, or a large benefit accrues to the trustee, or it appears that no provision was made for a serious contingency, such as the survivorship of the settler, as in *Russell's Appeal*,² or where a revocable deed would have answered the purpose of the trust as well as an irrevocable one; the absence of a power of revocation becomes important.³

SEC. 1827. Same—Revocation after acceptance.—The general rule as to the revocation of a trust by the grantor is well settled both in this country and in England, and is to the effect that when perfectly created without a reservation of the power of revocation,⁴ it cannot be

¹ *Toker v. Toker*, 3 DeG. J. & S. 487.

² 75 Pa. St. 269.

³ *Reidy v. Small*, 154 Pa. St. 505; s.c. 26 Atl. Rep. 602; 20 L. R. A. 362;

Cooke v. Lamotte, 15 Beav. 234; s.c. 21 L. J. Ch. 371;

Hall v. Hall, L. R. 14 Eq. 365;

Wollaston v. Tribe, L. R. 9 Eq. 44.

⁴ *Ewing v. Jones*, 130 Ind. 247; s.c. 29 N. E. Rep. 1057; 15 L. R. A. 75;

Frederick's Appeal, 52 Pa. St. 338; s.c. 91 Am. Dec. 159;

Cressman's Appeal, 42 Pa. St. 147; s.c. 82 Am. Dec. 498;

Re Atkinson, 16 R. I. 413; s.c. 16 Atl. Rep. 712; 3 L. R. A. 392;

Furman v. Fisher, 4 Cold. (Tenn.) 626; s.c. 94 Am. Dec. 210.

Agreement constituting declaration of trust is not revocable at the instance of a party competent to make it, merely because some of the *cestuis que trust* who joined in the instrument were minors or under the disability of marriage at the time of its execution.

Cressman's Appeal, 42 Pa. St. 147; s.c. 82 Am. Dec. 498.

Deed of trust for benefit of creditors duly registered cannot be annulled or revoked by one of subsequent date. The rights of the parties become vested and fixed by the execution and registration of

the first deed, subject alone to the election of the beneficiaries.

Furman v. Fisher, 4 Cold. (Tenn.) 626; s.c. 94 Am. Dec. 210.

Trust deed for payment of debts and support of grantor not founded upon any consideration paid by the trustee in a deed for the personal convenience of the grantor; and a clause directing the trustee to divide the property among the grantor's children can be regarded as no more than a mere covenant for posthumous gifts, and as such a *nudum pactum*, and revocable.

Fredericks' Appeal, 52 Pa. St. 338; s.c. 91 Am. Dec. 139.

A grantor cannot revoke a deed in trust for his own maintenance during life, providing that the property then "shall descend" to his "legal representatives," excluding a certain person named; nor will a reconveyance by the trustee be effective to defeat the interests of the remaindermen.

Ewing v. Jones, 130 Ind. 247; s.c. 29 N. E. Rep. 1057; 15 L. R. A. 75.

In Stone v. King, 7 R. I. 538; s.c. 84 Am. Dec. 557, the court say that "the party who makes a voluntary deed, whether of real or personal estate, without reserving a power to alter or revoke it, has no right to disturb it; and as against himself it is

revoked except with the consent of all the parties in interest, and will not be set aside in the absence of fraud, mistake, or undue influence.¹ To this general rule there is an exception where the beneficiary has dissented from the trust.² The courts are extremely reluctant to interfere to give relief in such cases, although ever ready to relieve in cases of fraud, mistake, undue influence, and the like;³ consequently, a mere mistake of law will not

valid and binding, both in equity and at law: *Eaton v. Tillinghast*, 4 R. I. 276, 279, 280; *Kekewich v. Manning*, 1 DeG. M. & G. 176; *Fletcher v. Fletcher*, 4 Hare 76; *Dilrow v. Bone*, 6 L. T. N. S. 71; *Smith v. Garland*, 2 Meriv. 125; *Ellison v. Ellison*, 6 Ves. 656; s.c. 6 Rev. Rep. 19; and *Hare and Wallace's Notes* (3d Am. ed.) 297-335, top paging, for a collection of the cases, English and American; *Adam's Equity*, 79, 80, side paging."

¹ *Light v. Scott*, 88 Ill. 239;

Ewing v. Jones, 130 Ind. 247; s.c. 29 N. E. Rep. 1057; 15 L. R. A. 75;

Gaylord v. City of Lafayette, 115 Ind. 429; s.c. 17 N. E. Rep. 899;

Keyes v. Carleton, 141 Mass. 45; s.c. 55 Am. Rep. 446; 6 N. E. Rep. 524; 1 New Eng. Rep. 916;

Sewall v. Roberts, 115 Mass. 262;

Viney v. Abbott, 109 Mass. 300;

Falk v. Turner, 101 Mass. 494;

Sherwood v. Andrews, 84 Mass. (2 Allen) 79;

Stone v. Hackett, 78 Mass. (12 Gray) 227;

Salisbury v. Bigelow, 37 Mass. (20 Pick.) 174, 183;

Hildreth v. Eliot, 25 Mass. (8 Pick.) 293;

Aubuchon v. Bender, 44 Mo. 560, 565;

Gilchrist v. Stevenson, 9 Barb. (N. Y.) 9;

Meiggs v. Meiggs, 15 Hun (N. Y.) 453;

Bunn v. Winthrop, 1 John. Ch. (N. Y.) 329;

Souverybye v. Arden, 1 John. Ch. (N. Y.) 240;

Fellows' Appeal, 93 Pa. St. 470; *Ritter's Appeal*, 59 Pa. St. 9;

Stone v. King, 7 R. I. 358; s.c. 84 Am. Dec. 557;

Broughton v. Broughton, 1 Atk. 625;

Newton v. Askew, 11 Beav. 145;

Rycroft v. Christy, 3 Beav. 238;

In re Way's Trusts, 2 DeG. J. & S. 365;

Kekewich v. Manning, 1 DeG. M. & G. 176;

Brookbank v. Brookbank, 1 Eq. Cas. Abr. 168;

Bale v. Newton, 1 Eq. Cas. Abr. 23; s.c. 1 Vern. 464;

Paterson v. Murphy, 11 Hare 88; *Re Way's Trusts*, 10 Jur. N. S. 836;

Paul v. Paul (No. 2), L. R. 19 Ch. Div. 47; s.c. 51 L. J. Ch. 5; 45

L. T. 437, aff'd 20 Ch. D. 742; 51 L. J. Ch. 839; 47 L. T. 210;

30 W. R. 801;

Morrall v. Jacob, 3 Meriv. 256;

Smith v. Garland, 2 Meriv. 125;

Bill v. Cureton, 2 Myl. & K. 503;

Petre v. Espinasse, 2 Myl. & K. 496;

Beatson v. Beatson, 12 Sim. 294; *Clavering v. Clavering*, 2 Vern. 473; s.c. 1 Eq. Cas. Abr. 24;

Villers v. Beaumont, 1 Vern. 100; s.c. 1 Eq. Cas. Abr. 23;

Pulvertoft v. Pulvertoft, 18 Ves. 84; s.c. 11 Rev. Rep. 151;

Ellison v. Ellison, 6 Ves. 656; s.c. 6 Rev. Rep. 19;

Smith v. Lyne, 2 Younge & C. Ch. 345;

1 Perry on Trusts (4th ed.), § 104.

² *Stockard v. Stockard's Admr.*, 7 Humph. (Tenn.) 303; s.c. 46 Am. Dec. 79;

Skipwith v. Cunningham, 8 Leigh (Va.) 271; s.c. 31 Am. Dec. 642.

³ *Garnsey v. Mundy*, 24 N. J. Eq. (9 C. E. Gr.) 243.

See: *Scrivner v. Dietz*, 84 Cal. 297; s.c. 24 Pac. Rep. 171;

be sufficient to authorize a court to relieve one from a voluntary settlement in favor of a third person in the absence of imposition, misrepresentation, undue influence, or surprise.¹ Thus it has been held that where lands are conveyed in trust for the benefit of a third person, and his children yet unborn, such trust cannot be revoked, although the trustee and all the beneficiaries in existence unite in reconveying the lands to the donor free of the trust.² And in a case where a wife conveyed her lands in trust to pay her the income for her life, and on her death for her children, with power to sell and convey in certain contingencies, but reserving no power of revocation, on the wife's surviving her husband, it was held that she was not entitled to rescind the trust.³ But to render this general rule applicable the trust must be perfectly established.⁴

Light v. Scott, 88 Ill. 239;

Conner v. Gerrard, 14 Ky. L. Rep. 214; s.c. 19 S. W. Rep. 926;

Cobb v. Knight, 74 Me. 253;

Ewing v. Shannahan (Mo. App.), 20 S. W. Rep. 1065;

McPherson v. Rollins, 107 N. Y. 316; s.c. 14 N. E. Rep. 411;

Thebaud v. Schmerhorn, 61 How. (N. Y.) Pr. 200;

Twinings' Appeal, 97 Pa. St. 36, 40;

Fellows' Appeal, 93 Pa. St. 470;

Greenfield's Estate, 14 Pa. St. 489, 501;

Sargent v. Baldwin, 60 Vt. 17; s.c. 13 Atl. Rep. 854;

Godfrey v. Poole, L. R. 13 App. Cas. 497.

¹ *Kopp v. Gunther*, 95 Cal. 68; s.c. 30 Pac. Rep. 301;

Dupre v. Thompson, 4 Barb. (N. Y.) 279, 282;

Nace v. Boyer, 30 Pa. St. 99.

² *Isham v. Del. & L. R. Co.*, 11 N. J. Eq. (3 Stock.) 227.

³ *Keyes v. Carleton*, 141 Mass. 45; s.c. 55 Am. Rep. 446; 6 N. E. Rep. 524; 1 New Eng. Rep. 916.

See: *Sewall v. Roberts*, 115 Mass. 262;

Viney v. Abbott, 109 Mass. 300.

This is not the case, however, where all the parties to the transaction supposed the set-

tlement to be revocable and the power of revocation was omitted by mistake of the scrivener.

Keyes v. Carleton, 141 Mass. 45; s.c. 55 Am. Rep. 446; 6 N. E. Rep. 524; 1 New Eng. Rep. 916.

See: *Garnsey v. Mundy*, 24 N. J. Eq. (8 C. E. Gr.) 243;

Aylsworth v. Whitcomb, 12 R. I. 298.

⁴ *Stone v. Hackett*, 78 Mass. (12 Gray) 227;

Re Way's Trusts, 10 Jur. N. S. 836.

Where the trustor has only a beneficial interest in the property the trust is not executed so as to be irrevocable unless notice has been given to the original trustees and they have assented to the new disposition of the property and recognized the new trustees.

Re Way's Trusts, 10 Jur. N. S. 836.

It is said by the court in *Stone v. Hackett*, *supra*, that "it is certainly true that a court of equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that if such an agreement or contract be exe-

SEC. 1828. **Assignment for benefit of creditors.**—Where a trust is created for the benefit of third persons by a voluntary assignment for the benefit of creditors, there is not a uniformity in the cases in regard to the right of the grantor to revoke the trust. In England it is well settled that in such a case, where the assignment has not been communicated to and accepted by the creditors, and they are not parties thereto and privy to its execution, that the trust may be revoked at the pleasure of the assignor.¹ In this country an assignment for the benefit

cuted by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery." Some modern cases, however, seem to regard deeds of trust to a greater extent to be under the control of the donors.

See: *Garnsey v. Mundy*, 24 N. J. Eq. (9 C. E. Gr.) 243;

Hall v. Hall, L. R. 14 Eq. 365, rev'd in L. R. 8 Ch. 430; s.c. 3 Moak Eng. Rep. 738;

Everitt v. Everitt, L. R. 10 Eq. 405;

Wollaston v. Tribe, L. R. 9 Eq. 44;

Coutts v. Acworth, L. R. 8 Eq. 558.

¹ *Wilding v. Richards*, 1 Coll. C. C. 655, 659; s.c. 14 L. J. Eq. N. S. 211;

LaTouche v. Earl of Lucan, 7 Clark & F. 772;

Simmons v. Palles, 2 Jon. & La. 489;

Acton v. Woodgate, 2 Myl. & K. 492; s.c. 3 L. J. Ch. N. S. 83;

Page v. Brown, 4 Russ. 6;

Lane v. Husband, 14 Sim. 656;

Wallwyn v. Coutts, 3 Sim. 14; s.c. 3 Meriv. 707;

Garrard v. Lord Lauderdale, 3 Sim. 1; s.c. 2 Russ. & M. 451;

Burrill on Assignments (5th ed.), §§ 125, 361;

2 *Perry on Trusts* (4th ed.), § 593;

2 *Story Eq. Jur.* (18th ed.), § 113

1036b.

In England deeds of assignment are called "deeds of agency" or "voluntary deeds of agency," and are revocable at the pleasure of the assignor; they merely operate as a power to the trustees, and have the same effect as if the debtor had delivered money to the agent to pay his creditors, and before any payment made by the agent, or communication by him to the creditors, had recalled the money so delivered.

Acton v. Woodgate, 2 Myl. & K. 495; s.c. 3 L. J. Eq. N. S. 83.

See: *Wilding v. Richards*, 1 Coll. C. C. 655, 659; s.c. 14 L. J. Eq. N. S. 211;

Wallwyn v. Coutts, 3 Sim. 14; s.c. 3 Meriv. 707;

Garrard v. Lord Lauderdale, 3 Sim. 1; s.c. 2 Russ. & M. 451.

Communication to the creditors of the fact of assignment by the assignee was held to defeat the power of revocation in the case of *Garrard v. Lauderdale*, 3 Sim. 1; s.c. 2 Russ. & M. 451; but it is said in *Mackinnon v. Stewart*, 20 L. J. Eq. N. S. 49, that what was really decided in this case was that "in such a case the conveyance of property to the agent makes no difference as to the right of revocation in the debtor. The party in whom the property has been vested is a mere trustee for the debtor, by whom it has been conveyed to him. He still is the mere agent or attorney, or in the nature of an agent or attorney, of the debtor, and must obey his directions as to the disposal of

of creditors, executed and delivered by the assignor and accepted by the assignee, is generally held to be irrevocable, the express assent of the creditors not being necessary;¹ the assignment being beneficial to the creditors their acceptance is presumed,² the relation of trustee and *cestui que trust* established between them and the assignee entitling them to compel the execution of the trust;³ consequently the assignment cannot be revoked

the property." But it is now generally held that such communication by the assignee does not have that effect.

Griffith v. Rickets, 7 Hare 299, 307;

Browne v. Cavendish, 1 Jon. & La. 606;

Glegg v. Rees, L. R. 7 Ch. 71, 74; s.c. 41 L. J. Ch. 243; 25 L. J. 621; 20 W. R. 193;

Acton v. Woodgate, 2 Myl. & K. 492; s.c. 3 L. J. Ch. N. S. 83.

¹ In an assignment directly to the creditors, however, their assent thereto is necessary.

Jones v. Dougherty, 10 Ga. 273; Houston v. Nowland, 7 Gill & J. (Md.) 480;

Nicoll v. Mumford, 4 John. Ch. (N. Y.) 522;

Cunningham v. Freeborn, 11 Wend. (N. Y.) 241, aff'g 3 Paige Ch. (N. Y.) 557; 1 Edw. Ch. (N. Y.) 256.

² Where the assignment is not beneficial it is otherwise, and the acceptance of the creditors must be affirmatively shown.

Ashley's Admr. v. Robinson, 29 Ala. 112;

Shearer v. Loftin, 26 Ala. 703;

Benning v. Nelson, 23 Ala. 801;

Evans v. Lamar, 21 Ala. 333, 335;

Townsend v. Harwell, 18 Ala. 301;

Hodge v. Wyatt, 10 Ala. 271;

Lockhart v. Wyatt, 10 Ala. 231; s.c. 44 Am. Dec. 481;

Smith v. Lavitts, 10 Ala. 92;

Elmes v. Sutherland, 7 Ala. 262;

Kemp v. Porter, 7 Ala. 138;

McCain v. Pickens, 32 Ark. 399;

Baldwin v. Peet, 22 Tex. 708; s.c. 75 Am. Dec. 806.

³ Bellamy v. Bellamy's Admr., 6 Fla. 62;

Hyde v. Olds, 12 Ohio St. 591.

See: Rankin v. Loder, 21 Ala.

380, 381;

Evans v. Lamar, 21 Ala. 333, 336;

Brown v. Lyon, 17 Ala. 659;

Governor v. Campbell, 17 Ala. 566;

Abercrombie v. Bradford, 16 Ala. 560;

Lockwood v. Nelson, 16 Ala. 294;

Mauldlin v. Armistead, 14 Ala. 702;

Kinnard v. Thompson, 12 Ala. 487;

Robinson v. Rapelye, 2 Stew. (Ala.) 86;

Hempstead v. Johnston, 18 Ark. 123; s.c. 65 Am. Dec. 458;

Ex parte Conway, 4 Ark. 302, 360;

De Forest v. Bacon, 2 Conn. 633;

McFerran v. Davis, 70 Ga. 661;

Reinhard v. Bank of Kentucky, 6 B. Mon. (Ky.) 252, 258;

Bank of United States v. Huth, 4 B. Mon. (Ky.) 423, 434;

Stewart v. Hall, 3 B. Mon. (Ky.) 218;

Houston v. Nowland, 7 Gill & J. (Md.) 480;

Wiley v. Collins, 11 Me. 193;

Gale v. Mensing, 20 Mo. 461; s.c. 64 Am. Dec. 197;

Scully v. Reeves, 3 N. J. Eq. (2 H. W. Gr.) 84; s.c. 29 Am. Dec. 694;

Cunningham v. Freeborn, 11 Wend. (N. Y.) 241, aff'g 3 Paige Ch. (N. Y.) 557; 1 Edw. Ch. (N. Y.) 256;

Tennant v. Stoney, 1 Rich. (S. C.) Eq. 222; s.c. 44 Am. Dec. 213;

Skipwith v. Cunningham, 8 Leigh (Va.) 271; s.c. 31 Am. Dec. 642;

Tompkins v. Wheeler, 41 U. S. (16 Pet.) 106; bk. 10 L. ed. 903;

Brooks v. Marbury, 24 U. S. (11 Wheat.) 78; bk. 6 L. ed. 423;

Brown v. Minturn, 2 Gall. C. C. 557; s.c. 4 Fed. Cas. 412;

by the assignor, or annulled by the joint action of the assignor and assignee, without the consent of all the creditors.¹ But in those cases where the creditors refuse to accept the terms of the deed of trust, the grantor may revoke the conveyance in trust.² And in some of the states it is held that the assignor has power to revoke the trust at any time before the creditors have been notified thereof;³ and by others that where a first assignment is erroneous or defective, it may be cured by a second assignment before the rights of the creditors have been fixed, either with or without a reconveyance of the property to the grantor.⁴

- Lawrence v. Davis, 3 McLean C. C. 177; s.c. Fed. Cas. No. 8137;
Halsey v. Fairbanks, 4 Mas. C. C. 206, 215; s.c. Fed. Cas. No. 5964.
- ¹ Lanier v. Driver, 24 Ala. 149;
Ex parte Conway, 4 Ark. 302, 359;
Forbes v. Scannell, 13 Cal. 242;
Brown v. Chamberlain, 9 Fla. 464;
Sevier v. McWhorter, 27 Miss. 442;
Alpaugh v. Roberson, 27 N. J. Eq. (12 C. E. Gr.) 96;
Scully v. Reeves, 3 N. J. Eq. (2 H. W. Gr.) 84, 131; s.c. 29 Am. Dec. 694, 703;
Briggs v. Davis, 20 N. Y. 15; s.c. 75 Am. Dec. 363;
Sheldon v. Smith, 28 Barb. (N. Y.) 593;
Bell v. Holford, 1 Duer (N. Y.) 58, 78;
Shepherd v. McEvers, 4 John. Ch. (N. Y.) 136; s.c. 8 Am. Dec. 561;
Messonier v. Kauman, 3 John. Ch. (N. Y.) 3;
Ingram v. Kirkpatrick, 6 Ired. (N. C.) Eq. 463; s.c. 51 Am. Dec. 428;
Walker v. Crowder, 2 Ired. (N. C.) Eq. 478, 485;
Stimpson v. Fries, 2 Jones (N. C.) L. 156, 159;
Klapp's Assignees v. Shirk, 13 Pa. St. 589;
Hall v. Dennison, 17 Vt. 310, 318;
Burrill on Assignments, § 361;
2 Perry on Trusts (4th ed.), § 593.
- ² Gibson v. Chedic, 1 Nev. 497; s.c. 90 Am. Dec. 503.
- ³ See: Gibson v. Rees, 50 Ill. 383, 400;
Mills v. Harris, 3 Head (Tenn.) 332;
Robertson v. Sublett, 6 Humph. (Tenn.) 313;
Brevard v. Neely, 2 Sneed (Tenn.) 164, 165;
Galt v. Dibrell, 10 Yerg. (Tenn.) 144, 158.
Compare: Furman v. Fisher, 4 Cold. (Tenn.) 626; s.c. 94 Am. Dec. 210;
Stockard v. Stockard's Admr., 7 Humph. (Tenn.) 303; s.c. 46 Am. Dec. 79;
Field v. Arrowsmith, 3 Humph. (Tenn.) 442; s.c. 39 Am. Dec. 185.
- ⁴ Ingraham v. Wheeler, 6 Conn. 277;
First National Bank v. Hughes, 10 Mo. App. 7;
Juliand v. Rathbone, 39 N. Y. 369;
Hone v. Woolsey, 2 Edw. Ch. (N. Y.) 289;
Mills v. Argall, 6 Paige Ch. (N. Y.) 577, 581;
Merrill v. Englesby, 28 Vt. 150;
Rumery v. McCulloch, 54 Wis. 565; s.c. 12 N. W. Rep. 65;
Brahe v. Eldridge, 17 Wis. 184;
Morrison v. Shuster, 1 Mackey (D. C.) 190.
See: Gates v. Andrews, 37 N. Y. 657; s.c. 97 Am. Dec. 764;
Porter v. Williams, 9 N. Y. 142; s.c. 59 Am. Dec. 519.
Compare: Metcalf v. Van Brunt, 37 Barb. (N. Y.) 621;
Baker v. Harlan, 3 Lea (Tenn.) 505.

SECTION XVI.—EXTINGUISHMENT AND TERMINATION OF TRUST.

SEC. 1829. Introductory.

SEC. 1830. Condition for termination—Deed of married woman.

SEC. 1831. By surrender of trust.

SEC. 1832. By death of beneficiary.

SEC. 1833. By reconveyance of property.

SEC. 1834. By sale under will.

SECTION 1829. **Introductory.**—The general rule regarding trusts is that whether the deed of trust does or does not contain words of inheritance the trustee will take such estate as is adequate to the execution of the trust, no more and no less.¹ Thus, where a legal estate is sufficient for the purposes of the trust, it will, if possible, be implied in the trustee whatever may be the limitation in the instrument creating the trust;² and where a legal estate is limited to a trustee to the fullest extent, he will not take a greater interest in the land than is necessary for the complete execution of the trust.³ In other words,

¹ *Liptrot v. Holmes*, 1 Kelly (Ga.) 389, 390;

Att'y-Gen. v. Federal Street Meeting-house, 69 Mass. (3 Gray) 1;

King v. Parker, 63 Mass. (9 Cush.) 71;

Cleveland v. Hallett, 60 Mass. (6 Cush.) 403;

Gould v. Lamb, 52 Mass. (11 Met.) 84;

Stearns v. Palmer, 51 Mass. (10 Met.) 32;

Wright v. Delafield, 23 Barb. (N. Y.) 498;

Fisher v. Fields, 10 John. (N. Y.) 105;

Welch v. Allen, 21 Wend. (N. Y.) 147;

Rutledge v. Smith, 1 Busb. (N. C.) Eq. 283;

Cooper v. Kynock, L. R. 8 Ch. 402.

Powell v. Glenn, 21 Ala. 468;

Comby v. McMichael, 19 Ala. 747, 751;

Chamberlain v. Thompson, 10 Conn. 243, 244; s.c. 26 Am. Dec. 390;

Preachers' Aid Society v. England, 106 Ill. 128;

Kirkland v. Cox, 94 Ill. 400,

Nelson v. Davis, 35 Ind. 474;

Gill v. Logan, 11 B. Mon. (Ky.) 231, 233;

Deering v. Adams, 37 Me. 244, 265;

Sears v. Russell, 74 Mass. (8 Gray) 86;

King v. Parker, 63 Mass. (9 Cush.) 71;

Cleveland v. Hallett, 60 Mass. (6 Cush.) 407;

Upham v. Varney, 15 N. H. 462;

Nicholl v. Walworth, 4 Den. (N. Y.) 385;

Hawley v. James, 5 Paige Ch. (N. Y.) 318;

Payne v. Sale, 2 Dev. & B. (N. C.) Eq. 455, 460;

Williams v. First Soc. in Cin., 1 Ohio St. 478;

Meeting St. Bap. Soc. v. Hail, 8 R. I. 234, 240;

King v. Ackerman, 67 U. S. (2 Black) 408; bk. 17 L. ed. 292;

Webster v. Cooper, 55 U. S. (14 How.) 488, 499; bk. 14 L. ed. 510;

Neilson v. Lagow, 53 U. S. (12 How.) 98; bk. 13 L. ed. 909;

Ward v. Amory, 1 Curt. C. C. 419, 427; s.c. Fed. Cas. No. 17146;

White v. Baylor, 10 Ir. Eq. 54.

² *Greenwood v. Coleman*, 34 Ala. 150;

the language used in creating the estate of a trustee will be limited and restrained to the purposes of its creation, and when those purposes are satisfied, the estate of the trustee ceases to exist, his title becomes extinct, and he cannot thereafter convey one.¹

- Bryan v. Weems, 29 Ala. 423 ;
s.c. 65 Am. Dec. 407 ;
West v. Fitz, 109 Ill. 425 ;
Ware v. Richardson, 3 Md. 505 ;
s.c. 56 Am. Dec. 762 ;
Farmers' Nat. Bank v. Moran, 30
Minn. 167 ; s.c. 14 N. W. Rep.
805 ;
Slevin v. Brown, 32 Mo. 176 ;
Wilcox v. Wheeler, 47 N. H.
488 ;
Norton v. Norton, 2 Sandf. (N.
Y.) 296 ;
McBride v. Smyth, 59 Pa. St.
245 ;
Koenig's Appeal, 57 Pa. St. 352 ;
Ivory v. Burns, 56 Pa. St. 300 ;
Pearce v. McClenaghan, 5 Rich.
(S. C.) L. 178 ; s.c. 55 Am. Dec.
710 ;
Williman v. Holmes, 4 Rich. (S.
C.) Eq. 475 ;
Gadsden v. Cappedeville, 3 Rich.
(S. C.) L. 468 ;
Davis v. Williams, 85 Tenn. 646 ;
s.c. 4 S. W. Rep. 8 ;
Gardenhire v. Hinds, 1 Head
(Tenn.) 402 ;
Smith v. Metcalf, 1 Head (Tenn.)
64 ;
Ellis v. Fisher, 3 Sneed (Tenn.)
231 ; s.c. 65 Am. Dec. 52 ;
Adams v. Adams, 6 Ad. & E. (6
Q. B.) N. S. 860, 866 ; s.c. 51
Eng. C. L. 860 ;
Nash v. Coates, 3 Barn. & Ad.
839 ; s.c. 23 Eng. C. L. 366 ;
Doe d. Player v. Nicholls, 1 Barn.
& C. 334 ; s.c. 8 Eng. C. L. 144 ;
Shapland v. Smith, 1 Bro. Ch. 75 ;
Doe d. Muller v. Claridge, 6 Man.
Gr. & S. (6 C. B.) 641 ; s.c. 60
Eng. C. L. 641 ;
Doe v. Hicks, 7 Durnf. & E. (7
T. R.) 433 ;
Saye v. Jones, 1 Eq. Cas. Abr.
383 ; s.c. 3 Bro. Ch. 113 ;
Blagrove v. Blagrove, 4 Exch.
569 ;
Watson v. Pearson, 2 Exch. 593 ;
Chapman v. Blissett, For. 145 ;
Brown v. Whiteway, 8 Hare 156 ;
Heardson v. Williamson, 1 Keen
33 ;
Barker v. Greenwood, 4 Mees. &
W. 429 ;
Warter v. Hutchinson, 5 Moore
153 ; s.c. 1 Barn. & C. 721 ; 8
Eng. C. L. 304.
See: McElroy v. McElroy, 113
Mass. 509 ;
Watkins v. Specht, 7 Cold. (Tenn.)
585.
¹ Young v. Bradley, 101 U. S. 782 ;
bk. 25 L. ed. 1044 ;
Doe ex d. Poor v. Considine, 73
U. S. (6 Wall.) 458 ; bk. 18 L.
ed. 869.
Chancellor KENT says: "The
general rule is that a trust es-
tate is not to continue beyond
the period required by the pur-
poses of the trust ; and notwith-
standing the devise to the trus-
tees and their heirs, they take
only a chattel interest where
the trust does not require an
estate of higher quality.
4 Kent Com. (13th ed.) 233.
See: Webster v. Cooper, 55 U. S.
(14 How.) 488 ; bk. 14 L. ed. 510 ;
Neilson v. Lagow, 53 U. S. (12
How.) 98 ; bk. 13 L. ed. 909 ;
Morrant v. Gough, 7 Barn. & C.
206 ; s.c. 14 Eng. C. L. 98 ;
Doe v. Hicks, 7 Durnf. & E. (7 T.
R.) 437 ;
Curtis v. Price, 12 Ves. 89, 99 ;
s.c. 8 Rev. Rep. 303.
By the New York statute of uses and
trusts (§§ 63 & 64, 4 N. Y. Rev.
Stat., 8th ed., 2439 ; 3 N. Y.
Rev. Stat. Codes & L. 3179, §§
19, 21), express trusts of realty
which are valid in their crea-
tion are indestructible, and the
beneficiaries cannot assign or
in any manner dispose of their
interests, and every sale or con-
veyance or other act of the
trustee in contravention of his
trust is absolutely void.
Cuthbert v. Chauvet, 136 N. Y.
326 ; s.c. 32 N. E. Rep. 1088 ;
18 L. R. A. 745.
See: Welsh v. Wilson, 101 N. Y.
254, 257 ; s.c. 54 Am. Rep. 698 ;
4 N. E. Rep. 633 .

SEC. 1830. Condition for termination—Deed of married woman.—It is thought that a conveyance of land to a trust will not be terminated and re-invest the land in the donor, even in those cases where the object for which the trust was created fails, unless there is a reservation in the instrument of a power of revocation. Thus it has been said that where a married woman, for the purpose of placing her property beyond the reach of her husband, conveys the same in trust to pay her the income for her life, and on her death the land to go to her children, with power to sell and convey on certain contingencies, without reserving the power of revocation, on the death of her husband the widow will not be entitled to rescind the trust.¹ On the other hand it has been said that where an unmarried woman conveys her estate in trust for her separate use during life, without control from any husband, and on her death to be conveyed to persons named by will, or, in the absence of appointment, to those to whom it would descend if she had died owning it in fee-simple, and she afterwards marries and becomes discoverd, that the trust thereupon fails.² The court say: “The words of

Tolles v. Wood, 99 N. Y. 616, 617 ;
s.c. 1 N. E. Rep. 251 ;

Bailey v. Bailey, 97 N. Y. 460 ;

Crooke v. County of Kings, 97 N.
Y. 421, 433, 446 ;

Radley v. Kuhn, 97 N. Y. 27, 31 ;

Wetmore v. Porter, 92 N. Y. 76,
83 ;

Lent v. Howard, 89 N. Y. 169 ;

Douglas v. Cruger, 80 N. Y. 15 ;

Fitzgerald v. Topping, 48 N. Y.
438, 444 ;

Anderson v. Mather, 44 N. Y.
249, 261 ;

Russell v. Russell, 36 N. Y. 581 ;
s.c. 93 Am. Dec. 540 ;

Campbell v. Foster, 35 N. Y. 361,
371 ;

Gilman v. Reddington, 24 N. Y.
9, 12 ;

Briggs v. Davis, 20 N. Y. 15, 21 ;
s.c. 75 Am. Dec. 363 ;

Leggett v. Hunter, 19 N. Y. 445,
455 ;

Leonard v. Burr, 18 N. Y. 96,
107 ;

Brown v. Cayuga & S. R. Co., 12
N. Y. 486 ;

Belmont v. O'Brien, 12 N. Y. 394 ;

Noyes v. Blakeman, 6 N. Y. 567 ;
Powers v. Bergen, 6 N. Y. 358 ;

L'Amoureux v. Van Rensselaer,
1 Barb. Ch. (N. Y.) 34 ;

Cruger v. Douglas, 4 Edw. Ch.
(N. Y.) 433 ;

Clute v. Bool, 8 Paige Ch. (N. Y.)
83 ;

Gott v. Cook, 7 Paige Ch. (N. Y.)
521 ;

Hallett v. Thompson, 5 Paige Ch.
(N. Y.) 583 ;

Arnold v. Gilbert, 3 Sandf. Ch.
(N. Y.) 531 ;

Grout v. Van Schoonhoven, 1
Sandf. Ch. (N. Y.) 336 ;

Kane v. Gott, 24 Wend. (N. Y.)
641 ; s.c. 35 Am. Dec. 641 ;

Van Rensselaer v. Akin, 22 Wend.
(N. Y.) 549 ;

Hawley v. James, 16 Wend. (N.
Y.) 61.

Keyes v. Carleton, 141 Mass. 45 ;
s.c. 55 Am. Rep. 446 ; 6 N. E.

Rep. 524 ; 1 New Eng. Rep.
916 ;

Sewall v. Roberts, 115 Mass. 262 ;
Viney v. Abbott, 109 Mass. 300.

² *Dodson v. Ball*, 60 Pa. St. 492 ; s.c.

the limitation being so exactly commensurate with the line of descent, there is no reason for upholding the trust after the life tenant has become discoverd by the death of her husband, in order to carry out a special intent. The trust being passive, the *cestui que trust* being armed with a power of appointment by will, the ultimate limitation being exactly coincident with the course of descent, and she being discoverd, it has now no useful or valuable purpose to subserve, no special intent to fulfill, no right of the donor to protect, and no reason exists, therefore, why the trust should not fall. The ultimate limitation was superadded only to meet the contingency of dying during coverture without an appointment by will. The great underlying principle of private dominion is not affected; while the other, public policy, requires the trust to be struck down. This being the case, it is evident that the concomitant proviso is useless, except to protect against changes which might result from the influence of the husband. Indeed, it was wholly useless, as no power to revoke or to change was reserved.¹ Nor is the power of sale to convert and re-invest on the same trusts sufficient to prevent the trust from falling in such a case. It was expressed to be for her own benefit, and was but an incident to protect the trust property during coverture. Now, being *sui juris*, the provision is not needed."²

SEC. 1831. **By surrender of trust.**—We have already seen that where a trustee has accepted and entered upon the execution of a trust he cannot thereafter relinquish

100 Am. Dec. 586. In this case a testator devised real estate to his executors in trust for his children, the trustees to have the management and control until the children should marry: "and when any of my said children shall marry, with the consent of said executors, any worthy person, then the part or portion of property herein devised, or the proceeds thereof, * * * shall be and become the property of said child so marrying, and my said executors shall make the necessary conveyance thereof, so as to

vest the absolute title in said legatee." The court held that the marrying of a child with the consent of the executors was not a condition precedent to the vesting in him or her of an interest in the estate, but only a condition for the termination of the trust as to the one so marrying, and that the children took an immediate vested interest.

¹ Wright v. Brown, 44 Pa. St. 224; Lancaster v. Dolan, 1 Rawle (Pa.) 231; s.c. 18 Am. Dec. 625.

² Dodson v. Ball, 60 Pa. St. 492; s.c. 100 Am. Dec. 586.

the trust and surrender the estate without the consent of the *cestui que trust* or the direction of the court,¹ and a delivery of the trust property to one not authorized to discharge the trust will not amount to a relinquishment and surrender of the trust.² The order of a court of equity alone can authorize the surrender by a trustee of his trust.³

SEC. 1832. **By death of beneficiary.**—The death of the first life tenant will, under the statute of uses, terminate an active trust created by will in favor of one for life, and at her death in favor of her children for life, with remainder at their death to their children in fee, where the active powers and duties of the trustee cease at the death of such tenant and the remainder in fee has then become vested.⁴ In England it was formerly held that if the *cestui que trust* died intestate and without heirs, his estate did not escheat, but went to the trustee,⁵ on the theory that the trustee being *in esse*, and in the legal seisin of the land, he was a tenant possessing all the capacities for the performance of the feudal services by which the land was held ;⁶ and that for this reason there could be no ground for a seizure by the lord of the manor. This doctrine was not imported into this country, not being applicable to the conditions and surroundings, and for that reason on the happening of such a contingency the land escheats to the government.⁷ This of course works a termination of the trust estate.

SEC. 1833. **By reconveyance of property.**—Where property is conveyed to a trust with a condition for reconveyance, on case of failure of the object for which the trust was appointed,⁸ such reconveyance will terminate

¹ Brennan v. Willson, 71 N. Y. 502, 506 ;

Shepherd v. McEvers, 4 John. Ch. (N. Y.) 136 ; s.c. 8 Am. Dec. 561.

See : *Ante*, § 1822.

² Guphill v. Isbell, 1 Bailey (S. C.) L. 230 ; s.c. 19 Am. Dec. 675.

³ Guphill v. Isbell, 1 Bailey (S. C.) L. 230 ; s.c. 19 Am. Dec. 675.

⁴ Gindrat v. Western R. of Ala.,

(Ala.), s.c. 11 So. Rep. 372 ; 19 L. R. A. 839.

⁵ Burgess v. Wheaton, 1 Eden 577.

⁶ See : Book II., "Tenures."

⁷ See : Matthew v. Ward, 10 Gill & J. (Md.) 443, 450.

⁸ Lincoln v. French, 105 U. S. 614 ; bk. 26 L. ed. 1189 ;

French v. Edwards, 88 U. S. (21 Wall.) 147 ; bk. 22 L. ed. 534.

Where one conveyed certain

the trust ;¹ and where the trustee is bound to reconvey, it is to be presumed that he discharged that duty rather than that he violated it ; and it is not necessary that the presumption should rest upon proof that the conveyance had been executed, because right and justice require it,² and equity regards as done that which ought to have been done.³

SEC. 1834. **By sale under will.**—Where a deed or will creating the trust estate provides for the sale of the trust property and the disposition of the proceeds thereof, such sale and disposition will determine the estate. Thus where manufacturing property was devised to trustees, with directions to permit testator's three sons to occupy and improve it for their joint benefit so long as they can agree and make the business profitable, and when they fail to do so to sell the same, invest the proceeds, and pay over to each son one-third of the accumulated fund upon his arriving at the age of fifty years, contains a clause which requires the property to be appraised and sold, if one of the sons so desires, to either, two if they will buy it at the appraised value, otherwise to strangers, —a sale to two of the sons under the latter clause will

lands to trustees for certain purposes, the deed to become void by its terms if a certain railroad was not completed within one year from its date, in an action of ejectment by the grantors against persons in possession, begun more than eight years after said year when the deed was to become void, a reconveyance of the premises by the trustees to the grantor will be presumed in equity and at law.

French v. Edwards, 88 U. S. (21 Wall.) 147 ; bk. 22 L. ed. 534.

¹ Quit-claim deed from trustee to trustor re-invests the trustor with the legal estate and divests the trustee of it.

Huckabee v. Billingsby, 16 Ala. 414 ; s.c. 50 Am. Dec. 183.

² French v. Edwards, 88 U. S. (21 Wall.) 147 ; bk. 22 L. ed. 534.

³ Case v. Case, 26 Mich. 484 ;

Russell's Appeal, 75 Pa. St. 269 ; Greenfield's Estate, 14 Pa. St. 489 ;

Phillipson v. Kerry, 32 Beav. 628 ;

Nanney v. Williams, 22 Beav. 452 ;

Forshaw v. Welsby, 20 Beav. 248 ;

Hoghton v. Hoghton, 15 Beav. 278 ; s.c. 21 L. J. Ch. 482 ; 17 Jur. 99 ;

Cooke v. Lamotte, 15 Beav. 234 ; s.c. 21 L. J. Ch. 371 ;

Phillips v. Mullings, L. R. 7 Ch. App. 244, 246 ; s.c. 41 L. J. Ch. 211 ; 20 W. R. 129 ; 2 Moak Eng. Rep. 259 ;

Hall v. Hall, L. R. 14 Eq. Cas. 365 ; 3 Moak Eng. Rep. 783 ;

Wollaston v. Tribe, L. R. 9 Eq. 44 ;

Huguein v. Baseley, 14 Ves. Jr. 273, 293 ; s.c. 9 Rev. Rep. 276.

not terminate the trust, but it will continue, as to the proceeds,—the same as if the sale had been made under the other provision of the will. The reason for this is, as is said in one case, because “there can be no doubt that the proceeds of the sale in the present case must be treated in the same way as if the property had been disposed of at public auction or private sale, after an appraisal under this provision and a failure of any two of the sons to take it at the appraised value. A sale of the kind last mentioned does not differ in character from a sale made under the last part of the clause without a request in writing. It is necessarily the result of a failure of the three sons to agree to carry on the business jointly in the manner contemplated. So long as they agree there can be no request, and if they fail to agree the last part of the clause is applicable. The special provision for a sale which gives any two of the sons an opportunity to have the price fixed by a previous appraisal is within the general language of the last part of the clause, both in regard to the causes which produce the sale and in the fact that the trustees ‘sell and convey in fee simple’ as required by that language.”¹

¹ *Kendall v. Gleason*, 152 Mass.

457; s.c. 25 N. E. Rep. 838; 9 L. R. A. 509.

CHAPTER XXVII.

EQUITABLE ESTATES—POWERS.

- SEC. 1835. Definition of power.
- SEC. 1836. Kinds of powers.
- SEC. 1837. Creation of power—Form of words.
- SEC. 1838. Same—Instrument creating.
- SEC. 1839. Same—New York doctrine.
- SEC. 1840. Powers distinguished from estates.
- SEC. 1841. Limitation of—Rule against perpetuities.
- SEC. 1842. Same—Same—Validity of appointment.
- SEC. 1843. Construction of powers—Introductory.
- SEC. 1844. Same—Enlarging estate.
- SEC. 1845. Same—Life estate with power of sale.
- SEC. 1846. Same—Power to sell and use proceeds.
- SEC. 1847. Same—Personal confidence.
- SEC. 1848. Same—Power to trustees “and their heirs.”
- SEC. 1849. Same—Power to a trustee “and his assigns.”
- SEC. 1850. Powers of appointment.
- SEC. 1851. Same—Extent of estate.
- SEC. 1852. Same—Power of disposal.
- SEC. 1853. Same—Power to appoint by will.
- SEC. 1854. Same—Absolute estate vests when.
- SEC. 1855. Liabilities of estates—For debt of donee.
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- SEC. 1857. Who may be donees.
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- SEC. 1861. Same—Power to sell.
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- SEC. 1863. Power to married women.
- SEC. 1864. Same—By implication.
- SEC. 1865. Same—Excessive execution.
- SEC. 1866. Same—Successive execution.
- SEC. 1867. Same—Defective execution.
- SEC. 1868. Non-execution of power.
- SEC. 1869. Delegation or assignment of power.
- SEC. 1870. Survival of powers.
- SEC. 1871. Extinguishment and merger of power.
- SEC. 1872. Suspension and destruction of power.

SECTION 1835. Definition of power.—Technically a power is an authority by which one person enables another to do some act for him ;¹ as the powers of an agent, or an executor, a power of attorney, and the like.² Under the statute of uses a power is an authority enabling a person, through the medium of the statute, to dispose of an interest in real property vested in himself or in another person,³ and is said to be a “method of causing a use with its accompanying estate to spring up at the will of a given person.”⁴ In those cases where a future use is to vest upon the happening of a contingency independent of human action, it is called a contingent,⁵ springing,⁶ or shifting⁷ use ; but where the contingency depends upon an act of some person or persons designated by the grantor of the use, then the limitation receives the name of power.⁸ The person who confers a power is called the donor ; the person who executes it, the appointor or donee ; and the person in whose favor it is executed, the appointee.⁹

SEC. 1836. Kinds of powers.—Powers under the statute have been divided into three distinct kinds or classes, to wit : (1) statutory powers, (2) powers of attorney, and (3) powers of appointment, otherwise known as simple powers. A statutory power is one which is created and vested in a person, or class of persons, by act of the Legislature. Such a power derives its authority entirely from the Legislature, and is governed by the rules of interpretation and construction applicable to statutes generally.¹⁰ A power of attorney is an authority conferred by the principal upon a person who acts as his agent, to perform

¹ 2 Lil. Abr. 239.

² Anderson's L. Dict. 795.

³ Clere's Case, 6 Co. 17b ;

4 Kent Com. (13th ed.) 316 ;

1 Sugd. on Pow. 82.

⁴ 1 Wms. on Real Prop. 245.

See : Mansfield v. Mansfield, 6 Conn. 559 ; s.c. 16 Am. Dec. 76 ;

Hunt v. Rousmanier's Admrs., 21 U. S. (8 Wheat.) 174 ; bk. 5 L. ed. 589.

⁵ See : *Ante*, § 1659, *et seq.*

⁶ See : *Ante*, § 1662.

⁷ See : *Ante*, § 1663.

⁸ Shep. Touch. (Prest. ed.) 529, note.

⁹ 4 Kent Com. (13th ed.) 316.

¹⁰ *Baltimore v. Porter*, 18 Md. 284.

See : *Markham v. Howell*, 33 Ga. 508 ;

Matter of Bull, 45 Barb. (N. Y.) 334 ; s.c. 31 How. (N. Y.) Pr. 69 ;

Leak v. Richmond Co., 64 N. C. 132.

certain general or special acts in the manner indicated in the instrument of attorney. Where those acts relate to real estate, the power must be executed in writing and under seal,¹ and are to be strictly construed.² In either of these powers the title remains in the original owner, unaffected by the creation of the power, until its execution, and it is divested only when the deed of conveyance is executed and delivered.³

Powers are again subdivided into appendant and collateral. An appendant power is one in which the donee is authorized to exercise out of the estate limited to him, and which depends for its validity upon the estate which is in him, such as a life estate limited to a person with a power to grant leases in possession.⁴ These powers are again subdivided into powers annexed to the estate and powers in gross. Both of these are said to be powers with an interest, because the trustee of the power has an interest in the estate as well as in the exercise of the power.⁵ A power in gross is one which gives the donee

¹ *Darst v. Roth*, 4 Wash. C. C. 471; *Berkeley v. Hardy*, 5 Barn. & C. 355; s.c. 11 Eng. C. L. 495.

² *Wood v. Goddridge*, 60 Mass. (6 Cush.) 117; s.c. 52 Am. Dec. 771.

³ 1 Sugd. on Pow. 1, 171, 174.

⁴ *Bergen v. Bennett*, 1 Cal. Cas. (N. Y.) 1, 15; s.c. 2 Am. Dec. 281;

Clere's Case, 6 Co. 17b;

Sugden on Powers, 107.

⁵ *Bergen v. Bennett*, 1 Cal. Cas. (N. Y.) 1, 15; s.c. 2 Am. Dec. 281;

Edwards v. Sleater, Hard. 415.

New York doctrine—*Bergen v. Bennett*.—It is said in *Bergen v. Bennett*, *supra*, that "if the person clothed with the power hath at the same time an estate in the land, the power is not collateral, because it savors of the land. The power now in question answers exactly to this definition of a power with an interest, because the mortgagee has at the same time a vested estate in the land, and it does not answer at all to the definition of a power simply

collateral; for that is but a bare authority to a stranger, who has not, nor ever had any estate whatsoever. I might, perhaps, rest satisfied with giving this description of the two powers, drawn from approved authority; but I think the point is susceptible of more precise and definite illustration. If a man, by his will, directs his executors to sell his land, that is but a bare authority without interest; for the land, in the mean time, descends to the heir at law, who, until the sale, would at common law be entitled to the profits, and, being but a naked authority, if one executor dies, the power at common law would not survive. But if a man devises his land to his executors, to be sold, then there is a power coupled with an interest; for the executors, in the mean time, take possession of the land and of the profits."

1 Co. Litt. (19th ed.) 113a, 181b;

2 Id. 236a;

1 Pow. on Dev. 291-310.

who has an estate in the land authority to create such estates only as will not attach an interest limited to take effect out of his own interest;¹ as where a life tenant has a power to create an estate to commence after his own ends.² Collateral powers are those in which the donee has no estate or interest in the land,³ and are always strictly construed.⁴

SEC. 1837. **Creation of power—Form of words.**—No particular form of words or technical phrases is required to create a power. Under the statute of uses or the statute of wills, any phrases or words which indicate an intention on the part of the donor to grant a power will be sufficient, if they designate the scope of such a power within a reasonable degree of certainty.⁵ The intention of the grantor, as expressed in the instrument, must prevail, provided only it be consistent with the rules of

¹ *Watkins' Conveyance*, 1 Atk. 260;

4 Kent Com. (13th ed.) 317.

² *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 236; s.c. 14 Am. Dec. 458; *Edwards v. Sleater*, Hard. 416.

³ *Addison v. Bowie*, 2 Bland Ch. (Md.) 606, 618; *Bergen v. Bennett*, 1 Cai. Cas. (N. Y.) 1, 15; s.c. 2 Am. Dec. 281.

⁴ *Zouch v. Woolston*, 2 Burr. 1136; *Darlington v. Pulteney*, 1 Cowp. 260.

⁵ *McCord v. McCord*, 19 Ga. 602; *Funk v. Eggleston*, 92 Ill. 515; s.c. 34 Am. Rep. 136;

Jameson v. Smith, 4 Bibb (Ky.) 307;

Putnam Free School v. Fisher, 30 Me. 523;

Scott v. Perkins, 28 Me. 22; s.c. 48 Am. Dec. 470;

Harris v. Knapp, 38 Mass. (21 Pick.) 412, 416;

Gregory v. Cowgill, 19 Miss. 415; *Owen v. Ellis*, 64 Mo. 77;

Turner v. Timberlake, 53 Mo. 371;

Conover v. Hoffman, 1 Bosw. (N. Y.) 214;

Jackson ex. d. Bogert v. Schaubert, 7 Cow. (N. Y.) 187;

Dominick v. Michael, 4 Sandf.

Ch. (N. Y.) 374;

Dunn v. Keeling, 2 Dev. (N. C.) L. 283;

Jones v. Hurst, 7 Ired. (N. C.) Eq. 134;

Withington's Appeal, 32 Pa. St. 419;

Shoofstall v. Powell, 1 Grant Cas. (Pa.) 19;

Porcher v. Daniels, 12 Rich. (S. C.) Eq. 349;

Mundy v. Sawter, 3 Gratt. (Va.) 518;

Brant v. Virginia Coal & Iron Co., 93 U. S. 326; bk. 23 L. ed. 927;

Peter v. Beverly, 35 U. S. (10 Pet.) 532; bk. 9 L. ed. 522;

Smith v. Bell, 31 U. S. (6 Pet.) 68; bk. 8 L. ed. 322;

Bateman v. Bateman, 1 Atk. 421;

Mather v. Norton, 8 Eng. L. & Eq. 255;

Re Thomson's Estate, L. R. 14 Ch. Div. 263; s.c. 49 L. J. Ch. 622; 43 L. T. 35;

Pennock v. Pennock, L. R. 13 Eq. 144; s.c. 41 L. J. Ch. 141;

25 L. T. 691; 1 Moak. Eng. Rep. 626;

Bradly v. Westcott, 13 Ves. 445; s.c. 9 Rev. Rep. 207;

1 Sugd. on Pow. 118.

law; and the rules of equitable construction will be applied in furtherance of that intention.¹

SEC. 1838. **Same—Instrument creating.**—Powers may be created either by deed or by will; and in those cases where by deed, is either by a grant to the grantee or a reservation to the grantor.² The power may either be incorporated in the instrument which conveys the land, be indorsed thereon, or be granted by a separate document. In those cases where there is a transmutation of the possession of the property, the conveyance of the legal estate is necessary for the creation of a valid power; but in all other instances a valid power may be granted without the transfer of the legal estate.³

SEC. 1839. **Same—New York doctrine.**—In some of the states, as in New York, statutes have been passed abolishing powers, as they exist at common law, and providing for the creation, construction, and execution of statutory powers.⁴ In these states a power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully

¹ *Jackson v. Veeder*, 11 John. (N. Y.) 169;

Smith v. Doe, 3 Bligh 290;

Griffith v. Harrison, 4 Burr. 749;

Right v. Thomas, 3 Burr. 1446;

Ren v. Bulkely, Doug. 293;

Pomeroy v. Partington, 3 Durnf.

& E. (3 T. R.) 665; s.c. 1 Rev. Rep. 787.

² *Dorland v. Dorland*, 2 Barb. (N. Y.) 63, 80;

Taylor v. Meads, 4 DeG. J. & S. 597;

Snape v. Thourton, 2 Rol. Abr. 215;

4 Kent's Com. (18th ed.) 319;

1 Sugd. on Pow. 96.

³ *Rush v. Lewis*, 21 Pa. St. 72;

Doe d. Cooper v. Finch, 4 Barn.

& A. 283; s.c. 24 Eng. C. L. 130;

Thompson v. Lawley, 2 Bos. & P.

303, 311; s.c. 5 Rev. Rep. 595;

Outon v. Weeks, 2 Keb. 809;

Fitz v. Smallbrook, 1 Keb. 134;

Andrew's Case, Moore 107;

Popham v. Bampfield, 1 Vern. 79;

Maundrell v. Maundrell, 10 Ves. 255; s.c. 7 Rev. Rep. 393;

Perry v. Phillips, 1 Ves. Jr. 255;

2 Co. Litt. (19th ed.) 271b;

1 Fearné Cont. Rem. 128;

Gilb. on Uses, 46;

3 Kent's Com. (13th ed.) 319;

1 Sandf. on Uses, 195;

1 Sugd. on Pow. 217, 228–231.

⁴ 4 N. Y. Rev. Stats. (8th ed.) 2445, § 73;

2 N. Y. Rev. Stats., Codes & L. 2288, § 1.

See: *Hutton v. Benkard*, 92 N. Y. 295, 304;

Delaney v. McCormack, 88 N. Y. 174;

Cutting v. Cutting, 86 N. Y. 522;

Jennings v. Conboy, 73 N. Y. 230;

Kinnier v. Rogers, 42 N. Y. 531,

534, aff'g 55 Barb. (N. Y.) 85;

Everitt v. Everitt, 29 N. Y. 39,

78, rev'g 29 Barb. (N. Y.) 112;

Belmont v. O'Brien, 12 N. Y. 403.

perform,¹ classifying such powers as general and special, beneficial or in trust.² Under these statutes a power is general when it authorizes an alienation by means of conveyance, will, or charge of the lands embraced in the power in fee, to any person whomsoever;³ and special (1) where the person or class of persons, to whom the disposition of the lands under the power is to be made, are designated, and (2) where the power authorizes the alienation, by means of a conveyance, will, or charge of a particular estate or interest less than a fee.⁴ A general or special power under these statutes is beneficial, when no person other than the grantee has, by the terms of its creation, any interest in its execution.⁵ These powers

¹ 4 N. Y. Rev. Stats. (8th ed.)

2445, § 74;

2 N. Y. Rev. Stats., Codes & L.

2288, § 2.

See: *Coleman v. Beach*, 97 N.

Y. 558;

Delaney v. McCormack, 88 N.

Y. 174;

Jennings v. Conboy, 73 N. Y. 230;

Bruner v. Meigs, 64 N. Y. 506;

Ocean National Bank v. Olcott,

47 N. Y. 12, 16;

Kinnier v. Rogers, 42 N. Y. 531,

534, aff'g 55 Barb. (N. Y.) 85;

Smith v. Bowen, 35 N. Y. 83, 89;

Belmont v. O'Brien, 12 N. Y.

394, 404;

Tucker v. Tucker, 5 N. Y. 408,

413; s.c. 10 N. Y. Leg. Obs. 67;

Hotchkiss v. Elting, 36 Barb. (N.

Y.) 38, 44;

Selden v. Vermilyea, 1 Barb. (N.

Y.) 62;

Blanchard v. Blanchard, 4 Hun

(N. Y.) 287, 290; s.c. 6 Thomp.

& C. (N. Y.) 551, aff'd 70 N. Y.

615.

² 4 N. Y. Rev. Stats. (8th ed.) 2446,

§ 76;

2 N. Y. Rev. Stats., Codes & L.

2288, § 4.

³ 4 N. Y. Rev. Stats. (8th ed.) 2446,

§ 77;

2 N. Y. Rev. Stats., Codes & L.

2288, § 5;

Tallmadge v. Sill, 21 Barb. (N. Y.)

34, 51, 52;

Selden v. Vermilyea, 1 Barb. (N.

Y.) 62.

See: *The Mutual Life Ins. Co. of*
New York v. Shipman, 108 N.

Y. 24;

Syracuse Savings Bank v. Holden,

105 N. Y. 418;

Crooke v. County of Kings, 97 N.

Y. 421, 448;

Delaney v. McCormack, 88 N. Y.

174;

Cutting v. Cutting, 86 N. Y.

522, 530;

Jennings v. Conboy, 73 N. Y. 230;

Hetzel v. Barber, 69 N. Y. 1;

Kinnier v. Rogers, 42 N. Y. 534,

aff'g 55 Barb. (N. Y.) 85;

Russell v. Russell, 36 N. Y. 581,

583;

Freeborn v. Wagner, 40 Barb. (N.

Y.) 54;

Syracuse Savings Bank v. Porter,

36 Hun (N. Y.) 168, 170;

Jackson v. Edwards, 7 Paige Ch.

(N. Y.) 386; s.c. 22 Wend. (N.

Y.) 498, 508.

⁴ 4 N. Y. Rev. Stats. (8th ed.) 2446,

§ 78;

2 N. Y. Rev. Stats. Codes, & L.

2288, § 23.

See: *Barber v. Cary*, 11 N. Y.

397, 402;

Delaney v. McCormack, 88 N. Y.

174;

Cutting v. Cutting, 86 N. Y. 522,

531;

Tallmadge v. Sill, 21 Barb. (N.

Y.) 51, 52;

Syracuse Savings Bank v. Porter,

36 Hun (N. Y.) 168, 170.

⁵ 4 N. Y. Rev. Stats. (8th ed.) 2446,

§ 78;

2 N. Y. Rev. Stats., Codes & L.

2288, § 7.

See: *Jackson v. Edwards*, 22

may be given to a married woman, to dispose, without the concurrence of her husband, during coverture, of lands conveyed or devised to her in fee.¹ And under these statutes a general power is in trust when any person or class of persons, other than the grantee of such power, is designated as entitled to the proceeds, or any portion thereof, or other benefits to result from the alienation of the lands in accordance with the power;² and a special power is in trust (1) when the disposition which it authorizes is limited to be made to any person or class of persons, other than the grantee of such power; and (2) when any person or class of persons, other than the grantee, is designated as entitled to any benefit from the disposition or charge authorized by the power.³

- Wend. (N. Y.) 498, aff'g 7 Paige Ch. (N. Y.) 386;
 Coleman v. Beach, 97 N. Y. 558;
 Delaney v. McCormack, 88 N. Y. 174;
 Cutting v. Cutting, 86 N. Y. 522, 531;
 Jennings v. Conboy, 73 N. Y. 230;
 Ackerman v. Gorton, 67 N. Y. 63;
 Kinnier v. Rogers, 42 N. Y. 531, 534, aff'g 55 Barb. (N. Y.) 85;
 Russell v. Russell, 36 N. Y. 581;
 Barber v. Cary, 11 N. Y. 397, 402;
 Freeborn v. Wagner, 49 Barb. (N. Y.) 54;
 Syracuse Savings Bank v. Porter, 36 Hun (N. Y.) 168, 170;
 Leonard v. American Bapt. Home Mission Soc., 35 Hun (N. Y.) 293;
 Root v. Stuyvesant, 18 Wend. (N. Y.) 257, 284.
¹ 4 N. Y. Rev. Stats. (8th ed.) 2446, § 80;
 2 N. Y. Rev. Stats., Codes & L. 2288, § 7.
 See: Cutting v. Cutting, 86 N. Y. 522, 533;
 Wright v. Tallmadge, 15 N. Y. 307, 313;
 Belmont v. O'Brien, 12 N. Y. 394, 423;
 Jackson v. Edwards, 7 Paige Ch. (N. Y.) 386, 399, 400; s.c. 22 Wend. (N. Y.) 498, 499.
A special and beneficial power may be granted (1) to a married woman, to dispose, during the marriage, and without the concurrence of her husband, of any estate less than a fee, be-
 longing to her, in the lands to which the power relates; and (2) to a tenant for life of the lands embraced in the power, to make leases for not more than twenty-one years, and to commence in possession during his life.
 Cutting v. Cutting, 86 N. Y. 522, 533;
 Wright v. Tallmadge, 15 N. Y. 307;
 Jackson v. Edwards, 7 Paige Ch. (N. Y.) 386, 400; s.c. 22 Wend. (N. Y.) 498;
 Root v. Stuyvesant, 18 Wend. (N. Y.) 270.
² 4 N. Y. Rev. Stats. (8th ed.) 2447, § 94;
 2 N. Y. Rev. Stats., Codes & L. 2290, § 22.
 See: Croke v. County of Kings, 97 N. Y. 421;
 Delaney v. McCormack, 88 N. Y. 174;
 Cutting v. Cutting, 86 N. Y. 522, 533;
 Hetzel v. Barber, 69 N. Y. 1;
 Moncrief v. Ross, 50 N. Y. 481;
 Kinnier v. Rogers, 42 N. Y. 531, 534, aff'g 55 Barb. (N. Y.) 85;
 Smith v. Bowen, 35 N. Y. 83, 89;
 Selden v. Vermilyea, 1 Barb. (N. Y.) 62;
 Syracuse Savings Bank v. Porter, 36 Hun (N. Y.) 168, 170;
 Root v. Stuyvesant, 18 Wend. (N. Y.) 257, 284.
³ 4 N. Y. Rev. Stats. (8th ed.) 2247, § 95;

SEC. 1840. **Powers distinguished from estates.**—That no precise form of words is requisite to create a power has already been pointed out,¹ the intention of the testator governing where it can be clearly ascertained, even though it be other than that conveyed by the literal meaning of the words made use of.² In consequence of the liberal rule concerning the construction of words necessary for the creation of a power in a will, the question as to the testator's real intention often becomes one of prime importance ; and most frequently arises in those cases where executors are clothed with the power to sell lands for the purpose of distribution. In such a case, where the executors have no duty other than to sell the property and distribute the proceeds, they are simply invested with a naked power ; but if it is the clear intention of the testator that they shall have possession of the lands until sold under the power, then their estate becomes a power coupled with an interest,³ and does

2 N. Y. Rev. Stats., Codes & L. 2290, § 23.

See : *Cutting v. Cutting*, 86 N. Y. 522, 536 ;

Smith v. Bowen, 35 N. Y. 83, 89 ;
Farmers' Loan & Trust Co. v. Carroll, 5 Barb. (N. Y.) 652 ;

Root v. Stuyvesant, 18 Wend. (N. Y.) 257, 284.

¹ See : *Ante*, § 1837.

² *Jameson v. Smith*, 4 Bibb (Ky.) 307 ;
Gray v. Lynch, 8 Gill (Md.) 403 ;
Clary v. Frayer, 8 Gill & J. (Md.) 308 ;

Digges' Lessee v. Jarman, 4 Har. & McH. (Md.) 468 ;

Brearly v. Brearly, 9 N. J. Eq. (1 Stock.) 21 ;

Jackson ex d. Bogert v. Schaubert, 7 Cow. (N. Y.) 187 ;

Sharpsteen v. Tillou, 3 Cow. (N. Y.) 651 ;

Bloomer v. Waldron, 3 Hill (N. Y.) 361 ;

Jackson v. Ferris, 15 John. (N. Y.) 346 ;

Franklin v. Osgood, 14 John. (N. Y.) 527 ;

Jackson v. Jansen, 6 John. (N. Y.) 73 ;

Zeback v. Smith, 3 Binn. (Pa.) 69 ;
Walker v. Quiggs, 6 Watts (Pa.) 87 ;

Nelson v. Carrington, 4 Munf. (Va.) 332 ;

Ladd v. Ladd, 49 U. S. (8 How.) 10 ; bk. 12 L. ed. 967 ;

Peter v. Beverly, 35 U. S. (10 Pet.) 532 ; bk. 9 L. ed. 522 ;

4 Kent's Com. (13th ed.) 319.

³ *Patton v. Crow*, 26 Ala. 426 ;
Clinefelter v. Ayers, 16 Ill. 329 ;

Baird v. Rowan, 1 A. K. Marsh. (Ky.) 214 ;

Inman v. Jackson, 4 Me. 237 ;
Greenough v. Wells, 64 Mass. (10 Cush.) 571 ;

Fay v. Fay, 55 Mass. (1 Cush.) 93 ;
McKnight v. Wimer, 38 Mo. 132 ;

Gregg v. Currier, 36 N. H. 200 ;
Snowhill v. Snowhill, 23 N. J. L. (3 Zab.) 447 ;

Fluke v. Fluke, 16 N. J. Eq. (1 C. E. Gr.) 478 ;

Bergen v. Bennett, 1 Cai. Cas. (N. Y.) 16 ; s.c. 2 Am. Dec. 281 ;

Jackson ex d. Bogert v. Schaubert, 7 Cow. (N. Y.) 18 ;

Bloomer v. Waldron, 3 Hill (N. Y.) 361 ;

Haskell v. House, 3 Brev. (S. C.) L. 242 ;

Thornton v. Gaillard, 3 Rich. (S. C.) L. 418 ;

Gordon v. Overton, 8 Yerg. (Tenn.) 121 ;

not descend, for the time being, to the heirs of the donor.¹

SEC. 1841. **Limitation of—Rule against perpetuities.**—The rule against perpetuities applies equally to powers themselves as to the estates created under a power. In those cases where the power cannot be exercised during a life or lives in being and twenty-one years thereafter, it is void. Consequently it has been said by Lord Eldon to be necessary to place a limitation upon the time within which the power may be exercised ;² but it is now well settled that such a power need not be expressly limited to take effect within any definite period of time.³ It may be regarded as well settled that a power to one and his heirs, without a limitation, express or implied, is at least void as regards the heirs.⁴ The greatest difficulty is experienced in the application of the rule against perpetuities to estates appointed under a power. The power will be absolutely void in all those cases where it is special, and the appointment is limited to a person or to persons, none of whom can take because being too remote under the rule ; but it will be otherwise where the power permits an appointment among a class, some of whom can take, and the discretion is given to the donee as to which individuals of the class shall be appointed ; although the power is absolutely void as to those who cannot take, the possibility of an illegal appointment under it will not invalidate the power, where it is actually exercised by an appointment to one who can lawfully take.⁵

Peck v. Henderson, 7 Yerg. (Tenn.) 18 ;

Miller v. Jones, 9 Gratt. (Va.) 585 ;

Mosby v. Mosby, 9 Gratt. (Va.) 584 ;

Doe d. Hampton v. Shotter, 8 Ad. & E. 905 ; s.c. 35 Eng. C.L. 902 ;

Lancaster v. Thornton, 2 Burr. 1027 ;

Howell v. Barnes, Cro. Car. 382 ;

Yates v. Crompton, 3 Pr. Wms. 308 ;

1 Co. Litt. (19th ed.) 113a ;

4 Kent's Com. (13th ed.) 326 ;

1 Sugd. on Pow. 189-194 ;

1 Williams on Exrs. 540.

¹ Gray v. Lynch, 8 Gill (Md.) 403 ;

Clary v. Frayer, 8 Gill & J. (Md.) 403 ;

Hartley's Appeal, 53 Pa. St. 212 ;

s.c. 91 Am. Dec. 207 ;

4 Kent's Com. (13th ed.) 320.

² Ware v. Polhill, 11 Ves. 257, 283 ; s.c. 8 Rev. Rep. 144.

³ Attorney-General v. Ailesbury, L. R. 12 App. Cas. 672 ; s.c. 57 L. J. Q. B. 83 ; 58 L. T. 192.

See : Lantsbery v. Collier, 2 Kay & J. 709 ; s.c. 25 L. J. Ch. 672.

⁴ Ware v. Polhill, 11 Ves. 257, 283 ; s.c. 8 Rev. Rep. 144 ;

Bristow v. Warde, 2 Ves. Jr. 336, 350 ; s.c. 2 Rev. Rep. 235.

⁵ Griffith v. Pownall, 13 Sim. 393 ;

SEC. 1842. **Same—Same—Validity of appointment.**—The criterion by which to determine the validity of an appointment under a general power is its conditions when made, and not by a consideration of a part of the instrument in which the power was created. Thus it is held that an appointment under a power to unborn children of parents *in esse* at the time of its execution, but who were unborn at the time of the creation of the power, will be good, the restriction upon alienation beginning to run only when the appointment is made.¹ In other words, in determining the validity, in respect to perpetuity, of an appointment under a special power, it must be viewed in its relation to the original instrument creating the power, and as a part of it, and considered in the light of the circumstances surrounding the estate and the parties thereto at the time the original instrument was executed, where created by deed, and at the death of the donor, where created by will. Thus where there is a power of appointment to grandchildren, it cannot be exercised in favor of such as were born of parents who were not in being at the time of the creation of the power. In this respect a difference is observed between an appointment to children and one to grandchildren.²

SEC. 1843. **Construction of power—Introductory.**—The rules of construction applied to naked powers and to powers coupled with an interest are different. Some subtle distinctions have been taken at law which often require the interposition of courts of equity. Thus it is a general rule of law that a mere naked power given to two or more persons cannot be executed except by their joint act, even though one of them be dead ;³ because the trust

Marlborough v. Godolphin, 2 Ves.

Sr. 61 ;

Routledge v. Dorril, 2 Ves. Jr.

357, 368 ; s.c. 2 Rev. Rep. 250 ;

2 Co. Litt. (19th ed.) 271b ;

Gilb. on Uses, 160, note.

1 Sugd. on Pow. 471-475.

¹ Routledge v. Dorril, 2 Ves. Jr.

357 ; s.c. 2 Rev. Rep. 250 ;

Fearne's Exec. Dev. 5 ;

1 Sugd. on Pow. 516.

See : William v. Farwell, 35 Ch.

Div. 128.

² Routledge v. Dorril, 2 Ves. Jr.

357 ; s.c. 2 Rev. Rep. 250 ;

Hockley v. Mawbey, 1 Ves. Jr.

150 ; s.c. 1 Rev. Rep. 93 ;

2 Co. Litt. (19th ed.) 271b ;

2 Prest. Abst. 165, 166 ;

1 Sugd. on Pow. 471-475.

³ Chapin v. Chicopee Universalist

Soc., 74 Mass. (8 Gray) 580 ;

Boston Franklinite Co. v. Condit,

19 N. J. Eq. (4 C. E. Gr.) 394 ;

is a personal one in all the trustees, unless the language used in the instrument indicates the contrary.¹ If the power is coupled with an interest, however, the construction is different even at law, and courts of equity will insist upon its execution.² This is a very important matter

1 Co. Litt. (19th ed.) 112b, 113a.

Conveyance by trustees—Chapin v. Chicopee Universalist Society.—In Chapin v. Chicopee Universalist Soc., *supra*, the court say: "As a general rule, trustees, not for a charity or public trust, must join in holding or conveying trust property for the preservation of the trust, and separate conveyances by each of his aliquot part or separate share will be void. If the trust is apparent on the deed, all who take under it will take subject to such trust. That was the case here. These demandants do not show any legal estate. Two of them are *cestuis que trust*, or assignees or grantees of *cestuis que trust*, as shareholders in the stock of the voluntary unincorporated association known as the Cabotville Mechanics' Association. This is not a case in which it could be pretended that the use was within the statute of uses, so that the use was vested by the force of the statute, and constituted an estate in fee. If it is asked what remedy the demandants have, who hold various shares in the joint stock of this unincorporated association, the answer is, by bill in equity, if they have any beneficial interest in the estate, requiring the trustees to execute their trust by effecting a partition or sale, so as to secure to each the proceeds of his beneficial interest. It may be that the trusts in favor of the Universalist Society, or others, have priority to those of these shareholders, so that they have no valuable beneficial interest, and of course no remedy. But at all events they do not show that legal title necessary to maintain this action."

Citing: Cleveland v. Hallett, 60

Mass. (6 Cush.) 403, 407.

Same—Trustees of a naked trust.—A nice distinction is sometimes drawn in regard to the power of trustees of a naked trust to sell. Thus where the testator gives authority to A and B to sell his estate and makes them executors, the power must be executed by both; but if he gives to his executors authority to sell and then makes A and B his executors, the survivor can execute the power. Justice STORY says: "The distinction is nice, but it proceeds upon the ground that in the latter case the power is given to the executors *virtute officii*, and in the former case it is merely personal to the parties named. Now although this distinction has been doubted and its soundness has been denied, yet it has much authority also in its support where the power is deemed at law to be a mere naked power."

Chapin v. Chicopee Universalist Soc., 74 Mass. (8 Gray) 580;

2 Story Eq. Jur. (13th ed.), § 1062.

See: Franklin v. Osgood, 14 John. (N. Y.) 527, 553;

Zebach v. Smith, 3 Binn. (Pa.) 69;

1 Co. Litt. (19th ed.) 113a:

1 Powell on Dev. (Jarman ed.) 239.

¹ 2 Story Eq. Jur. (13th ed.), § 1062.

² Jackson v. Burtis, 14 John. (N. Y.) 391;

1 Co. Litt. (19th ed.) 113a;

2 Story Eq. Jur. (13th ed.), § 1062;

1 Sugd. on Pow. (3d ed.), c. 2, § 1, pp. 105–111.

The result of the decisions upon this question has been summed up by Mr. Sugden, who lays down the following propositions: "(1) That where a power is given to two or more by their proper names, who are not

and the words of each particular will must be looked to in its construction to ascertain the intention of the donor, for upon the survival of the power of sale rests the necessity of joining or not joining the heir in the sale of the property.¹

SEC. 1844. **Same—Enlarging estate.**—Where the power is one coupled with an interest, and the duration thereof is not clearly defined, as in a devise of lands generally with full power of disposition by deed or will, the devise will be construed to pass an estate in fee, and not simply an estate for life with a general power in gross attached thereto;² but where the power is a special one, or a particular estate is given with a general power of disposal, such power will not enlarge the estate to a fee, and if the power is not executed the heirs of the testator will take as reversioners.³ This rule, however, is not inflexible, and if it appears from the whole will that it was the testator's intention to give a fee-simple estate, the estate granted will be enlarged by the power, although in terms limited for life,⁴ and the limitation over will be void.⁵

made executors, it will not survive without express words.

(2) That where it is given to three or more generally, as 'to my trustees,' 'my sons,' etc., and not by their proper names, the authority will survive whilst the plural number remains. (3) That where the authority is given to executors, and the will does not expressly point to the joint exercise of it, even a single surviving executor may execute it. But (4) that where it is given to them *nominatim*, although in the character of executors, it is at least doubtful whether it will survive."

Sugd. on Pow. (3d ed.), c. 3, § 2, art. 1, pp. 165, 166.

¹ See: *Anderson v. McGowan*, 45 Ala. 462;

Mastin v. Barnard, 33 Ga. 520;

Colsten v. Chaudet, 4 Bush (Ky.) 666;

Gould v. Mather, 104 Mass. 283;

Chandler v. Rider, 102 Mass. 268;

Warden v. Richards, 77 Mass. (11 Gray) 277;

Jackson v. Ferris, 15 John. (N. Y.) 347;

Franklin v. Osgood, 14 John. (N. Y.) 527;

Loring v. Marsh, 2 Cliff. C. C. 469; s.c. Fed. Cas. No. 8515;

Zamboco v. Cassavetti, L. R. 11 Eq. 439;

2 Co. Litt. (19th ed.) 290b.

² See: *Ante*, § 1836.

³ *Flintham's Appeal*, 11 Serg. & R. (Pa.) 16, 23, 24;

1 Sugd. on Pow. 179, 180.

⁴ *Denson v. Mitchell*, 26 Ala. 360;

Andrews v. Brumfield, 32 Miss. 107;

Wilson v. Gaines, 9 Rich. (S. C.) Eq. 420;

Robinson v. Dugale, 2 Vt. 181;

Doe d. Herbert v. Thomas, 3 Ad.

& E. 123; s.c. 30 Eng. C. L. 77;

Hot v. Master, 6 Sim. 568;

Bradford v. Street, 11 Ves. 135;

Goodtitle v. Otway, 2 Wils. 6.

⁵ *McKenzie's Appeal*, 41 Conn. 607; s.c. 19 Am. Rep. 525;

Rona v. Meier, 47 Iowa 607; s.c.

29 Am. Rep. 493;

Jones v. Bacon, 68 Me. 34; s.c.

28 Am. Rep. 1.

Thus where a testator, after providing for other children, devised specific property to a designated son in trust for such person or persons and use or uses as he should by deed or will appoint, and until and in default of such appointment in trust for the sole, separate, and exclusive use and benefit of the wife of such testator "during her life, and at her death to be equally divided between the children, etc.," the trustee was held to take a general power of appointment,¹ which, unlike a simple power of sale, carries with it a right to encumber and mortgage.²

SEC. 1845. **Same—Life estate with power of sale.**—A power of sale attached to an express estate for life will not enlarge it to a fee-simple;³ and where there are no words describing the estate given, which are technically words of inheritance, a power to sell and convey the property in fee will show that it was not the intention of the testator to devise the property in fee; and if the power be given to sell and convey by deed, this by implication excludes the power of conveying the property by will.⁴

¹ *Rogers v. Hinton*, 1 Phill. (N. C.) Eq. 101.

² *Hicks v. Ward*, 107 N. C. 790; s.c. 12 S. E. Rep. 318; 10 L. R. A. 821;

1 Sugd. on Pow. 496.

³ *Walker v. Pritchard*, 121 Ill. 221; s.c. 10 West. Rep. 146; 12 N. E. Rep. 336;

Hinkle's Appeal, 116 Pa. St. 490; s.c. 8 Cent. Rep. 863; 9 Atl. Rep. 342;

Rhode Island Hospital Trust Co. v. Commercial Nat. Bank, 14 R. I. 625; s.c. 1 New Eng. Rep. 20.

⁴ *Randall v. Shrader*, 20 Ala. 338; *Fairman v. Beal*, 14 Ill. 244;

McGaughey's Admrs. v. Henry 15 B. Mon. (Ky.) 383;

Collins v. Carlisle's Heirs, 7 B. Mon. (Ky.) 13;

Copeland v. Barron, 72 Me. 206;

Ramsdell v. Ramsdell, 21 Me. 288;

Kent v. Morrison, 153 Mass. 137; s.c. 26 N. E. Rep. 427; 10 L. R. A. 756;

Joslin v. Rhoades, 150 Mass. 301; s.c. 23 N. E. Rep. 42;

Welsh v. Woodbury, 144 Mass. 542; s.c. 11 N. E. Rep. 762; 4 New Eng. Rep. 256;

Damrell v. Hartt, 137 Mass. 218;

Kelley v. Meins, 135 Mass. 231;

Gregory v. Cowgill, 19 Miss. 414, 415;

Reinders v. Koppelman, 68 Mo. 482; s.c. 30 Am. Rep. 802;

Green v. Sutton, 50 Mo. 186, 190;

Agee v. Agee, 22 Mo. 366;

Rubey v. Barrett, 12 Mo. 3; s.c. 49 Am. Dec. 112;

Burleigh v. Clough, 52 N. H. 267, 272; s.c. 13 Am. Rep. 23;

Jackson v. Robins, 16 John. (N. Y.) 537;

Jackson ex d. Herrick v. Babcock, 12 John. (N. Y.) 389;

Jackson v. Coleman, 2 John. (N. Y.) 391;

Urich's Appeal, 86 Pa. St. 386; s.c. 27 Am. Rep. 707;

Deadrick v. Armour, 10 Humph. (Tenn.) 588;

Ward v. Amory, 1 Curt. C. C. 419; s.c. Fed. Cas. No. 17146;

Page v. Roper, 21 Eng. L. & Eq. 499;

SEC. 1846. **Same—Power to sell and use proceeds.**—We have already seen that an express power to sell and convey, contained in an instrument creating a life estate, by implication excludes the idea that the testator intended to convey in fee;¹ and where a power to sell for any purpose is given, with authority to use the proceeds in any manner the devisee may think proper, this carries an absolute and unrestricted power to sell for the benefit and in the discretion of the devisee of the power, and will include a power to mortgage.² Such a power is unlike a simple power of sale, which does not authorize the donee to charge the estate with an incumbrance.³ But when the intention in giving the power is that real estate may be converted out and out into money, such power does not authorize a mortgage. Thus where a life estate is given for maintenance with a power to sell and convey any and all of the real estate, if necessary, to secure such maintenance, it does not authorize a mortgage.⁴

SEC. 1847. **Same—Personal confidence.**—Where a power is given to trustees based on personal confidence, it is *prima facie* limited to the original trustees, and does not pass to others who may subsequently fill the office of trustee, unless such an intention is clearly expressed in the instrument creating the power. In such a case, on the death of the trustee, the power passes to his general representatives.⁵ There is an early case⁶ in which one of the judges seems to have thought that a power implying personal confidence would not, even by express

Jennor v. Hardie, 1 Leon. 283 ;

Bradly v. Westcott, 13 Ves. 445 ;

s.c. 9 Rev. Rep. 207 ;

Maundrell v. Maundrell, 10 Ves. 246 ; s.c. 7 Rev. Rep. 393.

¹ See: *Ante*, § 1845.

² See: Kent v. Morrison, 153 Mass. 137 ; s.c. 26 N. E. Rep. 427 ; 10 L. R. A. 756 ;

Loebenthal v. Raleigh, 36 N. J. Eq. (9 Stew.) 169 ;

Zane v. Kennedy, 73 Pa. St. 182.

³ Hicks v. Ward, 107 N. C. 790 ; s.c. 12 S. E. Rep. 318 ; 10 L. R. A. 821 ;

1 Sugd. on Pow. 496.

⁴ Kent v. Morrison, 153 Mass. 137 ; s.c. 26 N. E. Rep. 427 ; 10 L. R. A. 756 ;

Hoyt v. Jaques, 129 Mass. 286.

⁵ Crawford v. Forshaw, 1891, 2 Ch. 261 ; s.c. 66 L. J. Ch. 683 ; 35 L. T. 32 ;

Cole v. Wade, 16 Ves. 27, 46 ; s.c. 10 Rev. Rep. 129, 186.

See: Doyler v. Attorney-General, 2 Eq. Cas. Abr. 194 ; s.c. 4 Vin. 485 ;

Flanders v. Clark, 1 Ves. Sr. 9.

⁶ 2 Moor 61, pl. 172.

words, pass to the executors of an executor. WESTON, J., says: "This is a special trust and confidence which the testator puts in those to whom he commits the sale; but he could have no trust or confidence in those whom he did not know; and he could not know what persons his executors would make their executors." The other judges, however, differed from him upon this; as the power was expressly given to the executors of the executor; though all concurred that the authority, being joint, was determined by the death of one.

SEC. 1848. **Same—Power to trustees "and their heirs."**—Where there is a power given to two or more designated trustees "and their heirs," it is thought that, notwithstanding the limitation of an estate in such terms, the instrument would so vest it in the grantees that they might convey it to a stranger, and the survivor could devise it; yet the power is not to be construed as intended in like manner to be assignable and devisable.¹ It is thought that where such a power is given personally, and unaccompanied by an estate, to two or more trustees and "their several and respective heirs," should one of the trustees die the power is to be exercised by the heirs of such trustee;² but where the trustees are trustees of an estate limited to them and their heirs, and the power constitutes an essential part of the trust, it will pass with the estate to the survivor.³ Thus in a case where a power of sale was given to three persons and their heirs to preserve contingent remainders, directing that the money to arise from the sale of the property should be paid into the hands of the trustees or the survivors or survivor of them, and the executors, administrators, or assigns of such survivor, and there was a power of ap-

¹ *Cole v. Wade*, 16 Ves. 27, 46; s.c. 10 Rev. Rep. 129, 136.

See: *Townsend v. Wilson*, 1 Barn. & Ald. 608; s.c. 3 Madd. 261;

Bennett v. Wyndham, 23 Beav. 528;

Hall v. Dewes, Jac. 193;

Cooke v. Crawford, 13 Sim. 91;

Jones v. Rice, 11 Sim. 557;

Mansell v. Vaughan, 1 Wilm. 50, 51.

² *Mansell v. Vaughan*, 1 Wilm. 50, 51.

³ *Townsend v. Wilson*, 1 Barn. & Ald. 608; s.c. 3 Madd. 261;

Cooke v. Crawford, 13 Sim. 91;

2 Co. Litt. (19th ed.) 181b;

1 Co. Litt. (19th ed.) 13a.

pointment of new trustees, with a direction that such appointment should take place as often as any one or more of the trustees should die, it was held that on the death of one of the trustees the survivors alone were capable of exercising the power.¹ That Lord ELDON was dissatisfied with this doctrine is clearly indicated by his remarks in *Hall v. Dewes*,² where he says: "Did the Court of Queen's Bench consider that the two surviving trustees and the heir of the deceased trustee were to act together? for it was one thing to say that the survivors could not act until another was appointed; and a different thing to say the heir of the deceased trustee could act in the mean time."³

SEC. 1849. **Same—Power to a trustee "and his assigns."**—Where there is a discretionary legal power expressly limited to a specified trustee "and his assigns," the grantee or devisee of such trustee, or a claimant under him by operation of law, as an heir or executor, may exercise the power conferred by the trust.⁴ But where an estate is vested in a trustee upon trust that he, his heirs, executors, administrators, or assigns, shall sell, etc., the introduction of the word assigns will not authorize the trustee to assign the estate to a stranger;⁵ and if such an assignment should be made, the stranger thus receiving the estate will not be capable of exercising the power, for the reason that the power is not appendant to the estate, so as to follow along with it in every transfer by the trustee, or devolution by course of law;⁶ yet in those cases where the estate is duly transferred, the transferees take the estate and the office together, and can exercise the power.⁷

¹ *Townsend v. Wilson*, 1 Barn. & Ald. 608; s.c. 3 Madd. 261.

² 1 Jac. 189, 193.

³ See: *Jones v. Price*, 11 Sim. 557.

But this eminent judge afterwards so far bowed to the authority of *stare decisis* that he refused under similar circumstances to compel a purchaser to accept the title.

Hall v. Dewes, 1 Jac. 189.

⁴ *How v. Whitfield*, 1 Freem. 476; s.c. 1 Ventr. 338, 339.

⁵ Compare: *Hartwick v. Mynd*, 1 Anst. 109.

⁶ *Wilson v. Bennett*, 5 DeG. & Sm. 475;

Re Burt's Estate, 1 Drew 319;

Cole v. Wade, 16 Ves. 27, 47;

s.c. 10 Rev. Rep. 129;

Crewe v. Dicken, 4 Ves. 97.

⁷ See: *Post*, § 1859.

SEC. 1850. **Powers of appointment.**—Powers of appointment are those which are generally known simply as “powers,” and consist in the power to select and indicate by name the person or persons who shall discharge the duties of some office or trust ; in chancery practice it is the exercise of a right to designate the person or persons who are to take the title or use of real estate. The creation of the power invests in the donee a present indefeasible executory interest in the land, and cannot be revoked by the donor.¹ These powers may be created either by way of a use under the statute of uses, or by will under the statute of wills. A limit to use in the exercise of a power is executed under the statute of uses in the person to whom the use has been limited, and the estate created by the exercise of this power will be either a contingent,² a springing,³ or a shifting use,⁴ according to the limitations in the instrument creating the power.⁵ Where the estate is created under the statute of wills, it is an executory devise deriving its force and effect from the will itself, and all powers in the will operate under the statute of wills except such as are simply to limit a use, in which case the power operates under the statute of uses as a contingent future use.⁶ Contingent future uses ordinarily vest upon the happening of an uncertain event ; and where an estate is created by means of a power of appointment, the uncertain event is the exercise of that power.⁷ Where an estate is created by the exercise of a power, it will have the same characteristics in the hands of the appointee it would have had if limited in the deed or will creating the power ; because where a person takes by execution of a power, he takes under the authority of the power, equally as if the power and its execution had been incorporated

¹ 2 Co. Litt. (19th ed.) 237a ;

1 Sugd. Pow. 4.

² See : *Ante*, § 1659.

³ See : *Ante*, § 1662.

⁴ See : *Ante*, § 1663.

⁵ Bac. L. Tr. 314 ;

2 Co. Litt. (19th ed.) 271b ;

4 Kent's Com. (13th ed.) 334 ;

1 Spence Eq. Jur. 455.

⁶ Prest. Abst. 347 ;

1 Sugd. Pow. 240.

See : *Ante*, § 1663.

⁷ *Rodgers v. Wallace*, 5 Jones (N. C.) L. 181, 182 ;

Rush v. Lewis, 21 Pa. St. 72 ;

2 Co. Litt. (19th ed.) 271b ;

Shep. Touch. 529 ;

1 Tud. Ld. Cas. 264.

in one instrument.¹ The validity and character of the estate taken is to be tested by the relation it would bear to other limitations of the property had it been granted in the original instrument instead of the power by which it was created. In such a case the appointee is in by the original instrument which creates the power, the appointor being merely an instrument employed to limit the estate.²

SEC. 1851. Same—Extent of estate.—A power of appointment created either by deed or will is not an absolute right of property;³ it is not an estate, and has none of the elements of an estate,⁴ and the power, unless executed, is not an asset which is liable for debts.⁵ The reason of this is because an unexecuted power of appointment vests no interest in the donee, whether annexed to a particular estate or not, and for that reason is not assets for the payment of the debts of the deceased donee.⁶

¹ *Doolittle v. Lewis*, 7 John. Ch. (N. Y.) 45; s.c. 11 Am. Dec. 389.

² See: *Bradish v. Gibbs*, 3 John. Ch. (N. Y.) 523, 550;

Doe v. Britain, 2 Barn. & Ald. 93;

Bringle v. Goodson, 4 Bing. N. C. 726; s.c. 33 Eng. C. L. 944;

Roach v. Wadham, 6 East 289;

Mosley v. Mosley, 5 Ves. 256;

2 Co. Litt. (19th ed.) 271b;

4 Cruise Dig. (4th ed.) 220;

Gilbert on Uses, 127;

4 Kent's Com. (13th ed.) 337;

1 Sugd. Pow. 171, 242.

³ *Holmes v. Coghill*, 7 Ves. 499; s.c. 6 Rev. Rep. 166.

See: *Patterson v. Lawrence*, 83 Ga. 703; s.c. 10 S. E. Rep. 335; 7 L. R. A. 143;

Re Roper (1888), 39 Ch. Div. 482; s.c. 58 L. J. 31; 59 L. T. 203.

⁴ *Patterson v. Lawrence*, 83 Ga. 703; s.c. 10 S. E. Rep. 335; 7 L. R. A. 143.

See: *Burleigh v. Clough*, 52 N. H. 267;

Eaton v. Straw, 18 N. H. 320;

Livingston v. Murray, 68 N. Y. 485;

Williman v. Holmes, 4 Rich. (S. C.) Eq. 475;

Pulliam v. Byrd, 2 Strob. (S. C.)

Eq. 134;

Goodill v. Brigham, 1 Bos. & P. 197;

4 Kent Com. (13th ed.) 319.

⁵ *Holmes v. Coghill*, 7 Ves. 499; s.c. 6 Rev. Rep. 166;

Townshend v. Windham, 2 Ves. Sr. 2.

⁶ *Patterson v. Lawrence*, 83 Ga. 703; s.c. 10 S. E. Rep. 335; 7 L. R. A. 143;

Harrison v. Battle, 1 Dev. & B. (N. C.) Eq. 213.

Execution of general power of appointment—Effect.—Whether the execution of a general power of appointment will convert an estate into assets in equity for the payment of debts was discussed but not decided in *Patterson v. Lawrence*, 83 Ga. 703; s.c. 10 S. E. Rep. 335; 7 L. R. A. 143.

Upon this question see:

Tallmadge v. Sill, 21 Barb. (N. Y.) 34;

Cutting v. Cutting, 20 Hun (N. Y.) 360;

Harrison v. Battle, 1 Dev. & B. (N. C.) Eq. 213;

Wales v. Bowdish, 61 Vt. 23; s.c. 17 Atl. Rep. 1000; 4 L. R. A. 819.

Harrington v. Harte, 1 Cox Ch. 131;

SEC. 1852. **Same—Power of disposal.**—An absolute power of disposal is created in a wife where there is a devise to her of the residue of the property, with the instruction that what is undisposed of at her death shall descend to a specified heir ;¹ but in such a case the fee does not pass under the devise, the devisee takes only a life estate with power of disposition of the fee.² It does not give her an absolute ownership, and her heirs do not take the property which remains undisposed of at her death.³ The giving of a life estate to the testator's widow, with power to dispose of the whole of the property as she pleases, but providing that whatever may remain undisposed of at her death, and not disposed of by her will, shall be given to certain other persons, does not give her the absolute ownership, and her heirs do not take the property which remains undisposed of at her death.⁴ Thus it has been said that a devise to testator's wife of property for the maintenance of herself and children, providing that the wife shall have full control and management of the property to sell and dispose of any or all of it, and further providing that should there be any of the estate remaining after the wife's death the same to go to the children, gives the wife a life estate only, with power of sale.⁵

Fleming v. Buchanan, 3 DeG. M. & G. 976 ;

Vaughan v. Vanderstegen, 2 Drew. 165 ;

Shattock v. Shattock, L. R. 2 Eq. 187 ;

Jenny v. Andrews, 6 Madd. 264 ;

1 Story Eq. Jur. (13th ed.), § 176 ;

2 Sugd. Pow. 28, 29 ;

2 Wms. Exrs., 6th Am. ed. 1685, 1686.

¹ *Tower v. Hartford*, 115 Ind. 186 ; s.c. 17 N. E. Rep. 281 ; 14 West. Rep. 862.

Citing : *Fullenwider v. Watson*, 113 Ind. 18 ; s.c. 14 N. E. Rep. 571 ; 12 West. Rep. 165 ;

Allen v. Craft, 109 Ind. 476 ; s.c. 9 N. E. Rep. 919 ; 7 West. Rep. 512 ;

Van Gorder v. Smith, 99 Ind. 404.

² *Jenkins v. Compton*, 123 Ind. 117 ; s.c. 23 N. E. Rep. 1091 ;

Logue v. Bateman, 43 N. J. Eq. 434 ; s.c. 9 Cent. Rep. 485 ; 11

Atl. Rep. 259.

See : *McCullough v. Anderson*, 11 Ky. L. Rep. 939 ; s.c. 13 S. W. Rep. 353 ; 7 L. R. A. 836 ;

Wood v. Robertson, 113 Ind. 323 ; s.c. 15 N. E. Rep. 457 ; 13 West. Rep. 44 ;

Borden v. Downey, 35 N. J. L. (6 Vr.) 74 ;

Kibler v. Miller, 57 Hun (N. Y.) 14 ; s.c. 10 N. Y. Sup. 139 ;

Miller v. Potterfield, 14 Va. L. J. 277.

³ *McCullough v. Anderson*, 11 Ky. L. Rep. 939 ; s.c. 13 S. W. Rep. 353 ; 7 L. R. A. 836.

⁴ *McCullough v. Anderson*, 11 Ky. L. Rep. 939 ; s.c. 13 S. W. Rep. 353 ; 7 L. R. A. 836.

⁵ *Jenkins v. Compton*, 123 Ind. 117 ; s.c. 23 N. E. Rep. 1091.

See : *Wood v. Robertson*, 113 Ind. 323 ; s.c. 15 N. E. Rep. 457 ; 13 West. Rep. 44.

It will be otherwise, however, in those cases where there is a gift generally of the estate with a power of disposal annexed.¹ In such a case, where there is a remainder to the testator's children, it gives to the wife a life estate only, with the right to use it as her needs may require, and she cannot waste or squander it;² and the children and their descendants take a vested remainder in fee in equal shares,³ and the beneficiaries take *per stirpes*.⁴

SEC. 1853. **Same—Power to appoint by will.**—A power to appoint by will must be strictly pursued, and the execution of the power of appointment must be intended in the disposition, and that intention must be clearly manifested.⁵ The rule of construction by which the intention of the appointee is to be ascertained is explicit and exhaustive, and may be thus concisely stated: The intention to execute a power of appointment by will must appear by reference in the will to the power, or to the subject of it, or from the fact that the will would be inoperative without the aid of the power.⁶ One to

¹ *Logue v. Bateman*, 43 N. J. Eq. 434; s.c. 9 Cent. Rep. 485; 11 Atl. Rep. 259.

See: *Borden v. Downey*, 35 N. J. L. (6 Vr.) 74.

² *Glover v. Reid*, 80 Mich. 228; s.c. 45 N. W. Rep. 91.

³ *Jones v. Jones*, 66 Wis. 310; s.c. 28 N. W. Rep. 214.

⁴ *Wood v. Robertson*, 113 Ind. 323; s.c. 15 N. E. Rep. 407; 13 West. Rep. 44.

See: *Green Bay & Mississippi Canal Co. v. Hewitt*, 97 Ill. 113; s.c. 37 Am. Rep. 102;

Goudie v. Johnston, 109 Ind. 427; s.c. 10 N. E. Rep. 296; 7 West. Rep. 586;

Giles v. Little, 104 U. S. 291; bk. 26 L. ed. 745.

⁵ *Balls v. Dampman*, 69 Md. 390; s.c. 16 Atl. Rep. 16; 1 L. R. A. 545;

Mory v. Michael, 18 Md. 227, 241.

⁶ *Mory v. Michael*, 18 Md. 227, 241. See: *Balls v. Dampman*, 69 Md. 390; s.c. 16 Atl. Rep. 16; 1 L. R. A. 545;

Patterson v. Wilson, 64 Md. 198; s.c. 1 Atl. Rep. 68;

Foos v. Scarf, 55 Md. 309;

Maryland Mutual Benevolent Society v. Clendinen, 44 Md. 429, 435; s.c. 22 Am. Rep. 52.

Maryland doctrine—*Balls v. Dampman*.—In Maryland there is nothing to be found in any of the adjudged cases conflicting with, questioning, or in any way qualifying, this fixed rule of construction.

Balls v. Dampman, 69 Md. 390; s.c. 16 Atl. Rep. 16; 1 L. R. A. 545.

In the case of *Balls v. Dampman*, *supra*, the court say: "The will of Mrs. Balls contains no reference to the power, nor does it describe the subject of the power; but it would clearly be inoperative in so far as it purports, in the second clause, to dispose of real estate without the aid of the power; because, as already observed, the testatrix had no real estate of her own and none which she

whom property is devised in trust, “for such person or persons, and use or uses, as he shall by deed or will appoint,” has a general power of appointment, which will authorize him to mortgage the property.¹ Property disposed of by will, under a power of appointment, cannot be held liable for the appointor’s debts, even if it otherwise might be, unless the appointor’s assets are insufficient to pay such debts.²

SEC. 1854. **Same—Absolute estate vests when.**—The effect of the exercise of a power of appointment is to vest the estate in the appointee as if conveyed by the original donor,³ the rule requiring words of inheritance to convey a fee being subordinated to the intention of the testator;⁴ and where a devise and bequest is of an

could dispose of other than that embraced within the power. It has been repeatedly held that a general devise of real estate is a sufficient execution of a power of appointment where it clearly appears that the testator had no property of that description in his own right. The reason—and it is an obvious one—is that unless the power is invoked the will would be entirely inoperative and nugatory notwithstanding the existence of a plain intention, expressed in terms, to dispose of some real estate. The result is that the two youngest daughters take the property as appointees, unless the contention of the appellant is correct: that the first clause of the will of Mrs. Ball directing all her just debts to be paid is an execution of the power and an appropriation of the property to the payment of her debts. This position is wholly untenable. No such effect can be given to these general words.”

Standen v. Standen, 2 Ves. Jr. 539;

Sugd. on Pow. 916.

¹ *Hicks v. Ward*, 107 N. C. 392; s.c. 12 S. E. Rep. 318; 10 L. R. A. 831.

² *Patterson v. Lawrence*, 83 Ga. 703; s.c. 10 S. E. Rep. 335; 7 L. R. A. 143.

Exercise of a power of appointment, by will, by one having a life interest in trust property, to confirm title to a person who had previously purchased it for a valuable consideration from the appointor and trustee under an order from court, does not make the property assets of the appointor’s estate, and liable in equity for her debts.

Patterson v. Lawrence, 83 Ga. 703; s.c. 10 S. E. Rep. 335; 7 L. R. A. 143.

³ *Jackson ex d. Hammond v. Veeder*, 11 John. (N. Y.) 169; 2 Sugd. on Pow. 22.

⁴ *Melick v. Pidcock*, 44 N. J. Eq. 525; s.c. 13 Cent. Rep. 300; 15 Atl. Rep. 3;

Lambert v. Paine, 7 U. S. (3 Cr.) 97; bk. 2 L. ed. 377.

Thus where a testator devises land without legal words of limitation, but adds that the devisee “may sell or do therewith as he pleases,” he is presumed to have intended to give a fee.

King v. Ackerman, 67 U. S. (2 Black) 408; bk. 17 L. ed. 292.

In Kentucky, under a statute providing that an estate shall be deemed a fee-simple, although no words of inheritance are used, unless a different purpose is imposed or necessarily implied, a will directing the sale of certain realty for the inter-

express estate for life to the devisee, with a general power of disposition, without liability to account, followed by devise over of what may remain unused and undisposed of, will vest in the first taker an absolute estate in fee-simple;¹ and where the devise for life is followed by a clause giving the devisee the power to dispose of the residue by will, but giving what is left to certain other parties in case the first devisee leaves no will, this constitutes a gift of the fee to the first devisee, and the remainder over will be void.²

SEC. 1855. Liability of estate—For debts of donee.—The power of appointment not being an estate in the land,³ the creditors of the donee will have no legal rights in the

est of testator's wife, the proceeds to be invested in her name and for her use, prohibiting her from loaning them, but allowing her the interest as she may require, and the rents as she should desire if the land was not sold, and making no provision as to remainder in the property,—gives her a fee-simple.

Robbins v. Robbins (Ky.), 9 S. W. Rep. 254.

In New York, under a statute providing that words of inheritance are not necessary, unless there is an intent, express or to be necessarily implied, to grant a less estate, a devise of land to a wife, "to have and to hold for her benefit and support," is not a condition or limitation on her estate therein, but merely a statement of testator's reason for the gift.

Crain v. Wright, 114 N. Y. 307; s.c. 21 N. E. Rep. 401.

Bolman v. Lohman, 79 Ala. 63.

See: *Warner v. Willard*, 54 Conn. 470; s.c. 4 Atl. Rep. 136; 4 New Eng. Rep. 467;

Re Surrogate of Cayuga County, 46 Hun (N. Y.) 657; s.c. 13 N. Y. St. R. 45.

Where the devise of the life estate is followed by a clause disposing of the residue that might be left after her death, it confers upon her more than a life estate in

the property, both real and personal, and something less than the absolute ownership or unconditional power to dispose of the same.

Re Surrogate of Cayuga County, 46 Hun (N. Y.) 657; s.c. 13 N. Y. St. R. 45.

² *Powers v. Jeudevine*, 61 Vt. 587; s.c. 18 Atl. Rep. 778; 19 Atl. Rep. 572; 7 L. R. A. 517.

See: *Patty v. Goolsby*, 51 Ark. 61; s.c. 9 S. W. Rep. 846.

On a devise to a wife of the residue of an estate for her sole use, a trust is not created by the words, "said wife will by her last testament do what is right to my children."

Sturgis v. Paine, 146 Mass. 354; s.c. 16 N. E. Rep. 21; 6 New Eng. Rep. 76.

Citing: *Barrett v. Marsh*, 126 Mass. 213;

Sears v. Cunningham, 122 Mass. 538;

Hess v. Singler, 114 Mass. 56;

Thorp v. Owen, 2 Hare 607, 617; *Mussoorie Bank v. Raynor*, L. R.

7 App. Cas. 321;

Re Adams, L. R. 24 Ch. Div. 199; s.c. L. R. 27 Ch. Div. 394;

Re Hutchinson, L. R. 8 Ch. Div. 540; s.c. 25 Moak Eng. Rep. 459;

Lambe v. Eames, L. R. 10 Eq. Cas. 267; s.c. L. R. 6 Ch. App. 597.

³ See: *Ante*, § 1850.

power until after its execution ;¹ any interest they may have will be simply an equitable claim.² Yet it may be regarded as a well-settled principle in equity that where a person has a general power of appointment over property, and he actually exercises this power, whether by deed or will, the property appointed shall form part of his assets, and be subject to the claims of creditors, in preference to the claims of the appointee.³ In those cases where the power is a special one, the creditors of the donee can neither acquire an interest in such power nor prevent its execution ;⁴ and where a power of appointment over the corpus of the property is given to a woman who has a life estate, and she exercises the power, the appointed property is not thereby made applicable to the payment of her debts, excepting only

¹ *Strong v. Gregory*, 19 Ala. 146 ;
Lavender v. Lee, 14 Ala. 688 ;
Johnson v. Cushing, 15 N. H. 298 ;
 s.c. 41 Am. Dec. 694 ;
Tallmadge v. Sill, 21 Barb. (N. Y.) 34 ;
Harrison v. Battle, 1 Dev. & B. (N. C.) Eq. 213 ;
Jenny v. Andrews, 6 Madd. 264 ;
Thorpe v. Goodall, 17 Ves. Jr. 338, 460 ;
Holmes v. Coghill, 12 Ves. 206 ;
 s.c. 8 Rev. Rep. 323.

An unexecuted power of appointment is not assets for the payment of the debts of a deceased donee.
Harrison v. Battle, 1 Dev. & B. (N. C.) Eq. 213.

² *Blake v. Irwin*, 3 Kelly (Ga.) 345 ;
Covendale v. Aldrich, 36 Mass. (19 Pick.) 391 ;
Johnson v. Cushing, 15 N. H. 298 ; s.c. 41 Am. Dec. 694 ;
Townsend v. Windham, 2 Ves. Jr. 3.

³ *Johnson v. Cushing*, 15 N. H. 298 ; s.c. 41 Am. Dec. 694 ;
 4 Kent's Com. (13th ed.) 333.
 See : *Tallmadge v. Sill*, 21 Barb. (N. Y.) 34 ;
Cutting v. Cutting, 20 Hun (N. Y.) 360 ;
Harrison v. Battle, 1 Dev. & B. (N. C.) Eq. 213 ;
Harrington v. Hart, 1 Cox's Ch. 131 ;
Fleming v. Buchanan, 3 DeG. M. & G. 976 ;

Vaughan v. Vanderstegen, 2 Drew. 165 ;

Shattock v. Shattock, L. R. 2 Eq. 182, 187 ; 35 L. J. Ch. 509 ; 12 Jur. N. S. 405 ; 14 W. R. 600 ;
Jenney v. Andrews, 6 Madd. 264 ;
 1 Story Eq. Jur. (13th ed.), § 176 ;
 2 Sugd. on Pow. 28, 29.

This principle has been impugned in some cases, and doubts expressed whether its original introduction into equity jurisprudence was well warranted ; but its existence as a part of the system of equity, as administered in England for a long period, is not denied.

Hearle v. Greenbank, 3 Atk. 697 ;
Troughton v. Troughton, 3 Atk. 656 ;

Pack v. Bathurst, 3 Atk. 269 ;
Bainton v. Ward, 2 Atk. 172 ;
Hinton v. Toye, 1 Atk. 466 ;
Lassells v. Cornwallis, 2 Vern. 465 ;
Thorpe v. Goodall, 17 Ves. 388 ;
Barford v. Street, 16 Ves. 135 ;
Townshend v. Windham, 2 Ves. Sr. 1.

⁴ Nor can the creditors, through their assignee in bankruptcy, under the federal bankrupt law of 1867, execute the power for their benefit.

Jones' Assignee v. Clifton, 2 Flip. C. C. 191 ; s.c. 18 Nat. Bk. Reg. 125 ; 17 Am. L. Reg. 713 ; 6 Bost. Rep. 324 ; 7 Cent. L. J. 89 ; Fed. Cas. No. 7457.

those which are fraudulent ; that is, those of her liabilities arising from fraud.¹

SEC. 1856. **Same—For debts of beneficiary.**—The exercise of the power of appointment has the effect of transferring to the beneficiary the title to the land the same as a conveyance made by the donor would have done, and renders the property subject to a levy and sale under judgment by his creditors ; but such creditors cannot compel the trustee to exercise such power.² In those cases where the fee descends to the beneficiary subject to a power of sale, a subsequent exercise of such power will have the effect of defeating whatever interest the creditors of the beneficiary may acquire in the estate, although their interest will attach to the beneficiary's interest in the proceeds of such sale.³

SEC. 1857. **Who may be donees.**—The general rule is that powers of appointment may be conferred upon persons having an interest or estate of some kind in the land, or to persons who are altogether strangers to the property ;⁴ in short, any one who is capable of taking,

¹ *Hobday v. Peters*, 28 Beav. 349, 354, 356 ; s.c. 29 L. J. Ch. 780 ; 8 N. R. 512 ;

Vaughan v. Vanderstegen, 2 Drew. 165, 363 ;

Blatchford v. Woolley, 2 Drew & Sm. 204 ;

Shattock v. Shattock, L. R. 2 Eq. 182 ; s.c. 35 Beav. 489 ; 35 L. J. Ch. 509 ; 12 Jur. N. S. 405 ; 14 W. R. 600 ;

London Chartered Bank of Australia v. Lempriere, L. R. 4 P. C. 572.

² *Chew's Exrs. v. Chew*, 28 Pa. St. 17.

³ *Reed v. Underhill*, 12 Barb. (N. Y.) 133 ;

Allison v. Wilson's Exrs., 13 Serg. & R. (Pa.) 330.

⁴ *Bergen v. Bennett*, 1 Cai. Cas. (N. Y.) 1, 15 ; s.c. 2 Am. Dec. 281 ;

Edwards v. Slater, Hard. 416 ;

1 Sugd. on Pow. 107 ;

1 Tud. Ld. Cas. 286 ;

Williams on Real Prop. 294.

Where the donee has no interest in the property it is a collateral or naked power, is not attached

to any present estate, and the donee possesses simply the right to exercise the power.

Bergen v. Bennett, 1 Cai. Cas. (N. Y.) 1, 15 ; s.c. 2 Am. Dec. 281 ;

Edwards v. Slater, Hard. 416 ;

1 Sugd. on Pow. 107 ;

1 Tud. Ld. Cas. 286 ;

Williams on Real Prop. 294.

Where the donee of the power has an interest in the land the power is either appendant or gross, or in gross according to its relation to the estate ; the distinction being that where the power creating an estate issues partly or wholly out of the estate vested in the donee, the power is appendant.

Bergen v. Bennett, 1 Cai. Cas. (N. Y.) 1, 15 ; s.c. 2 Am. Dec. 281 ;

Wilson v. Troup, 2 Cow. (N. Y.) 195, 236 ; s.c. 14 Am. Dec. 458 ;

Edwards v. Slater, Hard. 416 ;

Maundrell v. Maundrell, 10 Ves. 246 ; s.c. 7 Rev. Rep. 393 ;

Williams on Real Prop. 310.

holding, and disposing of property can be the donee of a power; and where the power is purely collateral it may be exercised by an infant,¹ even though coupled with an interest² or the infant be a married woman.³ A *feme covert* may execute any kind of a power, whether simply collateral, appendant, or in gross, whether given to her sole or married, without the concurrence of her husband;⁴

¹ *Thompson v. Lyon*, 20 Mo. 155; s.c. 61 Am. Dec. 599;

Sheldon's Lessee v. Newton, 3 Ohio St. 494;

Hearle v. Greenbank, 3 Atk. 710;

Zouch v. Parsons, 3 Burr. 1794, 1802;

Re D'Angibau, 15 Ch. Div. 228;

Re Cardross's Settlement, 7 Ch. Div. 728; s.c. 23 Moak Eng. Rep. 827;

King v. Bellord, 1 Hem. & M. 343, 347.

It is thought, however, that such is not the case. It is believed that where the power is to be executed by means of an instrument which an infant is not capable of executing, such infant will not be able to execute the power.

At common law an infant could act as executor at the age of seventeen, and if an infant under seventeen, were appointed executor, administration *durante* might be committed to the mother or other friend of the infant, which would cease and become void when the infant arrived at the age of seventeen.

Prince's Case, 5 Co. 30;

Piggott's Case, 5 Co. 29.

² *Re Cardross's Settlement*, 7 Ch. Div. 728; s.c. 23 Moak Eng. Rep. 827;

King v. Bellord, 1 Hem. & M. 343; *St. Leonard's Pow.* (8th ed.) 911; 1 Prest. Abst. (2d ed.) 326.

Compare: Schneider v. Staihr, 20 Mo. 269;

Hearle v. Greenbank, 3 Atk. 710.

Infant may exercise power of sale—

King v. Bellord.—In *King v. Bellord*, 1 Hem. & M. 343, 347, though the decision in that case was upon another point, Vice-Chancellors says: "There can be no doubt upon the authorities from the earliest times, that if a man, by his will, gives an in-

fant a simple power of sale without an interest, the infant may exercise it." Then he says: "There is an opinion of Mr. Preston's mentioned without disapproval by Lord St. Leonards, that an infant can exercise a power even though it be coupled with an interest; but that is very different from selling an estate vested in the infant by a devise in fee."

Infant cannot execute power over real estate was held by Lord HARDWICKE in *Hearle v. Greenbank*, 3 Atk. 695, though it appears from his judgment, as interpreted by Preston, that an infant might exercise such a power if the minority is expressly dispensed with or there is an indication of the intention that the power might be exercised during minority.

See: *Re Cardross's Settlement*, 7 Ch. Div. 728, 729; s.c. 23 Moak Eng. Rep. 827, 828.

³ In *Re Cardross*, 7 Ch. Div. 728; s.c. 23 Moak Eng. Rep. 827, by a settlement made with the sanction of the court, upon the marriage of a lady then, and therein described as "an infant of seventeen years," certain funds belonging to her were vested in trustees upon trust to retain existing investments or re-invest "with the consent" of the lady and her husband during their joint lives; the lady taking the first life interest under the settlement. The court held that the lady had power to consent to a proposed re-investment, notwithstanding her minority.

⁴ *Thompson v. Lyon*, 20 Mo. 155; s.c. 61 Am. Dec. 599;

Thompson v. Murray, 2 Hill (S. C.) Eq. 204, 214;

and in those states where a married woman is still under the disabilities of the common law, this is a common mode of enabling her to dispose of the property secured to her by marriage settlement.¹

SEC. 1858. **Who may be appointees.**—Where the power is a special one, the appointee must be competent to have taken immediately from the donor, because every execution of a power must have a reference to the original instrument creating that power; and whoever claims under the execution must take title under the power itself.² Thus a power of appointment to children will not support an appointment to grandchildren, unless there are children in existence at the time when the power is created and an impossibility of other children being subsequently born, which, it is thought, would clearly show an intention to refer to grandchildren under the name of children.³ Where the power is a general one, any person

Doe d. Blomfield v. Eyre, 3 Man. Gr. & S. (3 C. B.) 557; s.c. 54 Eng. C. L. 556; 5 Man. Gr. & S. (5 C. B.) 713; 57 Eng. C. L. 712;

4 Kent's Com. (13th ed.) 625;

1 Sugd. on Pow. 148–155.

¹ *Doe d. Davis v. Vincent*, 1 Houst. (Del.) 416–427;

Leavitt v. Pell, 25 N. Y. 474, aff'g 27 Barb. (N. Y.) 322;

Wright v. Tallmadge, 15 N. Y. 307;

Bradish v. Gibbs, 3 John. Ch. (N. Y.) 523;

Rush v. Lewis, 21 Pa. St. 72;

Hoover v. Samaritan Society, 5 Whart. (Pa.) 445;

Ladd v. Ladd, 49 U. S. (8 How.) 10, 27; bk. 12 L. ed. 967;

Doe d. Blomfield v. Eyre, 3 Man. Gr. & S. (3 C. B.) 578; s.c. 54 Eng. C. L. 556; 5 Man. Gr. & S. (5 C. B.) 741; 57 Eng. C. L. 712;

4 Kent's Com. (13th ed.) 325;

1 Sugd. on Pow. 182.

See: *Ante*, § 469.

² *Robinson v. Hardcastle*, 2 Durnf. & E. (2 T. R.) 241; s.c. 1 Rev. Rep. 467. In this case it was said that where a power was given to A on his marriage

with B to appoint to and amongst the children of the marriage in such proportions, etc., and A by will appointed to C for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons, etc., of C, and in default of such issue to D, another child of A, D took nothing under the settlement. The law has been subsequently settled in the sense that, in such a case, C would take a life estate only; after which the estate would go according to the original settlement as in default of appointment.

Brudenell v. Elwes, 1 East 442; s.c. 7 Ves. 382; 6 Rev. Rep. 310;

Sugd. on Pow., c. 10, § 1, s. 27.

³ *Horwitz v. Norris*, 49 Pa. St. 211;

Wythe v. Thurlston, Amb. 555;

4 Kent's Com. (13th ed.) 345;

2 Sugd. on Pow. 253;

1 Tud. Ld. Cas. 306.

Power to appoint to "issue" generally embraces all descendants of every generation.

See: *Wythe v. Thurlston*, Amb. 555;

Freeman v. Parsley, 3 Ves. 421.

whom the donee selects may take under the power. Thus a wife may designate her husband, and a husband his wife.¹

SEC. 1859. Who may execute powers.—As a general proposition it is true that every person capable of being the donee of may execute powers conferred, with the single limitation that such person shall have the capacity to dispose of the estate actually vested in him by such power.² We have already seen that an infant may be the donee of a power that is simply collateral, or even of one coupled with an interest ;³ and that a married woman may also be the donee of a power, and execute the same without the consent of her husband, whether such power

¹ *Leavitt v. Pell*, 25 N. Y. 474, aff'g 27 Barb. (N. Y.) 322 ;

Wright v. Tallmadge, 15 N. Y. 307 ;

Braldish v. Gibbs, 3 John. Ch. (N. Y.) 523 ;

Hoover v. Samaritan Society, 5 Whart. (Pa.) 445 ;

Ladd v. Ladd, 49 U. S. (8 How.) 10, 27 ; bk. 12 L. ed. 967 ;

Barnes v. Irwin, 2 U. S. (2 Dall.) 201 ; bk. 1 L. ed. 348 ;

Doe d. Blomfield v. Eyre, 3 Man. Gr. & S. (3 C. B.) 578 ; s.c. 54 Eng. C. L. 556 ; 5 Man. Gr. & S. (5 C. B.) 741 ; 57 Eng. C. L. 712 ;

4 Kent Com. (13th ed.) 325 ;

2 Sugd. on Pow. 24 ; 1 Id. 182.

The statute of uses, in a case where the donee appoints to A to the use of B, will execute the use in A, leaving the use in B unexecuted, it being a use upon a use.

2 Prest. Abst. 248 ;

1 Sugd. on Pow. 229.

² *Logan v. Bell*, 1 Man. Gr. & S. (1 C. B.) 872 ; s.c. 50 Eng. C. L. 872 ;

4 Kent's Com. (13th ed.) 324 ;

1 Sugd. on Pow. 148.

In *Logan v. Bell*, *supra*, by a deed of settlement preparatory to the marriage of A and B, lands were conveyed to C and his heirs, to the use of B and his heirs, until the marriage should be solemnized ; and,

from and immediately after the solemnization thereof, to the use of such person or persons, for such estate or estates, and upon such trusts, etc., as B, notwithstanding coverture, and whether covert or sole, and without consent, etc., should by any deed or writing under seal, or by her last will, or any writing in the nature of, or purporting to be, her last will, or any codicil thereto, limit, direct, or appoint, etc., and in default of and until such appointment, to the use of C, during the joint lives of A and B ; and, after the decease of either of them, to the use of B, her heirs and assigns, forever. After the execution of the settlement, and before the marriage, B, by a codicil to a will made by her some time previously, in terms referring to the power contained in the settlement, devised the lands in trust for the children of the marriage, and, in default or failure of children, in trust for A for life. The court held that this was a good execution of the power, though made before the marriage, and notwithstanding that the event upon which it was to take effect, viz., the marriage of A and B, was contingent.

³ See : *Ante*, § 1857.

was given before or after marriage,¹ and that she may even execute it in favor of her husband.² But while a wife may execute a power of appointment conferred upon her in favor of her husband, yet she cannot convey her land directly to him except as allowed by the statute.³

The rule is that those persons only who are named as the donees in the instrument creating the power are competent to exercise it, such parties not being able to delegate or assign the duty to another.⁴ This rule, however, does not apply to powers on trust or powers coupled with an interest not requiring exercise of a special discretion reposed in a particular donee. We have already seen that such powers may be executed by a subsequent trustee, by the heirs of the donee, and the like.⁵

SEC. 1860. *How executed.*—Where there is no direction in the instrument creating a power, it may be executed by deed or by will, or even by a writing not under seal.⁶ The same formalities are not necessarily requisite in executing a power that are required in disposing of separate property; the terms prescribed by the power should furnish the criterion.⁷ But every execution of a power must have reference to the original instrument creating that power;⁸ and the donee must strictly observe all the conditions and restrictions imposed, both as to the manner and

¹ *Wright v. Tallmadge*, 15 N. Y. 307;

Oliver v. Oliver, 10 Ch. Div. 765; s.c. 27 Moak, Eng. Rep. 268;

1 Sugd. on Pow. 148.

² *Bradish v. Gibbs*, 3 John. Ch. (N. Y.) 523.

Rush v. Lewis, 21 Pa. St. 72;

Hoover v. Samaritan Society, 4 Whart. (Pa.) 445;

Doe d. Blomfield v. Eyre, 3 Man. Gr. & S. (3 C. B.) 578; s.c. 54 Eng. C. L. 556; 5 Man. Gr. & S. (5 C. B.) 741; 57 Eng. C. L. 712.

See: *Ante*, § 1858.

³ *Sims v. Ray*, 96 N. C. 87; s.c. 2 S. E. Rep. 443.

See: N. C. Code, §§ 1835, 1836.

⁴ See: *Post*, § 1861.

⁵ *Ante*, §§ 1848, 1849.

See: *Leeds v. Wakefield*, 76

Mass. (10 Gray) 514, 517;

Gibbs v. Marsh, 43 Mass. (2 Met.) 243;

Wilson v. Troup, 2 Cow. (N. Y.) 195, 236, 237; s.c. 14 Am. Dec. 458;

Hunt v. Rousmanire, 21 U. S. (8 Wheat.) 174, 207; bk. 5 L. ed. 589, 598;

2 Sugd. on Pow. 158.

⁶ *Hawkins v. Kemp*, 3 East 430;

Doe d. Mansfield v. Peach, 2 Maule & S. 576; s.c. 15 Rev. Rep. 361;

4 Kent Com. (13th ed.) 320.

See: *Portland v. Topham*, 11 H. L. Cas. 32;

Buller v. Burt, 6 Nev. & M. 281.

⁷ *Schley v. McCeney*, 36 Md. 266.

⁸ *Robinson v. Hardcastle*, 2 Durnf. & E. (2 T. R.) 241; s.c. 1 Rev. Rep. 467.

the time of execution ;¹ because the donor has the right to impose any condition he sees fit, no matter how unessential they may appear to be, and any neglect on the part of the donee of the directions given makes the execution defective.² Thus a power to appoint by deed cannot be executed by will, and *vice versa* ;³ but in those cases where the direction is that the power shall be executed by a written instrument, and there is no restriction as to the kind of instrument, it may be either by deed or by will.⁴ In those cases where a power is required to be exercised by a writing, under hand and seal attested by witnesses, it is sufficient that witnesses actually attest it, although it is not expressly stated to be so done in an attestation clause.⁵ And where a party has power to appoint a fee, in the absence of words of positive restriction, a less estate may be appointed ;⁶ and where a power is given to two or more persons all must ordinarily join in the execution of the power, unless the contrary is expressed.⁷

SEC. 1861. **Same—Power to sell.**—Where a power is given to sell and dispose of property, it can be sold only

- ¹ *Doe v. Smith*, 2 Brod. & B. 473 ;
s.c. 1 Brod. & B. 97 ;
Ex parte Williams, 1 Jac. & W.
93 ;
Wright v. Wakeford, 17 Ves.
454 ;
Longford v. Eyre, 1 Pr. Wms.
740.
² *Ives v. Davenport*, 3 Hill (N. Y.)
373 ;
Bentham v. Smith, 1 Cheves
(S. C.) Eq. 33 ;
Andrew v. Roye, 12 Rich. (S. C.)
L. 536, 546 ;
Ladd v. Ladd, 49 U. S. (8 How.)
30-40 ; bk. 12 L. ed. 967 ;
Hawkins v. Kemp, 3 East 410 ;
Vincent v. Bishop, 5 Exch. 683 ;
Burdett v. Doe d. Spilsbury, 6
Mann. & Gr. 386 ; s.c. 46 Eng.
C. L. 385 ;
Wright v. Barlow, 3 Maule & S.
512 ; s.c. 16 Rev. Rep. 339 ;
Wright v. Wakeford, 17 Ves.
454 ;
Habergham v. Vincent, 2 Ves.
231 ;
Langford v. Eyre, 1 Pr. Wms. 740 ;
1 Sugd. on Pow. 211, 250, 278.
³ *Darlington v. Poulteney*, 1 Cowp.
260.
⁴ *Alley v. Lawrence*, 78 Mass.
(12 Gray) 373, 375 ;
Moore v. Dimond, 5 R. I. 121,
130 ;
Ladd v. Ladd, 49 U. S. (8 How.)
30-40 ; bk. 12 L. ed. 967 ;
Mojoribanks v. Hovenden, 1
Drury 11 ;
Doe d. Mansfield v. Peach, 2
Maule & S. 576 ; s.c. 15 Rev.
Rep. 361 ;
Hopkins v. Myall, 2 Russ. & M.
86 ;
1 Chance on Pow. 273.
⁵ *Vincent v. Bishop of Sodoer*, etc.,
5 Exch. 683.
See : *Ladd v. Ladd*, 49 U. S. (8
How.) 30-40 ; bk. 12 L. ed. 967.
⁶ *Butler v. Heustis*, 68 Ill. 594 ; s.c.
18 Am. Rep. 589.
1 Co. Litt. (19th ed.) 112b.
⁷ See : Cal. Civ. Code, § 860 ;
Post § 1862.

in the manner prescribed by the donor, and the power will not include a right to mortgage,¹ or exchange the lands ;² this is because of the fundamental principle that the donee of a power is authorized to exercise it only to the extent and in the manner specified, and courts of equity, in determining whether or not the thing done is within the power conferred, will look to the ends and designs of the parties.³ Yet the power to mortgage has been held to be implied in powers to raise portions out of rents and profits or to sell for that purpose.⁴ A power to sell for a specific sum means a sale for cash, and not for approved notes.⁵ A power to sell and exchange, or to dispose of lands, includes the power to make partition of them.⁶ Where a mere naked power is given to several persons, it must be executed by all ;⁷ but where it is coupled with

¹ *Hoyt v. Jaques*, 129 Mass. 286 ;
Stokes v. Payne, 58 Miss. 614 ;
 s.c. 38 Am. Rep. 340 ;
Leavitt v. Pell, 25 N. Y. 474,
 aff'g 27 Barb. (N. Y.) 322 ;
Albany Fire Ins. Co. v. Bay, 4
 N. Y. 9, aff'g 4 Barb. (N. Y.)
 407 ;
Coutant v. Servoss, 3 Barb. (N.
 Y.) 128 ;
Ives v. Davenport, 3 Hill (N. Y.)
 373 ;
Bloomer v. Waldron, 3 Hill (N.
 Y.) 361 ;
Cumming v. Williamson, 1 Sandf.
 Ch. (N. Y.) 17 ; s.c. 2 N. Y.
 Leg. Obs. 157 ;
Hubbard v. Elmer, 7 Wend. (N.
 Y.) 446 ;
Devaynes v. Robinson, 24 Beav.
 86 ;
 4 Kent Com. (13th ed.) 331 ;
 1 Sugd. on Pow. 513.

² *City of Cleveland v. State Bank*,
 16 Ohio St. 268.

³ See : *Wayne v. Myddleton*, 2 Ga.
 383 ;

Watson v. James, 15 La. An.
 386 ;

Williams v. Woodward, 2 Wend.
 (N. Y.) 487, 492 ;

Pennsylvania Ins. Co. v. Austin,
 42 Pa. St. 257 ;

Ball v. Harris, 4 Myl. & Cr. 264 ;
Allen v. Backhouse, 2 Ves. & B.
 65 ; s.c. 13 Rev. Rep. 23 ;

Mills v. Banks, 3 Pr. Wms. 1.

⁴ *Wood v. Goodridge*, 60 Mass. (6

Cush.) 117 ;

Stokes v. Payne, 58 Miss. 614 ; s.c.
 38 Am. Rep. 340 ;

Albany Fire Ins. Co. v. Bay, 4 N.
 Y. 9 ;

Coutant v. Servoss, 3 Barb. (N.
 Y.) 128 ;

Bloomer v. Waldron, 3 Hill (N.
 Y.) 361, overruling *Williams*

v. Woodward, 2 Wend. (N. Y.)
 487, 492 ;

Cumming v. Williamson, 1 Sandf.
 Ch. (N. Y.) 17 ;

Head v. Temple, 4 Heisk. (Tenn.)
 34 ;

Patapasco Guano Co. v. Morrison,
 2 Woods C. C. 395 ; s.c. Fed.

Cas. No. 10792 ;
Devaynes v. Robinson, 24 Beav.

86 ;
Page v. Cooper, 16 Beav. 400 ;

Holdenby v. Spafforth, 1 Beav.
 390 ;

Stone v. Theed, 2 Bro. C. C. 243 ;
Stronghill v. Autrey, 1 DeG. M.

& G. 635 ;
Shaftesbury v. Duchess of Marl-

borough, 2 Myl. & K. 111.

⁵ *Ives v. Davenport*, 3 Hill (N. Y.)
 373 ;

4 Kent Com. (13th ed.) 331.

⁶ *Phelps v. Harris*, 101 U. S. 370 ;
 bk. 25 L. ed. 855.

⁷ *Tainter v. Clark*, 54 Mass. (13
 Met.) 220, 225 ;

Franklin v. Osgood, 14 John. (N.
 Y.) 527, 553 ; s.c. 2 John. Ch.

(N. Y.) 1, 19 ;

an interest, the power may be executed by the survivor.¹

SEC. 1862. **Same—Same—Given to several of a class.**—The general rule of the common law, as laid down by Lord Coke,² and sanctioned by many judicial decisions,³ is that where a naked power is limited to several persons as a class, such as executors, trustees, or sons, all must join in the execution of the power, which does not survive; but where the power is coupled with an interest, it may be executed by the survivors;⁴ and some cases

Peter v. Beverly, 35 U. S. (10 Pet.) 564; bk. 9 L. ed. 522;

Brassey v. Chalmers, 16 Beav. 231.

¹ Franklin v. Osgood, 14 John. (N. Y.) 527, 553; s.c. 2 John. Ch. (N. Y.) 1, 19;

Peter v. Beverly, 35 U. S. (10 Pet.) 564; bk. 9 L. ed. 522.

See: Mansfield v. Mansfield, 6 Conn. 559; s.c. 16 Am. Dec. 76;

Bergen v. Bennett, 1 Cai. Cas. (N. Y.) 1, 16; s.c. 2 Am. Dec. 281.

² 1 Co. Litt. (19th ed.), 112b; 113a; 2 Id. 181b;

Pow. on Dev. 292, 310;

Shep. Touch, pl. 9, p. 429.

³ See: Tainter v. Clark, 54 Mass. (13 Met.) 220. In this case the court say: "But the question in this case is not whether a power given to two or more executors to sell will survive, if one dies or refuses to act. At common law, before the statute of 21 Henry VIII., c. 4, it is clear that it would not. But by that statute it was provided that where lands were devised to be sold by executors, and some of them refused to accept administration, all sales by the executors, or executors who do accept, shall be as valid as if all the executors had joined. The question has been, whether this statute extended to executors where a power to sell was given to them *nominatim*. And all the authorities agree, that if a power is given, indicating personal confidence, it must be confined to the individual or individuals to whom it is given,

and will not, except by express words, pass to others than the trustees originally named, though they may, by legal transmission, sustain the same character. So it was decided in *Cole v. Wade*, 16 Ves. 27; s.c. 10 Rev. Rep. 129, and in many other cases. That such a personal confidence in the executor is indicated by the will, in this case, is manifest. He was to raise \$2,000, to hold in trust, and to pay over the interest of \$1,000 to the widow of the testator, and the interest of the other \$1,000 to his daughter, during their respective lives, and after their decease to appropriate the principal to other uses. If, then, this power, coupled with a trust, had been given to two executors by name, and one had died or declined the trust, the other could not have executed the power. And clearly such a power cannot be delegated, or legally transmitted, to an administrator with the will annexed."

⁴ Bergen v. Bennett, 1 Cai. Cas. (N. Y.) 1, 16; s.c. 2 Am. Dec. 281; Franklin v. Osgood, 14 John. (N. Y.) 527, 553; s.c. 2 John. Ch. (N. Y.) 1, 19;

Peter v. Beverly, 35 U. S. (10 Pet.) 532, 564; bk. 9 L. ed. 522, 534.

English doctrine—*Peter v. Beverly*.—The court say in *Peter v. Beverly*, *supra*: "But the difficulty arises in the application of this rule to particular cases. It may, perhaps, be considered

hold that there must be at least two surviving in order to comply with the plural description of the donees.¹

as the better conclusion to be drawn from the English cases on this question, that a mere direction, in a will, to the executors to sell land, without any words vesting in them any interest in the land, or creating a trust, will be only a naked power, which does not survive. In such case, there is no one who has a right to enforce an execution of the power. But when anything is directed to be done in which third persons are interested, and who have a right to call on the executors to execute the power, such power survives. This becomes necessary for effecting the object of the power. It is not a power coupled with an interest in executors, because they may derive a personal benefit from the devise. For a trust will survive though no way beneficial to the trustee. It is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question. And when an executor, guardian, or other trustee is invested with the rents and profits of the land, for the sale or use of another, it is still an authority coupled with an interest, and survives."

Bergen v. Bennett, 1 Cal. Cas. (N. Y.) 1, 16; s.c. 2 Am. Dec. 281.

American doctrine—*Bergen v. Bennett*.—In *Bergen v. Bennett*, *supra*, it is said that in "the American cases there seems to be less confusion and nicety on this point, and the courts have generally applied to the construction of such powers the great and leading principle which applies to the construction of other parts of the will, to ascertain and carry into execution the intention of the testator. When the power is given to executors, to be executed in their official capacity

of executors, and there are no words in the will warranting the conclusion that the testator intended, for safety or some other object, a joint execution of the power, as the office survives, the power ought also to be construed as surviving. And courts of equity will lend their aid to uphold the power, for the purpose of carrying into execution the intention of the testator, and preventing the consequences that might result from an extinction of the power; and where there is a trust, charged upon the executors in the directions given to them in the disposition of the proceeds, it is the settled doctrine of courts of chancery that the trust does not become extinct by the death of one of the trustees. It will be continued in the survivors, and not be permitted, in any event, to fail for want of a trustee. This is the doctrine of Chancellor KENT in the case of *Franklin v. Osgood*, 2 John. Ch. (N. Y.) 19, and cases there cited, and is in accordance with numerous decisions in the English courts (3 Atk. 714; 2 Pr. Wms. 102), and is adopted and sanctioned by the Court of Errors in New York, on appeal, in the case of *Franklin v. Osgood*, 14 John. (N. Y.) 527, 533; s.c. 2 John. Ch. (N. Y.) 1, 19. And Mr. Justice PLATT in that case refers to a class of cases in the English courts, where it is held that although, from the terms made use of in creating the power, detached from other parts of the will, it might be considered a mere naked power to sell, yet, if from its connection with other provisions in the will it clearly appears to have been the intention of the testator that the land should be sold to execute the trusts in the will, and such sale is necessary for the purpose of executing

¹ See authorities cited in the last foot-note.

This rule has been modified, however, so far as it relates to executors, so that a single survivor may execute the power. In the case of executors, where the power is coupled with an interest, it may be exercised by those who qualify as executors, it not being necessary for those who do not qualify to join.¹ Where the executor is the donee of a trust power which is distinct from the office of executor, and the trust may exist for years after the duties of the office of executor have been fully performed, the exercise of the power will not depend upon qualification as executors, and those named in the will who do not qualify may insist upon their right to join in the execution of the instrument of conveyance, even though they may or may not have fully qualified, or have resigned their executorship² in all those cases where they have not renounced the trust power.³ In those cases where the land over which the testamentary power of sale is given is situated in another state, the trustee may exercise this power when so directed, notwithstanding the fact that an executor appointed by will in one state is not authorized to execute the ordinary powers of an executor over lands situated in another state.⁴

such trusts, it will be construed as creating a power coupled with an interest, and will survive. This doctrine is fully recognized by the Supreme Court of Pennsylvania in the case of *The Lessee of Zebach v. Smith*, 3 Binn. (Pa.) 69. The court there considered it as a settled point that if the authority to sell is given to executors, *virtute officii*, a surviving executor may sell; and that the authority given by the will in that case to the executors to sell was to them in their character of executors, and for the purpose of paying debts, an object which is highly favored in the law."

¹ *Tainter v. Clark*, 54 Mass. (13 Met.) 220;

Bergen v. Bennett, 1 Cai. Cas. (N. Y.) 1, 16; s.c. 2 Am. Dec. 281;

Franklin v. Osgood, 14 John. (N.

Y.) 553; s.c. 2 John. Ch. (N. Y.) 19; 7 Am. Dec. 513;

Drayton v. Grimke, 1 Bailey (S. C.) Eq. 392;

Peter v. Beverly, 35 U. S. (10 Pet.) 564; bk. 9 L. ed. 522;

4 Kent Com. (13th ed.) 320;

1 Sugd. on Pow. 144, 146.

² *Tainter v. Clark*, 54 Mass. (13 Met.) 220.

³ *Tainter v. Clark*, 54 Mass. (13 Met.) 220;

Conklin v. Egerton's Admr., 21 Wend. (N. Y.) 430;

Wills v. Cowper, 1 Ohio 124.

⁴ *Doolittle v. Lewis*, 7 John. Ch. (N. Y.) 45-48; s.c. 11 Am. Dec. 389.

See: *Hutchins v. State Bank*, 53 Mass. (12 Met.) 421, 425;

Parsons v. Lyman, 20 N. Y. 103; s.c. 18 How. (N. Y.) Pr. 193;

aff'g 28 Barb. (N. Y.) 564;

Morrell v. Dickey, 1 John. Ch. (N. Y.) 153;

Vroom v. Van Horne, 10 Paige

SEC. 1863. **Power to married women.**—We have already seen¹ that a power may be limited to a married woman to appoint certain property ; and this power may be so limited that she may have the right to appoint by will and not by deed, or by deed and not by will.² If the power authorize an appointment by deed, its execution by her may be “immediate” during the lifetime of the donee ; if by will only, then the disposition cannot take effect until after the donee’s death.³

SEC. 1864. **Same—By implication.**—While it is thought necessary to insure a valid execution of a power that it should be expressly conferred in the instrument of execution, yet where it appears upon the face of the instrument, or from the facts of the case, that it was the intention of the donee to exercise the power given, it is thought that this will constitute a valid execution ;⁴ but where the donee leaves it uncertain whether the act is done in execution of the power or not it will not be held in this country to be an execution of such power, the American courts refusing to follow the early English rule.⁵ Some of the cases hold the instrument to be, by

Ch. (N. Y.) 549 ; s.c. 42 Am. Dec. 94.

¹ See : *Ante*, § 1859.

² *Re Harvey’s Estate*, L. R. 13 Ch. Div. 216 ; s.c. 49 L. J. Ch. 3 ; 28 W. R. 73.

³ *Sockett v. Wray*, 4 Bro. Ch. 483 ; *Nixon v. Nixon*, 2 Jones & Lat. 416 ;

Noble v. Willock, L. R. 8 Ch. 778 ;

Bishop v. Wall, L. R. 3 Ch. Div. 194 ; s.c. 17 Moak’s Eng. Rep. 835 ;

Heatley v. Thomas, 15 Ves. Jr. 596 ; s.c. 10 Rev. Rep. 122 ;

Anderson v. Dawson, 15 Ves. Jr. 532 ;

Bradley v. Westcott, 13 Ves. Jr. 445, 451 ; s.c. 9 Rev. Rep. 207 ;

Richards v. Chambers, 10 Ves. Jr. 580 ; s.c. 8 Rev. Rep. 44 ;

Reid v. Shergold, 10 Ves. Jr. 370 380 ;

Lee v. Muggeridge, 1 Ves. & B. 118.

See : *Roberts v. Cooper* (1891), 2 Ch. 335 ; s.c. 60 L. J. Ch. 377 ;

64 L. T. 227 ;

In re Roper (1888), 39 Ch. Div. 482 ; s.c. 58 L. J. Ch. 31 ; 59 L. T. 203 ;

Re Thomson’s Estate (1880), 14 Ch. Div. 263 ; s.c. 49 L. J. Ch. 622 ; 43 L. T. 35 ;

Pennock v. Pennock (1869), L. R. 13 Eq. Cas. 144 ; s.c. 41 L. J. Ch. 141 ; 25 L. T. 691 ; 1 Moak Eng. Rep. 626 ;

Hume v. Tenant, 1 Lead. Cas. in Eq. (4th Am. ed.) 690 ;

3 Pom. Eq. Jur. 31.

⁴ *Blagge v. Miles*, 1 Story C. C. 445–450 ; s.c. 4 Law Rep. 256 ; 3 Fed. Cas. 559.

Owens v. Dickenson, 1 Cr. & Ph. 53 ;

4 Kent Com. (13th ed.) 334 ;

2 Story Eq. Jur. (13th ed.) § 1062a ;

1 Sugd. on Pow. 232, 257, 373, 470.

⁵ *Hollister v. Shaw*, 46 Conn. 240 ;

Funk v. Eggleston, 92 Ill. 515,

539 ; s.c. 34 Am. Rep. 136 ;

Bangs v. Smith, 98 Mass. 270 ;

necessary intendment, a good execution of the power in those cases where it cannot operate in any other way, even though the deed or will purports to dispose only of the individual property of the donee.¹ The power to be executed need not be specifically referred to where the power is a collateral or naked one, a simple and specific reference to the property being sufficient to pass the land by virtue of the donee's ownership, even though his ownership be of a part only, while his power is over the whole.² In those cases where the power is appendant or in gross, if there is no express reference to the power, the instrument will pass only the legal estate. Where the power is not coupled with an interest the execution of the power will be a good one, although neither the power nor the property is referred to, where the donee has no property of which he can dispose by means of the instrument executed.³

SEC. 1865. **Same—Excessive execution.**—In those cases where the donee exceeds his authority in the execution of the power it will nevertheless be a valid execution if the excess can be separated from what would otherwise have been a valid execution. If this cannot be done the whole will be avoided, and a court of equity will decree a failure of execution.⁴ Thus an appointment exceeding

Willard v. Ware, 92 Mass. (10 Allen) 263 ;

Amory v. Meredith, 89 Mass. (7 Allen) 397 ;

Andrews v. Brunefield, 32 Miss. 107, 108 ;

Collier's Will, 40 Mo. 287, 329 ;

White v. Hicks, 33 N. Y. 383, aff'g 43 Barb. (N. Y.) 64 ;

Bolton v. De Peyster, 25 Barb (N. Y.) 539, 564 ;

Van Wert v. Benedict, 1 Bradf (N. Y.) 114 ;

2 Story Eq. Jur. (13th ed.) § 1062a.

¹ Doe v. Vincent, 1 Houst. (Del.) 416, 417.

² Hay v. Mayer, 8 Watts (Pa.) 203 ; s.c. 34 Am. Dec. 453.

³ Maryland Mut. Benev. Society v. Clendinen, 44 Md. 429 ; s.c. 22 Am. Rep. 52 ;

Amory v. Meredith, 89 Mass. (7

Allen) 397 ;

White v. Hicks, 33 N. Y. 392, aff'g 43 Barb. (N. Y.) 64 ;

Jones v. Wood, 16 Pa. St. 25 ;

Bepper's Will, 1 Pars. Eq. Cas. (Pa.) 440 ;

Hay v. Mayer, 8 Watts (Pa.) 203 ; s.c. 34 Am. Dec. 453 ;

Blagge v. Miles, 1 Story C. C. 426 ; s.c. 3 Fed. Cas. 559 ;

Probert v. Morgan, 1 Atk. 440 ;

Doe v. Rooke, 6 Barn. & C. 720 ;

2 Co. Litt. (19th ed.) 271b ;

4 Kent's Com. (14th ed.) 335 ;

1 Sugd. on Pow. 432.

⁴ Funk v. Eggleston, 92 Ill. 515 ; s.c. 34 Am. Rep. 136 ;

Warner v. Howell, 3 Wash. C. C. 12 ; s.c. Fed. Cas. No. 17184 ;

Hay v. Watkins, 3 Dru. & Warr. 339 ;

Alexander v. Alexander, 2 Ves. Sr. 640 ;

the power by a limitation to objects not within the power, is void as to the excess ; as where the power is to appoint to children, and the appointment is to a child for life, and after his decease to his wife and children ; but that void limitation shall not defeat a limitation over to an object of the power, in case such child dies without leaving a wife or child surviving.¹ The reason for this is that where a power is given to distribute among particular objects, the power must be exhausted among those objects ; and no other person, however nearly related to those objects, can be joined with them as such ; and the children of the objects are no more objects than any other persons. Therefore, as to so much of the property as is not distributed among the objects of the power, it is to be considered as unappointed.² Thus where the power is general, if the appointment is made to a number of persons, some of whom can and some of whom cannot take, the execution will be good as to the former ; and if the power is special it will be good as to those who can take provided the partial execution of the power does not affect the lawful rights of others.³ Where the donee annexes to the appointment conditions which are not authorized by the terms of the instrument creating the power, or are prohibited by it, the illegal conditions will be void and the appointee will take an absolute estate.⁴

SEC. 1866. **Same—Successive executions.**—Where a person has power to appoint a fee, in the absence of words of positive restrictions a less estate may be appointed,

Crompe v. Barrow, 4 Ves. 681 ;

s.c. 4 Rev. Rep. 318 ;

2 Sugd. on Pow. 55, 62, 75 ;

1 Tud. Ld. Cas. 306.

¹ *Crompe v. Barrow*, 4 Ves. 681 ;

s.c. 4 Rev. Rep. 318.

² *Crompe v. Barrow*, 4 Ves. 681 ;

s.c. 4 Rev. Rep. 318.

See : *Pitt v. Jackson*, 2 Bro. C. C.

51 ;

Williamson v. Farrell (1877), 35

Ch. Div. 128 ;

Robinson v. Hardcastle, 2 Durnf.

& E. (2 T. R.) 241 ; s.c. 1 Rev.

Rep. 467 ;

Routledge v. Dorrill, 2 Ves. Jr.

357 ; s.c. 2 Rev. Rep. 250.

³ *Sadler v. Pratt*, 5 Sim. 632.

⁴ *Campbell v. Leach*, Amb. 740 ;

Powcey v. Bowen, 1 Ch. Cas. 23 ;

Roe d. Brune v. Prideaux, 10 East

158 ; s.c. 10 Rev. Rep. 258 ;

Parker v. Parker, Gibb. Eq. 168 ;

Alexander v. Alexander, 2 Ves.

Sr. 640 ;

2 Sugd. on Pow. 85 ;

1 Tud. Ld. Cas. 317-319.

See : *Smith v. Widlake*, L. R. 3

C. P. Div. 10, 15 ; s.c. 47 L. J.

Ch. 282.

and such partial execution will be a valid one to that extent.¹ Thus where certain real property was conveyed to a trustee for the benefit of a designated person, the trustee to convey the same to such person as the beneficiary in his last will should appoint, which person should take the same in fee, and in default of such appointment the land to be conveyed to the beneficiary's children; and the beneficiary gave the use of the property to A. during his life, "the reversion and fee thereof to the heirs of her body after her decease," the court held the words "heirs of her body" were to be taken as words of description and not of limitation, and a decree sustaining the devise was confirmed.² Where a donee of a power has but partially executed it, such power may be exercised successively at different times over different parts of the property, whether the power be one of appointment or of revocation.³ But where a donee has once exercised his power of appointment, either in whole or in part, he cannot thereafter revoke the same, unless such power is granted to him in the instrument creating the power, or he reserves the right of revocation in the instrument of appointment.⁴

SEC. 1867. **Same—Defective execution.**—In those cases where the donee's execution of the power entrusted to him is defective, because of his failure to conform to the directions of the donor in the instrument creating the power, the appointment will be absolutely void; but in such case a court of equity will interpose in favor of the parties to whom the person entrusted with the execution of the power is under a moral or legal obligation to provide by an execution of the same, such as a *bona fide* purchaser for a valuable consideration, a creditor, a wife and a legitimate child,⁵ unless such action on the

¹ Butler v. Heustis, 68 Ill. 594; s.c. 18 Am. Rep. 589.

² Butler v. Heustis, 68 Ill. 594; s.c. 18 Am. Rep. 589.

³ Woolston v. Woolston, 1 W. Bl. 281;

Digges' Case, 1 Co. 174;

2 Co. Litt. (19th ed.) 271b;

2 Sugd. on Pow. 43-45; 1 Id. 342.

⁴ Saunders v. Evans, 8 H. L. Cas. 721;

2 Co. Litt. (19th ed.) 271b;

2 Sugd. on Pow. 243.

⁵ Fothergill v. Fothergill, 2 Freem. 256, 257;

1 Fonb. Eq., b. 1, c. 1, § 7, n. v;

Id., c. 4, § 25, n. h, i, and n;

Id., c. 5, § 2;

part of the court would be inequitable to other persons, or is repelled by some counter equity ;¹ and will make good the defective execution of the power by ordering a re-execution where there has been a substantial compliance with the conditions of the execution and use made of the technical words of limitation of conveyance, and the like.²

SEC. 1868. **Non-execution of power.**—We have seen in the preceding section that where there has been a defective execution of a trust power, equity will relieve by directing a re-execution, on certain conditions ; but it is different where there is an entire failure to execute the power. The want of execution cannot be supplied. The courts will not help the non-execution of a power which is left to the free will and election of a party whether he execute it or not ; and for that reason equity will not say he shall execute it, or do for him that which he does not think fit to do for himself.³ Otherwise a court of equity by directing the execution of the power would in effect deprive the party of all discretion in the matter in regard to the exercise of it, and thereby overturn the intention manifested by the donor of the power. The distinction between the defective execution and the non-execution of a power is manifest. When a party undertakes to execute a power, but through mistake, ignorance and the like, does it imperfectly, equity will interpose for the purpose of carrying into effect his intention, and in aid of those who are peculiarly within its protective favor.⁴

1 Story Eq. Jur. (13th ed.), § 169.

¹ 1 Story Eq. Jur. (13th ed.), § 169.

² Schenck v. Ellingwood, 3 Edw. Ch. (N. Y.) 175 ;

McRae v. Farrow, 4 Hen. & M. (Va.) 444 ;

Roberts v. Stanton, 2 Munf. (Va.) 129 ; s.c. 5 Am. Dec. 463 ;

Hunt v. Rousmaniere, 2 Mas. C. C. 251 ; s.c. Fed. Cas. No. 6898 ;

Cotter v. Laver, 2 Pr. Wms. 622 ;

Tollett v. Tollett, 2 Pr. Wms. 489 ;

1 Story Eq. Jur. (13th ed.) 169–175 ;

2 Sugd. on Pow. 88, *et seq.*

³ Tollet v. Tollet, 2 Pr. Wms. 290.

See : *Re Roper* (1888), 39 Ch. Div. 482 ; s.c. 58 L. J. Ch. 31 ;

59 L. T. 203 ;

Crossling v. Crossling, 2 Cox 396 ; s.c. 2 Rev. Rep. 88 ;

Lassells v. Cornwallis, 2 Vern. 465 ;

Holmes v. Coghill, 7 Ves. 506 ; s.c. 6 Rev. Rep. 166 ; 12 Ves. 206 ; 8 Rev. Rep. 323.

⁴ Darlington v. Pulteney, Cowp. 266 ;

Wilkinson v. Nelson, 7 Jur. N. S. 480 ;

SEC. 1869. *Delegation or assignment of power.*—Where the power is accompanied by personal trust or confidence it cannot be delegated by the trustee, unless authority is expressly given in the instrument creating the power.¹ Neither can the personal representatives of the trustee execute the power unless expressly named.² This rule does not apply to the mere form of acts, however.³ In those cases where the power is expressly limited to the donee and his assigns, an execution of it by the assignee

Elliss v. Nimmo, Lloyd & G.
Rep. 348 ;

Moodie v. Reid, 1 Madd. 516 ; s.c.
16 Rev. Rep. 257 ;

Jeremy on Eq. Jurisd., B. 3, pt.
2, c. 3, pp. 369, 370, 371, 372,
375.

¹ *Tainter v. Clark, 54 Mass. (13*
Met.) 226 ;

Hertell v. Van Buren, 3 Edw.
Ch. (N. Y.) 20 ;

Franklin v. Osgood, 14 John. (N.
Y.) 562 ; s.c. 2 *John. Ch. (N.*
Y.) 1, 19 ;

Berger v. Duff, 4 John. Ch. (N.
Y.) 368 ;

Osgood v. Franklin, 2 John. Ch.
(N. Y.) 21 ; s.c. 7 *Am. Dec.*
513 ;

Zebach v. Smith, 3 Binn. (Pa.) 69 ;

Peter v. Beverly, 35 U. S. (10
Pet.) 564, 565 ; bk. 9 *L. ed.* 522 ;

Topham v. Portland, 1 DeG. J. &
S. 517 ;

Cole v. Wade, 16 Ves. 28 ; s.c. 10
Rev. Rep. 129 ;

1 *Lewin on Tr. (8th ed.)* 228 ;

Story's Eq. Jur. (13th ed.) 1062 ;

1 *Sugd. on Pow.* 214–216.

² *Tainter v. Clark, 54 Mass. (13*
Met.) 220, 226 ;

Cole v. Wade, 16 Ves. 27 ; s.c. 10
Rev. Rep. 129 ;

Broom's Leg. Max. 665 ;

1 *Sugd. on Pow.* 214, 215.

The master of the rolls says in the
case of *Cole v. Wade, supra* :

“I conceive that, wherever a
power is of a kind that indi-
cates a personal confidence, it
must *prima facie* be under-
stood to be confined to the in-
dividual to whom it is given ;
and will not except by express
words pass to others, to whom
by legal transmission the same
character may happen to be-
long. Of this the case of *Doy-*

ley v. The Attorney-General, 4
Vin. 485 ; s.c. 2 *Eq. Cas. Abr.*
194, is a strong instance. There,
though for the very purpose of
sustaining and executing the
trusts of the will the trust had
been assigned by the direction
of the court, the power was
held not to have passed to the
assignee ; though there was no
doubt that he legally sustained
the character as completely as
if he had been at first invested
with it. In the case of *Fland-
ers v. Clark, 1 Ves. Sr.* 9, the
executors had a discretionary
power as to the time of pay-
ment. Lord HARDWICKE, hold-
ing that the surviving execu-
tor might execute the power,
says : ‘If that surviving execu-
tor had not disposed of it, it
would have devolved on the
court to have done it,’ not,
that the power would have
gone to the executor of the
survivor : yet in legal consid-
eration the executor of the
survivor was the executor of
the testatrix. There is a case
on *Moor* 61, pl. 172, in which
one of the judges seems to
have thought that a power,
implying personal confidence,
would not even by express
words pass to executors of an
executor. Weston says this
is a special trust and confi-
dence, which the testator puts
in those to whom he commits
the sale ; but he could have no
trust or confidence in those
whom he did not know ; and
he could not know what per-
sons his executors would make
their executors.”

³ *Cole v. Wade, 16 Ves.* 27 ; s.c. 10
Rev. Rep. 129.

will be valid and the devisee of such donee will be considered as within the words of the power.¹

SEC. 1870. Survivor of powers.—Where a power is given to several donees *nominatim*, it indicates the repose of a personal discretion in each, and the power will not survive the death of one of them.² Neither does a mere naked power survive.³ But in those cases where a power coupled with a trust is given to two or more individuals, to be executed by them jointly, if one renounces the trust or dies, the power will survive to the other or others, and they may execute it the same as though it were originally given to them only.⁴ The same is true where one of the executors has been removed after having qualified.⁵ The power survives

¹ Englefield's Case, 7 Co. 11 ;
4 Cruise Dig. (4th ed.) 211.

² Tainter v. Clark, 54 Mass. (13 Met.) 220 ;

Franklin v. Osgood, 14 John. (N. Y.) 553 ; s.c. 2 John. Ch. (N. Y.) 1, 19 ;

Peter v. Beverly, 35 U. S. (10 Pet.) 563 ; bk. 9 L. ed. 522 ;

Loring v. Marsh, 27 L. R. 377 ;

Cole v. Wade, 16 Ves. 27 ; s.c. 10 Rev. Rep. 129 ;

1 Co. Litt. (13th ed.) 113 ;

2 Story Eq. Jur. (13th ed.), §§ 1061, 1062 ;

1 Sugd. on Pow. 144-146.

³ Tainter v. Clark, 54 Mass. (13 Met.) 220, 225 ;

Franklin v. Osgood, 14 John. (N. Y.) 553 ; s.c. 2 John. Ch. (N. Y.) 1, 19 ;

Peter v. Beverly, 35 U. S. (10 Pet.) 563, 564 ; bk. 9 L. ed. 522 ;

Brassey v. Chalmers, 16 Beav. 231.

⁴ Clark v. Hornthall, 46 Miss. 434 ;

Franklin v. Osgood, 14 John. (N. Y.) 553 ; s.c. 2 John. Ch. (N. Y.) 1, 19 ;

Osgood v. Franklin, 2 John. Ch. (N. Y.) 1 ; s.c. 7 Am. Dec. 513 ;

Bailey's Petition, 15 R. I. 60 ; s.c. 1 Atl. Rep. 131 ; 1 New Eng. Rep. 175 ;

Peter v. Beverly, 35 U. S. (10 Pet.) 564 ; bk. 9 L. ed. 522.

See : Mansfield v. Mansfield, 6

Conn. 559 ; s.c. 16 Am. Dec. 76 ;

Bergen v. Bennett, 1 Cai. Cas. (N. Y.) 1, 16 ; s.c. 2 Am. Dec. 281.

Thus a sale by one of two executors under a will, the other not having refused to qualify, is good.

Pahlman v. Smith, 23 Ill. 448 ;

Wells v. Lewis, 4 Met. (Ky.) 269 ;

Boston Franklinite Co. v. Condit, 19 N. J. Eq. (4 C. E. Gr.) 394 ;

Meakings v. Cromwell, 5 N. Y. 136 ; s.c. 2 Sandf. (N. Y.) 512 ;

Roseboom v. Mosher, 2 Den. (N. Y.) 61 ;

McDowell v. Gray, 29 Pa. St. 211 ;

De Saussure v. Lyons, 9 S. C. 492.

See : Parrott v. Edmondson, 64 Ga. 332 ;

Weimar v. Fath, 43 N. J. L. (14 Vr.) 1 ;

Onderdonk v. Ackerman, 62 How. (N. Y.) Pr. 318 ;

Bingham v. Jones, 25 Hun (N. Y.) 6 ;

Jennings v. Teague, 14 S. C. 229 ;

Ferre v. American Board Comrs., etc., 53 Vt. 162 ;

4 Kent Com. (14th ed.) 325.

Compare : Clinefelters v. Ayers, 16 Ill. 329.

⁵ Weimar v. Fath, 43 N. J. L. (14 Vr.) 1.

because it is a power coupled with an interest.¹ But to constitute a power coupled with an interest there must be an interest in the thing itself, and not merely in the execution of the power.² A power coupled with an interest will ordinarily, not only survive the donee, but can be exercised by him to whom the interest has been assigned, provided, of course, the power is not expressly personal to the donee.³

SEC. 1871. **Extinguishment and merger of power.**—A collateral power relating to land may be extinguished by a complete execution,⁴ and powers in gross or appendant to land will be extinguished by a complete alienation of the estate;⁵ but collateral powers cannot be extinguished or destroyed by a feoffment, or other conveyance of the land.⁶ The reason of this is because the donee of such a power cannot, by any act of his own, extinguish or destroy it.⁷ Where a power is given to one having a particular estate in the land, it will be merged in or extinguished by his acquisition of the fee.⁸

¹ Putnam Free School v. Fisher, 30 Me. 523;

Jackson v. Ferris, 15 John. (N. Y.) 346;

Osgood v. Franklin, 2 John. Ch. (N. Y.) 1; s.c. 7 Am. Dec. 513;

Zebach's Lessee v. Smith, 3 Binn. (Pa.) 69;

Bailey's Petition, 15 R. I. 60; s.c. 1 Atl. Rep. 131; 1 New Eng. Rep. 175;

Peter v. Beverly, 35 U. S. (10 Pet.) 532; bk. 9 L. ed. 522.

² Mansfield v. Mansfield, 6 Conn. 559; s.c. 16 Am. Dec. 76;

Osgood v. Franklin, 2 John. Ch. (N. Y.) 1; s.c. 7 Am. Dec. 513.

See: Jackson d. Henderson v. Davenport, 18 John. (N. Y.) 295;

Franklin v. Osgood, 14 John. (N. Y.) 527;

Jackson d. King v. Burts, 14 John. (N. Y.) 391;

Zebach's Lessee v. Smith, 3 Binn. (Pa.) 69; s.c. 5 Am. Dec. 352;

Walsh v. Whitcomb, 2 Esp.* 565; 1 Sugd. on Pow. 141.

³ Bergen v. Bennett, 1 Cai. Cas. (N.

Y.) 1, 15; s.c. 2 Am. Dec. 281; Wilson v. Troup, 2 Cow. (N. Y.)

195; s.c. 14 Am. Dec. 458;

Doolittle v. Lewis, 7 John. Ch. (N. Y.) 45; s.c. 11 Am. Dec. 389;

Jencks v. Alexander, 11 Paige Ch. (N. Y.) 619;

Hartley's Appeal, 53 Pa. St. 212; s.c. 91 Am. Dec. 207;

Hunt v. Rousmanier, 21 U. S. (8 Wheat.) 174, 203; bk. 5 L. ed. 589.

⁴ 4 Cruise Dig. (4th ed.) 233.

See: Zouch v. Woolston, 1 Wm. Bl. 281; s.c. 2 Burr. 1136;

Hawkins v. Kemp, 3 East 410.

⁵ Brown v. Renshaw, 57 Md. 67; s.c. 12 Rep. 622;

Ren v. Buckelet, Doug. 292; 4 Kent's Com. (13th ed.) 347.

⁶ Digge's Case, 1 Co. 174; 4 Cruise Dig. (4th ed.) 238;

F. Moore 605.

⁷ Willis v. Sherral, 1 Atk. 474; West v. Barney, 1 Russ. & M. 391;

Tippet v. Eyres, 2 Vent. 110.

⁸ Wilson v. Troup, 2 Cow. (N. Y.) 195; s.c. 14 Am. Dec. 458;

* See: *Ante*, (*) footnote, p. 257.

SEC. 1872. **Suspension and destruction of power.**—A naked power may be revoked at pleasure, but a power coupled with an interest is irrevocable;¹ yet all powers given for the benefit of the donee may be released by him to one holding the freehold whether in possession, in remainder, or in reversion; and when thus released they are destroyed, whether they be powers collateral, appendant, or in gross.² With special powers, however, it is different. These cannot be extinguished or released by any act of the donee alone, because they are in the nature of a trust, and the beneficiaries have interests and rights beyond the power of the donee to surrender or destroy.³ In those cases, however, where it is within the discretion of the donee to exercise his power or not, a deed of release executed by the donee and the beneficiary will extinguish the power.⁴ Where the power is appendant to the land, it may be suspended, as where the donee conveys the land only for the purpose of creating a particular estate;⁵ or may be destroyed by the conveyance of the entire estate to which the power is annexed.⁶ The conveyance of a part of the land only,

Cross v. Hudson, 3 Bro. C. C. 30;
Maundrell v. Maundrell, 7 Ves. 567.

See: *Clere's Case*, 6 Co. 17b;

4 *Cruise Dig.* (4th ed.) 241;

4 *Kent Com.* (13th ed.) 348.

¹ *Mansfield v. Mansfield*, 6 Conn. 559; s.c. 16 Am. Dec. 76.

² *Albany's Case*, 1 Co. 11;

Edwards v. Salter, Hard. 416;

Smith v. Death, 5 Mad. 371;

West v. Bernly, 1 Russ. & M. 431;

Horner v. Swann, Turn. & R. 430;

Chance on Pow., § 3115;

1 *Sugd. on Pow.* 112;

1 *Tud. Ld. Cas.* 294;

Williams on Real Prop. 310.

³ *Norris v. Thompson*, 4 Me. (4 Greenl.) 307;

Tainter v. Clark, 54 Mass. (13 Met.) 220;

Townson v. Tickell, 3 Barn. &

Ald. 31; s.c. 5 Eng. C. L. 28;

Doe d. Smyth v. Smyth, 6 Barn.

& C. 112; s.c. 9 Dowl. & Ry.

186; 13 Eng. C. L. 62;

Begbie v. Crook, 2 Bing. N. C.

70; s.c. 29 Eng. C. L. 442;

Tuick v. Ludborough, 3 Bulst. 30;

Tippet v. Eyres, 5 Mod. 457;

Cunynghame v. Thurlow, 1 Russ. & M. 436;

West v. Barney, 1 Russ. & M. 431;

Chance on Pow., § 3105;

2 Co. Litt. (19th ed.) 237a, 265b;

1 *Sugd. on Pow.*, 117;

1 *Tud. Ld. Cas.* 286, 295.

⁴ *Brown's Appeal*, 27 Pa. St. 62;

Allison v. Wilson's Exrs., 13 Serg. & R. (Pa.) 330.

⁵ *Bringloe v. Goodson*, 4 Bing. N. C. 734; s.c. 33 Eng. C. L. 944;

Goodright v. Cator, Doug. 477;

Vincent v. Ennys, 3 Vin. Abr. 432.

⁶ *Wilson v. Troup*, 2 Cow. (N. Y.) 195; s.c. 4 Am. Dec. 458;

Doe v. Britain, 2 Barn. & Ald. 98;

Bringloe v. Goodson, 4 Bing. N. C. 726; s.c. 33 Eng. C. L. 944;

Goodright v. Cato, Doug. 460;

Walmesley v. Jowett, 23 Eng. L. & E. 353;

Penn v. Peacock, For. 41;

Barton v. Briscoe, 1 Jac. 603;

Noel v. Henry, McClel. & Yo. 302;

Jones v. Winwood, 4 Mees. & W. 653;

leaving a reversion in the donee, will be an extinguishment of the power only as to the part conveyed, and the power will remain in the residue.¹ In those cases where the power appendant is one which enables the donee merely to create an estate in possession, as to make leases, the exercise of the power is a complete suspension.² Where the power is in gross, it can only be extinguished by a conveyance in feoffment; a release in any other mode not having that effect.³

Yelland v. Ficlis, Moore 788 ;
Bullock v. Thorne, Moore 615 ;
Anon., Moore 612 ;
Webb v. Shaftesbury, 3 Myl. & K.
 599 ;

Parker v. White, 11 Ves. Jr. 209 ;
Maundrell v. Maundrell, 10 Ves.
 246 ; s.c. 7 Rev. Rep. 393 ;

Chance on Pow., §§ 3155, 3159 ;

4 *Kent's Com.* (13th ed.) 347 ;

1 *Sugd. on Pow.* 57, 113-115 ;

1 *Tud. Ld. Cas.* 260, 290 ;

Williams on Real Prop. 310.

¹ *Doe d. Lumley v. Scarborough*, 3
Ad. & E. 2 ; s.c. 30 *Eng. C. L.*
 25 ;

Bringloe v. Goodson, 4 *Bing. N.*
C. 726 ; s.c. 33 *Eng. C. L.* 944 ;
Tyrrell v. Marsh, 3 *Bing.* 31 ; s.c.
 11 *Eng. C. L.* 25 ;

Goodright v. Cator, *Doug.* 477 ;

Ren v. Bulkeley, *Doug.* 302 ;

Roper v. Halifax, 8 *Taunt.* 845 ;
 s.c. 4 *Eng. C. L.* 409 ;

1 *Tud. Ld. Cas.* 287.

² *Bringloe v. Goodson*, 4 *Bing. N.*
C. 726 ; s.c. 33 *Eng. C. L.* 944 ;
 1 *Sugd. on Pow.*, 112.

³ *Edwards v. Slater*, *Hard.* 416 ;
Savile v. Blacket, 1 *Pr. Wms.*
 777 ;
 1 *Sugd. on Pow.* 112.

CHAPTER XXVIII.

CONDITIONAL ESTATES.

- SEC. 1873. Introductory.
- SEC. 1874. Definition of conditional estate.
- SEC. 1875. Nature of conditional estate.
- SEC. 1876. Same--Assignment.
- SEC. 1877. Distinguished from a trust.
- SEC. 1878. Distinguished from conditional limitation.
- SEC. 1879. Kinds of conditions.
- SEC. 1880. Same—Express, in deed.
- SEC. 1881. Same—Implied, in law.
- SEC. 1882. Same—Precedent condition.
- SEC. 1883. Same—Same—Copulative condition.
- SEC. 1884. Same—Same—Particular estate.
- SEC. 1885. Same—Subsequent condition.
- SEC. 1886. How created—Form of words.
- SEC. 1887. At what time created—As to things executed.
- SEC. 1888. Same—As to things executory.
- SEC. 1889. To what estate attaches.
- SEC. 1890. Valid conditions—Conditions precedent.
- SEC. 1891. Same—Conditions subsequent.
- SEC. 1892. Void conditions—Conditions precedent.
- SEC. 1893. Same—Conditions subsequent.
- SEC. 1894. Failure to perform condition—Effect.
- SEC. 1895. Same—Who may enter for breach.
- SEC. 1896. Same—Same—After conveyance.
- SEC. 1897. Same—Apportionment.
- SEC. 1898. Performance of condition.
- SEC. 1899. Same—Time of performance.
- SEC. 1900. Same—Place of performance.
- SEC. 1901. Forfeiture by non-performance.
- SEC. 1902. Same—Waiver of.
- SEC. 1903. Same—Excusing non-performance
- SEC. 1904. Same—Relief against.
- SEC. 1905. Same—Who bound by.

SECTION 1873. *Introductory.*—We have already treated of conditional estates in so far as they relate to the fee. A conditional fee is defined to be a species of estate limited

upon or subject to a condition, either precedent or subsequent ; that is, an estate defeasible upon the breach of, or enlarged upon the performance of, a stipulated condition.¹ The early history of these estates,² the mode of limitation,³ and the like have already been sufficiently discussed. It is the object of this chapter to speak more especially regarding the effect of such estates, and their enforcement.

SEC. 1874. **Definition of conditional estate.**—A conditional estate is one which may be created, enlarged, diminished, or defeated, on the happening or the not happening of some contingent event, or by the performing or the failing to perform a stipulated condition, which condition may be either precedent or subsequent.⁴

¹ See : *Ante*, § 431.

² See : *Ante*, § 432.

³ See : *Ante*, § 433.

⁴ *Wheeler v. Walker*, 2 Conn. 196, 200 ; s.c. 7 Am. Dec. 264 ;

2 Bl. Com. 152 ;

2 Co. Litt. (19th ed.) 201a ;

4 Kent's Com. (13th ed.) 121.

See : *Seymour v. Harvey*, 11 Conn. 275 ;

Lloyd v. Holly, 8 Conn. 490 ;

Judd v. Bushnell, 7 Conn. 204.

Conditional devise—Stipulating for payment of specific sum.—Thus a devise of an estate to the sons of the testator, "they jointly and severally paying" to his daughters a certain sum within a specified time, is strictly conditional upon the payment of the money within the time limited.

Wheeler v. Walker, 2 Conn. 196 ; s.c. 7 Am. Dec. 264.

In the above case, SWIFT, C. J., says the word "paying," according to all the authorities, clearly imports a condition. There is no gift or legacy to the daughters. No right is created in their favor by the will, nor are any words used which can be construed to imply such intent. It is, then, a conditional devise. The deviser has given the land to his sons, on condition that they pay three hundred dollars to each of his daughters within

one year after his decease. To entitle them to the land, they are bound literally to perform the condition on which it was given, and pay the money by the time prescribed. Having failed to do this they have no right to the land under the devise. It reverts to the heirs of the deviser.

"Paying" and "to pay" in a will have been construed as creating a condition.

Crickmere v. Patterson, Cro. Eliz. 146 ;

2 Co. Litt. (19th ed.) 206b ;

The case of *Crickmere v. Patterson* was this : A man seized of certain lands, holden in socage, had issue, two daughters, A and B, and devised all his lands to A and her heirs, to pay unto B a certain sum of money, at a certain day and place. The money was not paid ; and it was adjudged that these words, "to pay," etc., did amount in a will to a condition ; and the reason was for that the land was devised to A for that purpose ; otherwise B, to whom the money was appointed to be paid, would be remediless ; and the lessee of B upon an actual ejectment recovered the moiety of the land against A. The words "to pay," in the preceding case, are precisely equivalent to the word "paying" in

These interests may be said to be more properly qualifications of other estates, than a distinct species of estate themselves.¹ Lord Mansfield has said that at common law the only method of modification of estates was by annexing conditions.²

SEC. 1875. **Nature of conditional estate.**—The annexation of conditions, either precedent or subsequent, will not prevent the alienation of the estate or its disposition by devise. The only effect such conditions have is to cause the alienee or devisee to take the estate subject to the condition of failure or forfeiture.³ The presence of the condition does not alter the character of the estate, or determine whether it is of the degree of a freehold or not.⁴ Any one interested in the condition in the deed or devise, or in any land to which it relates, may perform this condition;⁵ but conditions subsequent may defeat the estate, where they depend upon the happening of a specified event.⁶ For this reason, while conditions precedent are favored in law, conditions subsequent are not.⁷

SEC. 1876. **Same—Assignment.**—Conditions subsequent inure to the benefit of the grantor and those claiming

the one before the court. In *Mary Portington's Case*, 10 Co. 41; *Boraston's Case*, 3 Co. 21; *Fox v. Carlyne*, Cro. Eliz. 454; and *Wellock v. Hammond*, Cro. Eliz. 204, the word "paying" in a will was considered as creating a condition, or limitation, as should best effectuate the intent of the testator. In the case of *Crickmere v. Patterson*, the words "to pay," etc., were decided to import a condition, and this construction gave a sufficient remedy. But in *Wellock v. Hammond*, the expression, paying forty shillings to each of his brothers and sisters," was adjudged a limitation; for if it were considered a condition, there was in that case no remedy for the money. And in *Mary Portington's Case*, it is said, "this word, 'paying,' shall amount to a limitation in a will by con-

struction, because in law it is not any word, either of condition or limitation; and therefore in a will it shall serve as well for the one as for the other, to supply the intent of the devisor."

¹ 2 Bl. Com. 153.

² *Doe v. Hutton*, 3 Bos. & P. 654.

³ *Taylor v. Sutton*, 15 Ga. 103; s.c. 60 Am. Dec. 682;

Wilson v. Wilson, 38 Me. 18; s.c. 61 Am. Dec. 227;

Underhill v. Saratoga and Washington R. R. Co., 20 Barb. (N. Y.) 445.

⁴ *Ludlow v. New York & H. R. Co.*, 12 Barb. (N. Y.) 440; 1 Co. Litt. (19th ed.) 42a.

⁵ *Wilson v. Wilson*, 38 Me. 18; s.c. 61 Am. Dec. 227.

⁶ *Taylor v. Sutton*, 15 Ga. 103; s.c. 60 Am. Dec. 682.

⁷ *Stackpole v. Beaumont*, 3 Ves. 89, 96; s.c. 3 Rev. Rep. 52.

See: *Post*, §§ 1885, 1904.

under him, and they alone can take advantage of them.¹ This is on the principle that in all cases of personal contracts, even before breach of condition, neither party can assign without the consent of the other.² This condition could not be aliened or assigned by the devisee, and does not pass with a grant of the reversion.³ In those cases, however, where the condition is an implied condition, or a condition in law, the right of entry is alienable and assignable, being considered more in the nature of an incident to the right of property than as a separate and independent chose in action.⁴ The common-law rule against assignments of the right of entry was restricted by the statute of Henry VIII.⁵ to freehold estates upon condition,⁶ and did not reach express conditions, which could be devised with the reversion, and the devisee and his heirs enter for breach thereof.⁷ This appears to be the rule in Massachusetts,⁸ though probably not elsewhere in this country.⁹

¹ See: *Post*, § 1901, *et seq.*

² *Bryant v. Erskine*, 56 Me. 571;

Bryant v. Erskine, 55 Me. 157;

Cole v. Lake Co., 54 N. H. 285;

Rollins v. Riley, 44 N. H. 14;

Bethlehem v. Annis, 40 N. H. 34;

s.c. 77 Am. Dec. 700.

³ *Smith v. Brannon*, 13 Cal. 107;

Warner v. Bennett, 31 Conn. 468, 478;

Norris v. Milner, 20 Ga. 563;

Throp v. Johnson, 3 Ind. 343;

Cross v. Carson, 8 Blackf. (Ind.)

138; s.c. 44 Am. Dec. 742;

Hooper v. Cummings, 45 Me. 359;

Guild v. Richards, 82 Mass. (16 Gray) 309;

Gray v. Blanchard, 25 Mass. (8 Pick.) 284;

Gilbert v. Peteler, 38 N. Y. 165;

s.c. 38 Barb. (N. Y.) 488;

Nicoll v. N. Y. & Erie R. R., 12 Barb. (N. Y.) 461; s.c. 12 N. Y. 132;

2 Co. Litt. (19th ed.) 214a.

⁴ 2 Co. Litt. (19th ed.) 214a.

⁵ 32 Hen. VIII., c. 34.

⁶ *Plumleigh v. Cook*, 13 Ill. 669;

Trask v. Wheeler, 89 Mass. (7 Allen) 107, 111;

Burden v. Thayer, 44 Mass. (3

Met.) 76; s.c. 37 Am. Dec. 117;

Van Rensselaer v. Ball, 19 N. Y. 100, 102, aff'g 27 Barb. (N. Y.) 104;

Nicoll v. N. Y. & Erie R. Co., 12 Barb. (N. Y.) 461; s.c. 12 N. Y. 132;

Lewes v. Ridge, Cro. Eliz. 863;

Fenn v. Smart, 12 East 444;

2 Co. Litt. (19th ed.) 215a.

⁷ See: *Jones v. Roe*, 3 Durnf. & E. (3 T. R.) 88; s.c. 1 H. Bl. 30; 1 Rev. Rep. 656;

Avelyn v. Ward, 1 Ves. Sr. 422.

⁸ *Austin v. Cambridgeport Parish*, 38 Mass. (21 Pick.) 215;

Clapp v. Stoughton, 27 Mass. (10 Pick.) 463;

Hayden v. Stoughton, 22 Mass. (5 Pick.) 528.

⁹ See: *Southard v. Central R. Co.*, 26 N. J. L. (2 Dutch.) 21;

Cornelius v. Ivins, 25 N. J. L. (1 Dutch.) 376, 386.

See: *Nicoll v. N. Y. & Erie R. R.*, 12 N. Y. 121; s.c. 12 Barb. (N. Y.) 461;

Henderson v. Hunter, 59 Pa. St. 335, 341;

Webster v. Cooper, 55 U. S. (14 How.) 488, 501; bk. 14 L. ed. 510.

SEC. 1877. **Distinguished from a trust.**—In practice it is important to distinguish an estate on condition from a trust, for the reason that a breach of a condition destroys the estate in the one instance, and forever thereafter deprives the party of the gift; but where the limitation creates a trust which those who take the estate are bound to perform, in case of breach a court of equity will interpose at the instance of the beneficiary¹ and enforce the performance.² The determination of whether the condition is annexed to the estate or creates a trust, depends upon the ascertained intention of the testator. In a proper case, the estate will be declared to be held upon trust instead of upon condition, notwithstanding the fact that the word “provided” or others of similar import are used.³ In speaking of conditions, Mr. Sugden observes, that what by the old law was deemed a devise upon condition, would now, perhaps, in almost every case, be construed a devise in fee upon trust, and, by this construction, instead of the heir taking advantage of the condition broken, the *cestui que trust* can compel an observance of the trust by a suit in equity.⁴

¹ See: *Ante*, § 1787.

² *Stanley v. Colt*, 72 U. S. (5 Wall.) 119; bk. 18 L. ed. 502.

³ *Stanley v. Colt*, 72 U. S. (5 Wall.) 119; bk. 18 L. ed. 502.

⁴ 1 Sugd. on Pow. (7th Lond. ed.) 123.

This observation of Mr. Sugden has been approved in *Wright v. Wilkins*, 3 L. T. Rep. N. S. 507.

“Provided” is a technical word and has always been used to create an estate upon condition to be divested by failure to perform the acts specified.

Rich v. Hotchkiss, 16 Conn. 409, 419;

Lloyd v. Holly, 8 Conn. 491;

Judd v. Bushnell, 7 Conn. 204, 205;

Wheeler v. Walker, 2 Conn. 196;

Wright v. Tuttle, 4 Day (Conn.) 313;

Marston v. Marston, 47 Me. 495;

Hooper v. Cummings, 45 Me. 359;

Rawson v. Inhabitants of School District No. 5 in Uxbridge, 89

Mass. (7 Allen) 125; s.c. 83 Am. Dec. 670;

Att’y-Gen. v. Merrimack Mfg. Co., 80 Mass. (14 Gray) 586;

Hadley v. Hadley Mfg. Co., 70 Mass. (4 Gray) 140;

Hayden v. Stoughton, 22 Mass. (5 Pick.) 528;

Chapin v. School District, 35 N. H. 445;

Wiggin v. Berry, 22 N. H. (2 Fost.) 114;

Caw v. Robertson, 5 N. Y. 125, rev’g 3 Barb. (N. Y.) 410;

Pickle v. McKissick, 21 Pa. St. 232;

McKissick v. Pickle, 16 Pa. St. 140;

Tattersall v. Howell, 2 Meriv. 26.

Same—Similar expressions have been held to create a condition in such cases.

Scott v. Stipe, 12 Ind. 74;

Princeton v. Adams, 64 Mass. (10 Cush.) 129;

Cong. Soc. v. Stark, 34 Vt. 243;

Castleton v. Langdon, 19 Vt. 210.

SEC. 1878. **Distinguished from conditional limitation.**—A distinction is to be observed between a condition that defeats an estate, but requires a re-entry, and a limitation which determines the estate *ipso facto* without entry.¹ The first determines an estate after breach upon entry or claim by the grantor or those claiming under him.² The latter marks the period of determination of the estate without any act on the part of him who has the following expectant estate.³ Thus the devise of an estate to a wife during her widowhood is a limitation expressive of the duration of the estate, and not a condition, and the estate is determined *ipso facto* by her subsequent marriage.⁴ Of the first, advantage cannot be taken by a stranger; it is otherwise, however, of the second. In the first there remains in the grantor a vested right reserved in him of a present existing interest, which is transmissible to his heirs;⁵ while in the second the whole interest of the grantor passes at once, creating an estate to arise and vest in another at a future and uncertain period, upon the happening of a specified contingency.⁶

SEC. 1879. **Kinds of conditions.**—The conditions attached to estates are divided into different classes, as follows: As to nature, into (1) express, or in deed, and (2) implied, or in law; as to time, conditions are divided into those which are (1) precedent, and (2) subsequent.

SEC. 1880. **Same—Express, or in deed.**—Where the conditions attached to an estate are designated in the in-

¹ 2 Bl. Com. 155;

2 Cruise Dig. (4th ed.) 37.

² Bowen v. Bowen, 18 Conn. 535.

See: Post, § 1899.

³ Coppage v. Alexander's Heirs, 2 B. Mon. (Ky.) 313, 316; s.c. 38 Am. Dec. 153;

Ashley v. Warner, 77 Mass. (11 Gray) 43;

Proprietors of the Church in Battle Square v. Grant, 69 Mass. (3 Gray) 147;

Portington's Case, 10 Co. 42.

⁴ Coppage v. Alexander's Heirs, 2 B. Mon. (Ky.) 313, 316; s.c. 38 Am. Dec. 153.

⁵ Hooper v. Cummings, 45 Me. 359; Proprietors of the Church in Battle Square v. Grant, 69 Mass. (3 Gray) 147;

Cornelius v. Ivins, 26 N. J. L. (2 Dutch.) 376, 386;

Nicoll v. N. Y. & Erie R. Co., 12 N. Y. 127, 139, aff'd 12 Barb. (N. Y.) 460.

⁶ Proprietors of the Church in Battle Square v. Grant, 69 Mass. (3 Gray) 147;

Portington's Case, 10 Co. 42.

See: Mayor of N. Y. v. Stuyvesant, 17 N. Y. 34.

strument, they are said to be express.¹ Thus the conveyance of land on the condition that the grantee shall keep a saw-mill and a grist-mill doing business on the premises, is an express condition attached to the grant, and if the grantee fails to perform the condition he forfeits the estate.² Such an instrument creates a conditional fee,³ determinable upon the failure of the grantee to keep the mills running.⁴ And where land is leased upon a reserved rent payable on a day certain, conditioned that if it be not paid on that day the lessor may re-enter, the instrument creates an estate held upon an express condition, defeasible upon failure to perform.⁵

SEC. 1881. Same—Implied, or in law.—Where a condition is impliedly annexed to an estate, although no condition is found in the express words of limitation, it is called an implied condition.⁶ Thus, at common law, to the grant of every estate is annexed, by law, a condition implied, that the grantee shall not commit felony or treason. And Lord Coke says, “There is a condition in law an-

¹ 2 Co. Litt. (19th ed.) 215 ;

4 Kent's Com. (13th ed.) 121.

See : *Sperry's Lessee v. Pond*, 5 Ohio 387, 389 ; s.c. 24 Am. Dec. 296 ;

Bear v. Whisler, 7 Watts (Pa.) 144.

It is said in *Wheeler v. Walker*, 2 Conn. 196 ; s.c. 7 Am. Dec. 264, that “an estate on condition expressed in the grant or devise itself is where the estate granted has a qualification annexed whereby the estate shall commence, be enlarged, or defeated upon performance or breach of such qualification or condition.”

See : *Laberee v. Carleton*, 53 Me. 211.

² *Sperry's Lessee v. Pond*, 5 Ohio 387, 389 ; s.c. 24 Am. Dec. 296.

³ See : *Ante*, 431, *et seq.*

⁴ The failure to keep either the grist mill or the saw mill will be a breach of the condition and work a forfeiture of the estate.

See : *Sperry's Lessee v. Pond*, 5 Ohio 387, 389 ; s.c. 24 Am. Dec. 296.

⁵ *Van Rensselaer v. Ball*, 19 N. Y.

100, aff'g 27 Barb. (N. Y.) 104 ; *Hickman v. Cantrell*, 9 Yerg. (Tenn.) 172 ; s.c. 30 Am. Dec. 396.

Right of re-entry at common law was confined to the grantor and his heirs.

Nicoll v. The N. Y. & E. R. Co., 12 N. Y. 121, aff'g 12 Barb. (N. Y.) 460 ;

2 Co. Lit. (19th ed.) 214b ;

4 Kent Com. (13th ed.) 127.

In New York, however, such an estate is made admissible with the rent by statute.

Van Rensselaer v. Ball, 19 N. Y. 100, aff'g 27 Barb. (N. Y.) 104.

An annual payment reserved upon the conveyance of land was, at common law and independent of tenure or a reversion in the grantor, rent for which the right to re-enter existed when provided for by the deed.

Van Rensselaer v. Ball, 19 N. Y. 100, aff'g 27 Barb. (N. Y.) 104.

⁶ *Vanhorne's Lessee v. Dorrance*, 2 U. S. (2 Dall.) 317 ; bk. 1 L. ed. 391 ;

2 Bl. Com. 152 ;

2 Co. Litt. (19th ed.) 251b.

nexed to every estate tail after possibility of issue extinct, estate by the curtesy, in dower, for life or years, that if the tenants of these estates alien in fee¹ they shall forfeit the estate. As to conditions in law, founded upon statutes, it is enacted by the several laws against mortmain, that the grantee of an estate in fee shall not alien it to an ecclesiastical corporation. And by the Statute of Marlbridge, tenants for life and years hold their estates upon condition not to commit waste.”

SEC. 1882. **Same — Precedent condition.**—A condition precedent is one which must take place, or be performed, before the estate will vest, be enlarged or discontinued.² Such conditions, if possible and lawful, must be strictly, literally, and punctually performed.³ It is a known maxim, that where the estate is to arise upon a condition precedent, it cannot vest until that condition is performed, and this has been so strongly adhered to, that even where the condition has become impossible, no estate or interest grew thereupon. Where a condition copulative precedes an estate, the whole must be performed before the estate can arise; or where an act is previous to any estate, and that act consists of several particulars, every particular must be performed before the estate can vest or take effect.⁴

SEC. 1883. **Same — Same — Copulative condition.**—Where the condition precedent is copulative, consisting of several branches, the entire condition must be performed before the estate can vest. The grantee in a conditional deed,

* **Alienations by feoffment** are covered by this doctrine, and not deeds of bargain and sale.

See: *Ante*, §§ 541, *et seq.*, 591, 786, 918, 1269.

* *Moore v. Sanders*, 15 S. C. 440;

Vanhorne's Lessee v. Dorrance, 2 U. S. (2 Dall.) 304, 317; bk. 1 L. ed. 391;

2 Bl. Com. 154;

2 Co. Litt. (19th ed.) 201a.

See: *Hihn v. Peek*, 30 Cal. 280;

Hayden v. Stoughton, 22 Mass. (5 Pick.) 528;

Towle v. Remsen, 70 N. Y. 303;

Towle v. Palmer, 1 Abb. Pr. (N.

Y.) N. S. 81; s.c. 1 Robt. (N. Y.) 437;

Cook v. Wardens of St. Paul's Church, 5 Hun (N. Y.) 293;

Tompkins v. Elliot, 5 Wend. (N. Y.) 496, 497.

* *Baltimore & O. R. Co. v. Polly*, 14 Gratt. (Va.) 447;

Vanhorne's Lessee v. Dorrance, 2 U. S. (2 Dall.) 304, 317; bk. 1 L. ed. 391.

* *Vanhorne's Lessee v. Dorrance*, 2 U. S. (2 Dall.) 304, 317; bk. 1 L. ed. 391;

2 Co. Litt. (19th ed.) 206, 218.

if he refuses or neglects to perform all the conditions upon which his title depends, forfeits his estate none the less because he may have paid some portion of its value. The estate reverts to the grantor as a matter of legal right, and, if he sees fit to enter for the breach of condition, and to claim a forfeiture, the estate reverts to him to all intents and purposes, without regard to the part performance or outlays which the conditional grantee may have made on account of it.¹

SEC. 1884. **Same—Same—Particular estate.**—Where a particular estate is limited, with the condition that upon the performance of a certain act, or the happening of a certain event, the person to whom the estate is limited, shall thereupon have a larger estate than what was originally limited to him, such a condition is precedent, and good under certain circumstances.²

SEC. 1885. **Same—Subsequent condition.**—The general rule is that where the act or condition required do not necessarily precede the vesting of the estate, but may accompany or follow it; and if the act may as well be done after as before the vesting of the estate, or if from the nature of the act to be performed, and the time required in its performance, it is evidently the intention of the parties that the estate shall vest and the grantee perform the act after taking possession,—the condition is subsequent.³ Conditions subsequent are of such a nature

¹ Rowell v. Jewett, 71 Me. 408.

See: Vanhorne's Lessee v. Dor-
rance, 2 U. S. (2 Dall.) 304;
bk. 1 L. ed. 391.

² 2 Cruise Dig. (4th ed.) 3.

³ Hayden v. Inhabitants of Stough-
ton, 22 Mass. (5 Pick.) 528;

Nicoll v. N. Y. & E. R. Co., 12 N.
Y. 130; aff'g 12 Barb. (N. Y.)
460;

Underhill v. Saratoga & Wash-
ington R. Co., 20 Barb. (N. Y.)
455;

Barruso v. Madan, 2 John. (N. Y.)
145;

Rogan v. Walker, 1 Wis. 527;

Finlay v. King, 28 U. S. (3 Pet.)
343, 374; bk. 7 L. ed. 701.

See: Rollins v. Riley, 44 N. H. 9;

McCullough v. Cox, 6 Barb.
(N. Y.) 386.

In Hayden v. Inhabitants of
Stoughton, 22 Mass. (5 Pick.)
528, there was a devise of real
estate to a town for the pur-
pose of building a schoolhouse,
provided it should be built
within a given distance of the
place where the meeting-house
stood. The court held that
this was a devise upon a con-
dition subsequent; that the
estate vested accordingly in
the devisees; that it was for-
feited by a neglect for twenty
years to comply with the con-
dition; and that it passed to
the residuary devisee, and not

that when they do take place, they render the estate already vested liable to be defeated,¹ and for that reason are not favored in law,² and are always strictly construed by the courts.³ We shall hereafter see⁴ that, at common law, conditions subsequent can only be reserved for the benefit of the grantor and his heirs, and no other person can take advantage of a breach.⁵

SEC. 1886. **How created—Form of words.**—No particular words or form of technical expression is necessary to constitute a condition, either precedent or subsequent;⁶ and whether it shall be construed as precedent or subsequent will depend upon the fair construction of the contract, and the plain intention of the parties.⁷ The

to the heir, there being an interest in the testator not specifically devised, depending upon the performance or non-performance of the condition

¹ 2 Bl. Com. 154;

2 Co. Litt. (19th ed.) 201a.

See: *Hihn v. Peek*, 30 Cal. 280;

Hayden v. Stoughton, 22 Mass. (5 Pick.) 528;

Towle v. Remsen, 70 N. Y. 303;

Towle v. Palmer, 1 Abb. Pr. (N. Y.) N. S. 81;

Cook v. Wardens of St. Paul's Church, 5 Hun (N. Y.) 293;

Tompkins v. Elliot, 5 Wend. (N. Y.) 496, 497;

Van Horne's Lessee v. Dorrance, 2 U. S. (2 Dall.) 304, 317; bk. 1 L. ed. 391.

² *Taylor v. Sutton*, 15 Ga. 103; s.c. 60 Am. Dec. 682.

³ *Wheeler v. Walker*, 2 Conn. 196, 200; s.c. 7 Am. Dec. 264;

Wilson v. Galt, 18 Ill. 431;

Hooper v. Cummings, 45 Me. 359;

Bradstreet v. Clark, 38 Mass. (21 Pick.) 389;

Gadberry v. Sheppard, 27 Miss. 203;

Southard v. Central R. Co., 26 N. J. L. (2 Dutch.) 13;

Nicoll v. New York & Erie R. Co., 12 N. Y. 131, aff'g 12 Barb. (N. Y.) 460;

Sharon Iron Co. v. Erie, 41 Pa. St. 341;

4 Kent Com. (13th ed.) 129.

⁴ See: *Post*, § 1895.

⁵ *Nicoll v. New York & Erie R. Co.*, 12 N. Y. 121, aff'g s.c. 12 Barb. (N. Y.) 460.

⁶ *Hotham v. East India Co.* 1 Durnf. & E. (1 T. R.) 638, 645; s.c. 1 Rev. Rep. 333.

⁷ *Houston v. Spruance*, 4 Harr. (Del.) 117;

Robbins v. Gleason, 47 Me. 259;

Lowell Meeting-house v. Hilton, 77 Mass. (11 Gray) 407;

Gardiner v. Corson, 15 Mass. 500;

Nicoll v. New York & Erie R. Co., 12 N. Y. 121, aff'g 12 Barb. (N. Y.) 460;

Underhill v. Saratoga & W. R. Co., 20 Barb. (N. Y.) 455;

Finlay v. King's Lessee, 28 U. S. (3 Pet.) 346, 374; bk. 7 L. ed. 701;

Jones v. Barclay, 2 Doug. 691;

Hotham v. East India Co., 1 Durnf. & E. (1 T. R.) 638, 645;

s.c. 1 Rev. Rep. 333;

Thorp v. Thorp, 12 Mod. 464;

Turner v. Teddult, 2 Younge & C. 225;

4 Kent Com. (13th ed.) 124.

Whether a condition be precedent or subsequent, depends on the intention of the parties; if the act do not necessarily precede the vesting of the estate, but may accompany or follow it, or if it may be done after as before the vesting of the estate, or if, from the nature of the act to be performed and the time required for its performance, it is evidently the inten-

intention of the parties to the instrument must be determined by the court from the words of the instrument itself, and should not be submitted to a jury to determine.¹ Words which imply a condition in the grant are various, and their operation depends upon the sense which they carry in the particular situation in which they are placed.² In a deed, land granted to a person "if it shall so happen," "on condition," "provided," or "provided always," or "so that he pay to another a specified sum within specified time," and the like, have been held to vest a conditional estate in the grantee.³ A right of entry reserved in a deed for a breach of the covenant creates an estate upon condition.⁴ In case of devise the phrases above mentioned do not necessarily create an estate on condition, where it is clearly indicated by the text that such was not the intention of the testator;⁵ but the words "to pay" in a will have been considered as constituting a condition.⁶

SEC. 1887. **At what time created—As to things executed.**—As to things executed, a condition must be created and annexed to the estate at the time of the making thereof, not at any subsequent time. Consequently where a condition is made in a separate deed it must be sealed and

tion of the parties that the estate shall vest, and the grantee perform the act, after taking the possession, then the condition is subsequent.

Underhill v. Saratoga & Washington R. Co., 20 Barb. (N. Y.) 455.

¹ *Hammond v. Port Royal & A. R. Co.*, 15 S. C. 10.

² *Gibert v. Peteler*, 38 N. Y. 165, 168, aff'g 38 Barb. (N. Y.) 488; *Bagshaw v. Spencer*, 1 Ves. Sr. 147.

³ *Wheeler v. Walker*, 2 Conn. 196, 201; s.c. 7 Am. Dec. 264;

Marshall Co. High School Co. v. Iowa Evangelical Synod School, 28 Iowa 360; 2 Co. Litt. (19th ed.) 203a.

⁴ *Wheeler v. Walker*, 2 Conn. 196, 201; s.c. 7 Am. Dec. 264;

Supervisors, etc., v. Patterson, 50 Ill. 119;

Ayer v. Emery, 96 Mass. (14 Allen) 67, 69;

Rawson v. Inhabitants of School District No. 5 in Uxbridge, 89 Mass. (7 Allen) 125; s.c. 83 Am. Dec. 670;

Moore v. Pitts, 53 N. Y. 85;

Watters v. Bredin, 70 Pa. St. 235.

⁵ *Wheeler v. Walker*, 2 Conn. 196, 201; s.c. 7 Am. Dec. 264;

Lindsey v. Lindsey, 45 Ind. 552;

Austin v. Cambridgeport Parish, 38 Mass. (21 Pick.) 215;

Hayden v. Stoughton, 22 Mass. (5 Pick.) 528;

Stuyvesant v. Mayor, etc., of New York, 11 Paige Ch. (N. Y.) 414, 427.

⁶ *Crickmere v. Paterson*, Cro. Eliz. 146.

See: *Wheeler v. Walker*, 2 Conn. 196, 201; s.c. 7 Am. Dec. 264. :

delivered at the same time with the principal deed ;¹ but it has been held that a condition written upon the back of the deed, and executed by the grantee, constitutes a conveyance upon condition, where there is nothing in the instrument to show a contrary intention.² But a deed absolute on its face will not be avoided by a condition or defeasance resting upon a parol agreement.³

SEC. 1888. **Same—As to things executory.**—As to things executory, such as annuities, rents, leases, and the like, the grant may be restrained by a condition annexed thereto, by the consent of both parties, after the execution of the instrument of conveyance.⁴

SEC. 1889. **To what estates annexed.**—Conditions precedent and subsequent may be annexed to any species of estate or interest in real property, whether it be an estate in fee-simple, in fee-tail, for life or for years, or in any lands or tenements.⁵

SEC. 1890. **Valid conditions—Conditions precedent.**—In the case of condition precedent, inasmuch as the estate does not vest until the performance of the condition, if the condition is unlawful or impossible in performance, the dependent estate fails and the grant or devise becomes wholly void, and no estate vests.⁶ Thus conditions in restraint of marriage are generally void, as being against public policy and good morals, and the grant or devise becomes wholly void, and no estate vests.⁷ But it

¹ 2 Co. Litt. (19th ed.) 236b ;

1 Inst. 236b ;

Shep. Touch. 126.

² *Barker v. Cobb*, 36 N. H. 344.

³ *Rogers v. Sebastian*, 21 Ark. 440.

⁴ 2 Co. Litt. (19th ed.) 237a ;

1 Inst. 237a ;

2 Prest. Con. 199 ;

Shep. Touch. 126, 396.

⁵ 2 Bl. Com. 152 ;

2 Co. Litt. (19th ed.) 201a.

⁶ *Jones v. Doe*, 2 Ill. 276 ;

Martin v. Ballou, 13 Barb. (N. Y.) 119 ;

Mizell v. Burnett, 4 Jones (N. C.)

L. 249 ; s.c. 69 Am. Dec. 744 ;

Taylor v. Mason, 22 U. S. (9

Wheat.) 325 ; bk. 6 L. ed. 101 ;

Vanhorne's Lessees v. Dorrance,

2 U. S. (2 Dall.) 317 ; bk. 1 L.

ed. 391 ;

Harvey v. Aston, 1 Atk. 374 ;

Bertie v. Falkland, 2 Freem. Ch. 223 ;

2 Co. Litt. (19th ed.) 206.

⁷ *Taylor v. Sutton*, 15 Ga. 103 ; s.c.

60 Am. Dec. 682 ;

Waters v. Tazewell, 9 Md. 291 ;

Blackstone Bank v. Davis, 38

Mass. (21 Pick.) 42 ; s.c. 32 Am.

Dec. 241 ;

Hall v. Tuffts, 35 Mass. (18 Pick.) 455 ;

Gadberry v. Sheppard, 27 Miss. 203 ;

is otherwise where the prohibition is not absolute; as where an estate is granted to a widow during widowhood.¹ Where the condition precedent requires the devisee or grantee to marry a specified person, it is thought that an offer to marry the required person, and a refusal on his or her part, will be sufficient to satisfy the condition, on the ground that the testator or grantor intended to limit the condition by the unexpressed words, "if the consent of the designated party to such marriage can be obtained."

SEC. 1891. Same—Conditions subsequent.—Conditions subsequent in a deed are valid whenever their performance is not impossible, or do not afterwards become so by the act of God or of the grantor, and they are not contrary to law nor repugnant to the deed; otherwise they

- Williams v. Cowden, 13 Mo. 211; s.c. 53 Am. Dec. 143;
 De Peyster v. Michael, 6 N. Y. 467; s.c. 57 Am. Dec. 470;
 Schermerhorn v. Negus, 1 Den. (N. Y.) 448;
 Walker v. Vincent, 19 Harris (Pa.) 369;
 Maddox v. Maddox, 11 Gratt. (Va.) 804;
 Doe d. Anglesea v. Church Wardens, 6 Ad. & E. (6 Q. B.) 107, 114; s.c. 151 Eng. C. L. 107;
 Bertie v. Falkland, 2 Freem. Ch. 222;
 Willis v. Hiscox, 4 Myl. & Cr. 197;
 Brandon v. Robinson, 18 Ves. 429; s.c. 11 Rev. Rep. 226;
 Scott v. Tyler, 2 White & Tudor's Lead. Cas. 429.
¹ Phillips v. Mebury, 7 Conn. 568;
 Harmon v. Brown, 58 Ind. 207;
 Vance v. Campbell, 1 Dana (Ky.) 229;
 Coppage v. Alexander's Heirs, 2 B. Mon. (Ky.) 313; s.c. 38 Am. Dec. 153;
 Gough v. Manning, 26 Md. 347;
 Binnerman v. Weaver, 8 Md. 517;
 McCullough's Appeal, 12 Pa. St. 197;
 Commonwealth v. Stauffer, 10 Pa. St. 350; s.c. 51 Am. Dec. 489;
 Little v. Birdwell, 21 Tex. 597; s.c. 73 Am. Dec. 242;
 2 Co. Litt. (19th ed.) 42a.
- In those cases, however, where the devise is to a widow for life or during widowhood, the first gives her an estate for life, and the second must be construed as a condition subsequent and therefore void.
 Stillwell v. Knapper, 69 Ind. 558; s.c. 35 Am. Rep. 240;
 Coon v. Bean, 69 Ind. 474;
 Binnerman v. Weaver, 8 Md. 517;
 Dumey v. Schoeffler, 24 Mo. 170; s.c. 69 Am. Dec. 422;
 Walsh v. Mathews, 11 Mo. 131;
 Lloyd v. Lloyd, 2 Sim. N. S. 255.
 Where the restriction to marry is limited for a particular time only, during coverture or minority, or directed against a specified person or class of persons, the condition is valid and will be enforced.
 Shackelford v. Hall, 19 Ill. 212;
 Stewart v. Brady, 3 Bush (Ky.) 623;
 Hunt v. Wright, 47 N. H. 396; s.c. 93 Am. Dec. 451;
 Plumb v. Tubbs, 41 N. Y. 442;
 McWilliams v. Nicly, 2 Serg. & R. (Pa.) 507, 513; s.c. 7 Am. Dec. 654;
 Phillips v. Ferguson, 85 Va. 509; s.c. 8 S. E. Rep. 241; 17 Am. St. Rep. 78;
 Attwater v. Attwater, 18 Beav. 330;
 Large's Case, 2 Leon. 82;
 2 Co. Litt. (19th ed.) 223a.

are void, and the grantee takes an absolute estate.¹ Thus a condition in a deed conveying the fee that the conveyance is to be void upon failure to pay the purchase money is valid;² so also is a condition annexed to a grant of land that the grantor should be allowed to remain in possession, and that the grantee should cultivate the land and furnish the grantor with one-half it produced and pay him a certain sum of money;³ or that the grantee shall maintain the grantor and pay his debts⁴ and the like.

SEC. 1892. **Void conditions—Conditions precedent.**—Conditions which operate as restrictions upon the use and enjoyment of fee simple estates are void when arbitrary, unreasonable or inconsistent with the nature of the estate granted;⁵ as that the feoffee shall not commit waste,⁶ or

¹ Taylor v. Sutton, 15 Ga. 103; s.c. 60 Am. Dec. 682.

² Taylor v. Sutton, 15 Ga. 103; s.c. 60 Am. Dec. 682.

See: Frost v. Butler, 7 Me. (7 Greenl.) 225; s.c. 22 Am. Dec. 199;

Jackson v. Topping, 1 Wend. (N. Y.) 388; s.c. 19 Am. Dec. 515.

³ Frost v. Butler, 7 Me. (7 Greenl.) 225; s.c. 22 Am. Dec. 197.

⁴ Jackson v. Topping, 1 Wend. (N. Y.) 388; s.c. 19 Am. Dec. 515.

⁵ Van Rensselaer v. Ball, 19 N. Y. 100, 103, aff'g 27 Barb. (N. Y.) 104.

New York doctrine—Van Rensselaer v. Ball.—Judge DENIO says in the case of Van Rensselaer v. Ball, *supra*, that “the books which treat of such estates do, indeed, state that a condition repugnant to the nature of the estate granted is void, and the instances given are of feoffments, or conveyances in fee, by bargain and sale, with a condition that the feoffee or grantee shall not alien; and they say that even this could be done before the statute of *Quia Emptores*, because the feoffor had a possibility of reverter, by the expiration of the feudal investiture upon the failure of heirs of the tenant. 2 Co. Litt. 223a. The argument in the opinion of the chief judge, in *De Peyster v. Michael*,

6 N. Y. 467, consisted in showing that a condition for the payment of one-quarter part of the value of the land and improvements upon each sale by the grantee, or those who should succeed to his estate, was a restraint upon alienation repugnant to the nature of a fee-simple, within the sense of the authorities; and that, although this could be done where there was a reversion, as upon the grant of an estate for life or years, or a possibility of reverter, as upon a feoffment before the statute of *Quia Emptores*, it was unlawful in this state, in respect to a conveyance in fee, after the re-enactment of that statute by the Legislature. It seems to me that there is nothing in the reasoning of that opinion to encourage one to question the validity of a clause of re-entry for non-payment of rent in a conveyance in fee, even though the chief judge had not taken care to state, as he has done, that the principles which he laid down would leave to the grantee in these conveyances, and his representatives, the full benefit of the remedy or re-entry for the enforcement of their right to the rent.”

⁶ Brooke's Abr. Cond. 57, fol. 149.

that he shall not receive the profits,¹ or that he shall not devise the estate to charitable purposes, or the rents be raised ;² also that the estate shall not be appropriated to the payment of the grantee's debts.³ That is, there must not be an exception to everything or the substance of the gift ; if there is, it is void, and the estate granted will stand unaffected by such conditions.⁴

SEC. 1893. **Same—Conditions subsequent.**—In the case of conditions subsequent, where the condition is invalid for any reason, such invalidity will destroy the right of re-entry and forfeiture on the part of the grantor, and leave the estate in the grantee absolutely and free from all conditions.⁵

SEC. 1894. **Failure to perform condition—Effect.**—Where the condition is a condition precedent, the failure to perform will prevent the estate from attaching ; but where the condition is a condition subsequent, the estate is not defeated by the mere breach of the condition, except at the election of the parties to take advantage of the breach.⁶ That is, where the condition is valid and is broken the estate does not *ipso facto* revert to the donor or grantor and his heirs, or the person who takes by limi-

¹ Moore v. Savill, 2 Leon. 132 ; s. c. 1 Coke 206b.

² Attorney-General v. Master of Oath Hall, Jac. 381.

³ Blackstone Bank v. Davis, 38 Mass. (21 Pick.) 42 ; s. c. 32 Am. Dec. 241 ;

Brandon v. Robinson, 18 Ves. 429 ; s. c. 11 Rev. Rep. 226.

⁴ Blackstone Bank v. Davis, 38 Mass. (21 Pick.) 42 ; s. c. 32 Am. Dec. 241 ;

Moore v. Sanders, 15 S. C. 440.

⁵ Taylor v. Sutton, 15 Ga. 103 ; s. c. 60 Am. Dec. 682 ;

Jones v. Doe, 2 Ill. 276 ;

Blackstone Bank v. Davis, 38 Mass. (21 Pick.) 42 ; s. c. 32 Am. Dec. 241 ;

Merrill v. Emery, 27 Mass. (10 Pick.) 507 ;

Badlam v. Tucker, 18 Mass. (1 Pick.) 284, 389 ; s. c. 11 Am. Dec. 202 ;

Gadberry v. Sheppard, 27 Miss.

203, 205 ;

Hughes v. Edwards, 22 U. S. (9 Wheat.) 489 ; bk. 6 L. ed. 142 ;

Brandon v. Robinson, 18 Ves. 429 ; s. c. 11 Rev. Rep. 226 ;

Bradley v. Peixoto, 3 Ves. 324 ; s. c. 4 Rev. Rep. 7 ;

2 Co. Litt. (19th ed.) 206a.

⁶ Warner v. Bennett, 31 Conn. 468, 477 ;

Tallman v. Snow, 35 Me. 342 ;

Canal Co. v. Railroad Co., 4 Gill & J. (Md.) 121 ;

Hubbard v. Hubbard, 97 Mass. 188, 192 ; s. c. 93 Am. Dec. 75 ;

King's Chapel v. Pelham, 9 Mass. 501 ;

Willard v. Henry, 2 N. H. 120 ;

Ludlow v. N. Y. & Harlem R. Co., 12 Barb. (N. Y.) 440 ;

Phelps v. Chesson, 12 Ired. (N. C.) L. 194 ;

Webster v. Cooper, 55 U. S. (14 How.) 488, 501 ; bk. 14 L. ed. 510.

tation over, but requires an entry, or some action-equivalent thereto before and in order that the estate in the grantee be defeated.¹ If no such action is taken, and the person entitled to enter afterwards accept a performance, he is held to have waived the forfeiture.² In the case of a forfeiture of a lease for non-payment of rent, however; the rule is different. In that case there must be an acceptance of rent falling due after the breach of the condition, in order to constitute the acceptance a waiver.³

SEC. 1895. **Same—Who may enter for breach.**—At common law it was necessary for some party to enter upon the estate in order to work a forfeiture, and we have already seen⁴ that the only parties entitled to enter were the grantor and his heirs.⁵ At common law this entry could not be effected by simply bringing an action to recover the possession; but this has been changed so that at the present time an ordinary action of ejectment has the same effect as a technical entry at common law.⁶

¹ *Smith v. Brannan*, 13 Cal. 107;
Chalker v. Chalker, 1 Conn. 79;
 s.c. 6 Am. Dec. 206;
Norris v. Milner, 20 Ga. 563;
Reimer v. American Contract Co.,
 9 Bush (Ky.) 202;
Osgood v. Abbott, 58 Me. 73;
Lincoln & K. Bk. v. Drummond,
 5 Mass. 321;
Dewey v. Williams, 40 N. H. 222;
 s.c. 77 Am. Dec. 708;
Sperry v. Sperry, 8 N. H. 477;
Southard v. Central R. Co., 26 N.
 J. L. (2 Dutch.) 13;
Ruch v. City of Rock Island, 97
 U. S. 693; bk. 24 L. ed. 1101.

² *Chalker v. Chalker*, 1 Conn. 79;
 s.c. 6 Am. Dec. 206;

Coon v. Brickitt, 2 N. H. 163;
Jackson v. Cryslar, 1 John. Cas.
 (N. Y.) 125, 126.

³ *Jackson v. Allen*, 3 Cow. (N. Y.)
 220;

Hunter v. Osterhoudt, 11 Barb.
 (N. Y.) 33.

⁴ See: *Ante*, § 1885.

⁵ This right of entry is not an estate,
 not even a possibility of re-
 verter; it is simply a chose in
 action.

Cross v. Carson, 8 Blackf. (Ind.)
 138; s.c. 44 Am. Dec. 742;

Hooper v. Cummings, 45 Me
 359;

Merritt v. Harris, 102 Mass. 326
 328;

Gray v. Blanchard, 25 Mass. (8
 Pick.) 284;

Van Rensselaer v. Ball, 19 N. Y.
 100, aff'g 27 Barb. (N. Y.) 104;

Nichol v. N. Y. & Erie R. Co.; 12
 N. Y. 132; s.c. 12 Barb. (N. Y.)
 461;

De Peyster v. Michael, 6 N. Y.
 467, 506; s.c. 57 Am. Dec. 470;

Fonda v. Sage, 46 Barb. (N. Y.)
 109, 122; s.c. 48 N. Y. 173;

Shulenberg v. Harriman, 88 U. S.
 (21 Wall.) 346; bk. 22 L. ed.
 551;

2 Co. Litt. (19th ed.) 201a.

⁶ *Jackson ex d. Bronck v. Cryslar*,
 1 John. Cas. (N. Y.) 125;

Doe d. Harris v. Masters, 2 Barn.
 & C. 490; s.c. 9 Eng. C. L. 217;

2 Co. Litt. (19th ed.) 201a; 1
 Prest. Est. 46, 48, 50.

See: *Chalker v. Chalker*, 1 Conn.
 79; s.c. 6 Am. Dec. 206;

Osgood v. Abbott, 58 Me. 73;
Stearns v. Harris, 90 Mass. (8

Allen.) 597, 598;

Austin v. Cambridgeport Parish,
 38 Mass. (21 Pick.) 215, 224;

SEC. 1896. **Same—Same—After conveyance.**—The right of entry need not be reserved, but follows as a necessary incident to the condition, and passes therewith into whose-soever hands it may come;¹ consequently, where the grantor has conveyed all his interest in the premises to a third person, he will not be entitled to enter for condition broken.² The one entitled to insist on a forfeiture is the person who has purchased from the grantor, and he may waive the forfeiture³ and bring suit for damages for breach of the covenant, or pursue either remedy as he may elect.⁴

SEC. 1897. **Same — Apportionment.**—Apportionment of the condition between two or more assignees of separate portions of the reversion so as to entitle each to enter for a breach was not permissible under the English common laws, and in this country such an apportionment of the reversion destroys the right of re-entry.⁵

SEC. 1898. **Performance of condition.**—Where estates are given upon a condition precedent, that condition must be performed before the vesting of the estate,⁶ but that condition may be performed by any one who has an interest either in the condition or in the estate to which it relates.⁷ Whether the condition be either precedent or

Green v. Pettingill, 47 N. H. 375;
s.c. 93 Am. Dec. 444;

Sperry v. Sperry, 8 N. H. 477;

McKelway v. Seymour, 29 N. J. L. (5 Dutch.) 329;

Fonda v. Sage, 46 Barb. (N. Y.) 109, 123; s.c. 48 N. Y. 173;

Phelps v. Chesson, 12 Ired. (N. C.) L. 194;

Goodright v. Cator, Dougl. 480;

Jones v. Carter, 15 Mees. & W. 718;

Duppa v. Mayo, 1 Saund. 287c.

¹ *Bowen v. Bowen*, 18 Conn. 535;

Wheeler v. Walker, 2 Conn. 196,

201; s.c. 7 Am. Dec. 264;

Osgood v. Abbott, 58 Me. 73;

Gray v. Blanchard, 25 Mass. (8

Pick.) 284;

Jackson v. Allen, 3 Cow. (N. Y.)

220;

Jackson v. Topping, 1 Wend. (N.

Y.) 388; s.c. 19 Am. Dec. 515.

² *Gray v. Blanchard*, 25 Mass. (8

Pick.) 284;

Underhill v. Saratoga R. Co., 20

Barb. (N. Y.) 455;

Ruch v. City of Rock Island, 97

U. S. 693; bk. 24 L. ed. 1101.

³ See: *Post*, § 1902.

⁴ *Stuyvesant v. Mayor of N. Y.*, 11

Paige Ch. (N. Y.) 414.

⁵ *Cruger v. McLaury*, 41 N. Y. 219,

225, aff'g 51 Barb. (N. Y.) 642;

Doe d. De Rutzen v. Lewis, 5 Ad.

& El. 277; s.c. 31 Eng. C. L.

613;

Wright v. Burroughes, 3 Mann.

Gr. & S. 685, 700; s.c. 54 Eng.

C. L. 684;

2 Co. Litt. (19th ed.) 215a.

⁶ *Brost v. Simpson*, 90 Ala. 373; s.c.

7 So. Rep. 814.

⁷ *Wilson v. Wilson*, 38 Me. 18, 20;

s.c. 61 Am. Dec. 227;

Simonds v. Simonds, 44 Mass. (3

Met.) 558;

Vermont v. Society for the Prop.

subsequent, when once performed, it is thenceforth entirely gone, and the thing to which it was annexed becomes absolute and unconditional.¹

In performance of the condition attached to an estate, a distinction is made between conditions precedent and conditions subsequent. The former are liberally construed, and are to be performed according to the intention of the parties;² and where they consist of several parts united by copulatives the whole must be performed before an estate can arise under the condition.³ But conditions subsequent are strictly construed⁴ because failure to perform destroys the estate.⁵ The breach of a condition subsequent, however, does not *ipso facto* divest the estate and effect a reverter,⁶ but simply confers a right of entry upon the grantor or those claiming under him,⁷ which right may be waived.⁸ In those cases where the performance of the condition subsequent is impossible, the estate to which it is annexed becomes, by that event, absolute.⁹ Conditions subsequent are never favored in

agation of the Gospel, 2 Paine C. C. 546, 548; s.c. Fed. Cas., No. 16920.

See: *Ante*, § 1875.

Thus if a feoffee, upon condition to pay at Michaelmas twenty pounds, enfeoffs another person before that time, the second feoffee may perform the condition.

2 Cruise Dig. (4th ed.), c. 2, § 6.

¹ See: *Dickey v. McCullough*, 2 Watts & S. (Pa.) 88, 100;

2 Cruise Dig. (4th ed.) 27.

² *Merrifield v. Cobleigh*, 58 Mass. (4 Cush.) 178;

Ludlow v. N. Y. & Harlem R. Co., 12 Barb. (N. Y.) 440, 443;

Hogeboom v. Hall, 24 Wend. (N. Y.) 146;

2 Co. Litt. (19th ed.) 219b.

³ *Vanhorne's Lessees v. Dorrance*, 2 U. S. (2 Dall.) 304, 317; bk. 1 L. ed. 391;

Wood v. Southampton, 2 Freem. Ch. 186.

See: *Hasbrook v. Paddock*, 1 Barb. (N. Y.) 635;

Ante, § 1883.

⁴ *Laberee v. Carleton*, 53 Me. 211; *Merrifield v. Cobleigh*, 58 Mass. (4 Cush.) 178;

Ludlow v. New York & Harlem R. Co., 12 Barb. (N. Y.) 440, 444.

⁵ *Merrifield v. Cobleigh*, 58 Mass. (4 Cush.) 78;

Hogeboom v. Hall, 24 Wend. (N. Y.) 146;

Taylor v. Mason, 22 U. S. (9 Wheat.) 325; bk. 6 L. ed. 101.

⁶ *Cullen v. Sprigg*, 83 Cal. 56; s.c. 23 Pac. Rep. 222;

Norris v. Moody, 84 Cal. 143; s.c. 24 Pac. Rep. 37.

⁷ *Mower v. Kemp*, 42 La. An. 1007; s.c. 8 So. Rep. 830;

Neely v. Haskins, 84 Me. 386; s.c. 24 Atl. Rep. 882;

Haywood v. Kinney, 84 Mich. 591; s.c. 48 N. W. Rep. 170.

⁸ *Ludlow v. N. Y. & Harlem R. Co.*, 12 Barb. (N. Y.) 440;

Phoenix v. Commissioner of Emigration, 12 How. (N. Y.) 1, Pr. aff'g 1 Abb. (N. Y.) Pr. 466.

See: *Post*, § 1902.

⁹ *Merrill v. Emery*, 27 Mass. (10 Pick.) 507;

McLachlan v. McLachlan, 9 Paige Ch. (N. Y.) 534;

Hughes v. Edwards, 22 U. S. (9 Wheat.) 489; bk. 6 L. ed. 142;

Laughter's Case, 5 Co. 22; s.c. 2 Pr. Wms. 626.

law, and before an instrument will be held to create them, the language must be clear and conclusive.¹ Recent cases hold that a court of equity will not lend its aid to divest an estate for the breach of a condition subsequent.²

SEC. 1899. **Same—Time of performance.**—Where there is a specified time for the performance of a condition, it cannot be performed after that time has elapsed; but where there is no time fixed for such performance, it may be performed either during the lifetime of the person in whose favor it is reserved, or within a reasonable and convenient time thereafter, according to the circumstances of the case;³ and performance may be presumed from mere lapse of time.⁴ Where the person dies without performing the condition, the right to perform it is not transmitted to his heirs;⁵ but where a particular time has been appointed for the performance, and that time has not elapsed, the right to perform will descend to the heirs.⁶ In those cases where it appears from the instrument that prompt performance was intended, or from the nature of the case an early performance is necessary in order that the grantor may obtain the expected benefit from the condition, the grantee must perform within a reasonable time.⁷

Thomas v. Howell, 1 Salk. 170;
4 Kent Com. (13th ed.) 124-127;
2 Story Eq. Jur., (13th ed.) § 1304
et seq.

¹ Cullen v. Sprigg, 83 Cal. 56; s.c. 23 Pac. Rep. 222;

Higbee v. Rodeman, 123 Ind. 244; s.c. 28 N. E. Rep. 442;

Sumner v. Darnell, 128 Ind. 38; s.c. 27 N. E. Rep. 162; 13 L. R. A. 173;

Ruggles v. Clare, 45 Kan. 662; s.c. 26 Pac. Rep. 25;

Curtis v. Board of Education, 43 Kan. 138; s.c. 23 Pac. Rep. 98;

Chute v. Washburn, 44 Minn. 312; s.c. 46 N. W. Rep. 555.

² See: Chute v. Washburn, 44 Minn. 312; s.c. 46 N. W. Rep. 555.

³ Ross v. Tremain, 43 Mass. (2 Met.) 495;

Hayden v. Stoughton, 22 Mass. (5 Pick.) 528;

Hamilton v. Elliott, 5 Serg. & R

(Pa.) 375;

Finlay v. King's Lessee, 28 U. S. (3 Pet.) 346, 374; bk. 7 L. ed. 701, 711.

⁴ 2 Cruise Dig. (4th ed.) 25.

⁵ Mark v. Mark, 1 Abr. Cas. Eq. 106.

⁶ Mark v. Mark, 1 Abr. Cas. Eq. 106.

⁷ Allen v. Howe, 105 Mass. 241;

Ross v. Tremain, 43 Mass. (2 Met.) 495;

Hayden v. Stoughton, 22 Mass. (5 Pick.) 528;

Nicoll v. N. Y. & Erie R. R., 12 N. Y. 132; s.c. 12 Barb. (N. Y.) 461;

Stuyvesant v. Mayor of N. Y., 11 Paige Ch. (N. Y.) 414, 425;

Hamilton v. Elliott, 5 Serg. & R. (Pa.) 375;

Williams v. Angell, 7 R. I. 145, 152;

Finlay v. King's Lessee, 28 U. S. (3 Pet.) 374; bk. 7 L. ed. 701;

2 Co. Litt. (19th ed.) 208b.

SEC. 1900. **Same—Place of performance.**—Where a particular place is appointed for the performance of a condition, the party who is to perform it must come to that place ; for the person to whom the condition is to be performed is not obliged to accept of the performance elsewhere ; he may, however, if he pleases, accept of the performance at another place, and such acceptance will be good.¹ If no particular place be appointed for the performance of a condition, and the condition be that the feoffee shall pay a sum of money ; in that case the feoffee must seek for the person to whom the money is to be paid, if he be within the realm ; if he is out of the realm, then it is not incumbent on the feoffee to seek him, nor is the condition broken.² But where the condition is to deliver cumbrous articles, and a place of performance is not designated, the presumed intention is that the delivery may be at any place which the party to whom the condition is to be performed may reasonably appoint.³

¹ 2 Cruise Dig. (4th ed.) 26.

² 2 Co. Litt. (19th ed.), § 340 ;
2 Cruise Dig. (4th ed.) 26 ;
1 Inst. 210b.

³ 1 Rolle Abr. 444.

See : Aldrich v. Albee, 1 Me. (1 Greenl.) 120 ; s.c. 10 Am. Dec. 45 ;

Lamb v. Lathrop, 13 Wend. (N. Y.) 95 ; s.c. 27 Am. Dec. 174 ;

Wade's Case, 5 Co. 115 ;

Duke of Rutland v. Hudson, 1 Ld. Raym. 686 ;

3 Shep. Abr. 2, 3, 4, 5.

The general rule laid down by Greenleaf (2 Greenl. on Ev. 14th ed., §§ 609–611) is that “if the goods are cumbrous, and the place of delivery is not designated, nor to be inferred from collateral circumstances, the presumed intention is that they were to be delivered at any place which the creditor might reasonably appoint ; and, accordingly, it is the duty of the debtor to call upon the creditor, if he is within the state, and request him to appoint a place for the delivery of the goods. If the creditor refuses, or, which is the same

in effect, names an unreasonable place, or avoids, in order to prevent the notice, the right of election is given to the debtor, whose duty it is to deliver the articles at a reasonable and convenient place, giving previous notice thereof to the creditor, if practicable. And if the creditor refuses to accept the goods when properly tendered, or is absent at the time, the property, nevertheless, passes to him, and the debtor is forever absolved from the obligation. Aldrich v. Albee, 1 Me. (1 Greenl.) 120 ; s.c. 10 Am. Dec. 174 ; Lamb v. Lathrop, 13 Wend. (N. Y.) 95 ; s.c. 12 Barb. (N. Y.) 461 ; Howard v. Miner, 2 Applet. R. 325 ; Chipman on Contracts, 51–56 ; 2 Co. Litt. (19th ed.) 210b ; 2 Kent Com. (13th ed.) 507, 508, 509. Whether, if the creditor is out of the state, no place of delivery having been agreed upon, this circumstance gives to the debtor the right of appointing the place, *quære* ; and see Bixby v. Whitney, 5 Me. (5 Greenl.) 192 ; in which, however, the reporter's mar-

SEC. 1901. **Forfeiture by non-performance.**—Where an estate is accepted with a condition attached, breach of the condition forfeits the estate;¹ and the grantor, or those claiming under him, becomes entitled to the estate to which such condition was annexed.² But the person entitled to do so may decline to take advantage of such failure to perform,³ in which case the estate is not defeated,⁴ because a mere failure to perform a condition subsequent does not in and of itself divest the estate.⁵ The grantor or his heirs may not choose to take advantage of the breach, and, until they do so, by entry, or by what is now made by statute its equivalent, there is no forfeiture of the estate. This was the common law, and it has not been altered by statute so as to give a right of entry to an assignee in any instance not coupled with a reversionary interest, as in the cases of estates for years and for life, except in cases of leases, or rather of grants in fee, reserving rent. To that extent the law was changed in England by the statute of Henry VIII.,⁶ and

ginal note seems to state the doctrine a little broader than the decision requires, it not being necessary for the plaintiff, in that case, to aver any readiness to receive the goods, at any place, as the contract was for the payment of a sum of money, in specified articles, on or before a day certain.

“By the Roman law, where the house or shop of the creditor was designated or ascertained as the intended place of payment, and the creditor afterwards, and before payment, changed his domicile or place of business to another town or place, less convenient to the debtor, the creditor was permitted to require payment at his new domicile or place, making compensation to the debtor for the increased expense and trouble thereby caused to him. But by the law of France the debtor may in such require the creditor to nominate another place, equally convenient to the debtor; and on his neglecting so to do, he may himself ap-

point one; according to the rule, that *nemo, ulterius, prægravari debet*. Poth. on Oblig., Nos. 238, 239, 513. Whether, in the case of articles not portable, but cumbersome, such removal of domicile may, at common law, be considered as a waiver of the place, at the election of the debtor, does not appear to have been expressly decided.” See: Howard v. Miner, 20 Me. 325, 330.

¹ Woodruff v. Water Power Co., 10 N. J. Eq. (2 Stock.) 489.

² Cross v. Carter, 8 Blackf. (Ind.) 138; s.c. 44 Am. Dec. 42;

Fisk v. Chandler, 30 Me. 79; s.c. 50 Am. Dec. 612;

2 Cruise Dig. (4th ed.) 32.

³ See: Post, § 1903.

⁴ Tallman v. Snow, 35 Me. 342;

Atkins v. Chilson, 50 Mass. (9 Met.) 62;

Phelps v. Chesson, 12 Ired. (N. C.) L. 194;

Webster v. Cooper, 55 U. S. (14 How.) 488, 501; bk. 14 L. ed. 510.

⁵ Nicoll v. N. Y. & Erie R. Co., 12 N. Y. 121, 131, aff'g 12 Barb. (N. Y.) 460.

⁶ 32 Hen. VIII., c. 34.

similar enactments have been made in various of the states of the Union.¹ Where estates are given upon conditions subsequent, such conditions will be strictly construed for the reason that they go to the destruction of estates and are odious in law.² The only method in which a breach of a condition subsequent could be taken advantage of at common law was by actual entry of the grantor, or those claiming under him.³

SEC. 1902. **Same.—Waiver of.**—A mere failure to perform such a condition subsequent does not divest the title of the grantee. There must be an entry, or what is made equivalent thereto by the statute, by the grantor or his heirs for a breach of the condition in order to forfeit the estate.⁴ The waiver of any condition attached to an estate, either precedent or subsequent, may be made by the party entitled to insist upon the performance of such condition. On the breach of a condition subsequent, if the party who is entitled to the right of entry for such

¹ *Nicoll v. N. Y. & Erie R. Co.*, 12 N. Y. 121, 131, aff'g 12 Barb. (N. Y.) 460;

2 *Kent's Com.* (13th ed.) 123.

² *Taylor v. Sutton*, 15 Ga. 103; s.c. 60 Am. Dec. 682;

Voris v. Renshaw, 49 Ill. 425; s.c. 1 Alb. L. J. 335;

Wilson v. Galt, 18 Ill. 431;

Thompson v. Thompson, 9 Ind. 323; s.c. 68 Am. Dec. 638;

Laberee v. Carleton, 53 Me. 211;

Hooper v. Cummings, 45 Me. 359;

Glenn v. Davis, 35 Md. 208; s.c. 6 Am. Rep. 389;

Merrifield v. Cobleigh, 58 Mass. (4 Cush.) 178;

Michigan State Bank v. Hastings, 1 Doug. (Mich.) 225; s.c. 41 Am. Dec. 549;

Gadberry v. Sheppard, 27 Miss. 203;

Hoyt v. Kimball, 49 N. H. 322;

Page v. Palmer, 48 N. H. 385;

Emerson v. Simpson, 43 N. H. 475; s.c. 82 Am. Dec. 168;

Southard v. Central R. Co., 26 N. J. L. (2 Dutch.) 13;

Lynde v. Hough, 27 Barb. (N. Y.) 415;

Ludlow v. N. Y. & Harlem R. Co., 12 Barb. (N. Y.) 440, 444;

Wier v. Simmons, 55 Wis. 637; s.c. 13 N. W. Rep. 873;

Fraunces' Case, 8 Co. 90b;

Clavering v. Ellison, 25 L. J. Ch. 274, 278;

Radford v. Willis, L. R. 7 Ch. 7; 2 Co. Litt. (19th ed.) 218a;

Leake's Dig. L. of Prop. in Land, pt. 2, c. 1, § 6, subd. 3.

³ *Chalker v. Chalker*, 1 Conn. 79; s.c. 6 Am. Dec. 206;

Tallman v. Snow, 35 Me. 342;

Andrews v. Senter, 32 Me. 394;

Austin v. Cambridgeport Parish, 38 Mass. (21 Pick.) 215;

Sperry v. Sperry, 8 N. H. 477;

Nicoll v. N. Y. & Erie R. Co., 12 N. Y. 121, 131, aff'g 12 Barb. (N. Y.) 460;

Hamilton v. Elliott, 5 Serg. & R. (Pa.) 375;

2 Bl. Com. 154;

2 Co. Litt. (19th ed.) 218a;

4 *Kent's Com.* (13th ed.) 122, 127.

⁴ *Nicoll v. N. Y. & Erie R. Co.*, 12 N. Y. 121; s.c. 12 Barb. (N. Y.) 461;

Ludlow v. New York & Harlem R. Co., 12 Barb. (N. Y.) 440.

See: *Alleghany Oil Co. v. Bradford Oil Co.*, 21 Hun (N. Y.) 26, aff'd 86 N. Y. 638.

breach waives the performance by an actual release of the condition, or by an express license, the condition will be gone and advantage cannot be taken of any subsequent breach.¹ Thus, as we have already seen, if the party entitled to entry for the breach accept a performance he will be held to have waived the forfeiture,² as by the acceptance of rent³ accruing after the breach,⁴ or the sum due by the condition, or any other equivalent act.⁵ Mere acquiescence, however, without any act or license, will not constitute a waiver of a breach, and the party will have a right of re-entry on any subsequent breach.⁶

Mere delay in making a re-entry will not amount to a license, and apparent acquiescence is not sufficient to effect a waiver, unless the grantee is thereby induced to incur expenses, and the subsequent re-entry by the party would work a legal fraud upon him. This is on the principle that to constitute a waiver there must be some affirmative or express agreement on the part of the person entitled to re-entry for the breach.⁷

- ¹ *Chalker v. Chalker*, 1 Conn. 79 ;
s.c. 6 Am. Dec. 206 ;
Goodright d. Walter v. Davids,
Cowp. 805 ;
Doe d. Lockwood v. Clark, 8
Durnf. & E. (8 T. R.) 185 ;
2 Bl. Com. 156 ;
2 Co. Litt. (19th ed.) 218a ;
Shep. Touch. 150 ;
1 Swift's Supt. 264 ;
Wood's Inst. 182.
- ² *Chalker v. Chalker*, 1 Conn. 79 ,
s.c. 6 Am. Dec. 206 ;
Coon v. Breckett, 2 N. H. 163 ;
Jackson v. Chrysler, 1 John. Cas.
(N. Y.) 126.
- ³ *Chalker v. Chalker*, 1 Conn. 79 ;
s.c. 6 Am. Dec. 206 ;
Hubbard v. Hubbard, 97 Mass.
188, 192 ;
Coon v. Breckett, 2 N. H. 153 ;
Jackson v. Chrysler, 1 John. Cas.
(N. Y.) 126.
- ⁴ *Hunter v. Osterhoudt*, 11 Barb.
(N. Y.) 33 ;
Jackson v. Allen, 3 Cow. (N. Y.)
220 ;
Green's Case, Cro. Eliz. 1 ; s.c. 1
Leon. 262 ;
Price v. Worwood, 4 Hurl. & N.
512.
See : *Dumpor's Case*, 4 Co. 119 ;
- s.c. 1 Smith's Ld. Cas. (9th Am.
ed.) 119 ;
Downes v. Turner, 2 Salk. 597.
- ⁵ *Chalker v. Chalker*, 1 Conn. 79 ;
s.c. 6 Am. Dec. 206.
- ⁶ *Chalker v. Chalker*, 1 Conn. 79 ;
s.c. 6 Am. Dec. 206 ;
Andrews v. Senter, 32 Me. 394,
397 ;
Hubbard v. Hubbard, 97 Mass.
192 ;
Guild v. Richards, 82 Mass. (16
Gray) 309, 326 ;
Gray v. Blanchard, 25 Mass. (8
Pick.) 284 ;
Jackson v. Chrysler, 1 John. Cas.
(N. Y.) 126 ;
Doe d. Muston v. Gladwin, 6 Ad.
& E. N. S. (6 Q. B.) 953 ; s.c. 51
Eng. C. L. 952.
- ⁷ *Doe d. Flower v. Peck*, 1 Barn. &
Ad. 428 ; s.c. 20 Eng. C. L.
546 ;
Doe v. Jones, 5 Exch. 498 ;
2 Co. Litt. (19th ed.) 211b.
- ¹ *Ludlow v. N. Y. & Harlem R. R.*,
12 Barb. (N. Y.) 440.
See : *Gray v. Blanchard*, 25 Mass.
(8 Pick.) 284 ;
Jackson v. Chrysler, 1 John. Cas.
(N. Y.) 126 ;
Williams v. Dakin, 22 Wend. (N.

SEC. 1903. **Same—Excusing non-performance.**—There are various circumstances on the happening of which the non-performance of a condition is excused, as where it is prohibited by law ;¹ the party to be benefited refuses to accept the performance,² or renders such performance impossible or unnecessary,³ (1) by his absence in those cases where his presence is necessary to the performance of the condition, (2) by his obstructing or preventing the performance of the condition,⁴ (3) by his neglecting to do the first act where it is incumbent on him to take the initiative,⁵ and (4) by waiver on the part of the person to whom the condition is to be performed ;⁶ or where the performance of a condition subsequent is rendered impossible by the act of God,⁷—in either of which cases the grantee holds the property as if no condition had attached.⁸

SEC. 1904. **Same—Relief against.**—The general rule is that equity will neither relieve against nor enforce a forfeiture, but will leave the parties to their remedies at law · yet such court may nevertheless, relieve from the

- Y.) 201, 209, aff'g 17 Wend. (N. Y.) 447 ;
 Sharon Iron Co. v. City of Erie, 41 Pa. St. 349 ;
 Doe d. Muston v. Gladwin, 6 Ad. & E. N. S. (6 Q. B.) 953 ; s.c. 51 Eng. C. L. 952 ;
 Doe d. Flower v. Peck, 1 Barn. & Ald. 428 ; s.c. 20 Eng. C. L. 546 ;
 Doe v. Jones, 5 Exch. 498.
¹ Doe d. Anglesea v. Church Wardens of Rugeley, 6 Ad. & E. N. S. (6 Q. B.) 107 ; s.c. 51 Eng. C. L. 107 ;
 Brewster v. Kitchell, 1 Salk. 198 ; s.c. 1 Ld. Raym. 317, 321 ;
 Lucy v. Levington, 1 Ven. 175 ;
 4 Bacon Abr., tit. Conditions, Q. 2, p. 161 ;
 Com. Dig., tit. Conditions, L. 1.
 See : Doe d. Mitchinson v. Carter, 8 Durnf. & E. (8 T. R.) 57, 300 ; s.c. 4 Rev. Rep. 586 ;
 Abbott of West Minister v. Clerke, Dyer 26b, 28b, pl. 186 ;
 Duppa v. Mayor, 1 Wm. Saund. (6th ed.) 288b, note d.
² Jackson ex d. Bauers v. Crafts, 18 John. (N. Y.) 110 ;
 2 Co. Litt. (19th ed.) 206 ;
 2 Cruise Dig. (4th ed.) 28.
³ Cape Fear, etc., Navigation Co. v. Wilcox, 7 Jones (N. C.) L. 481 ; s.c. 78 Am. Dec. 260 ;
 Jones v. Chesapeake, etc., R. Co., 14 W. Va. 514.
⁴ Jones v. Walker, 13 B. Mon. (Ky.) 163 ; s.c. 56 Am. Dec. 557.
⁵ 1 Rolle Abr. 453.
⁶ Enfield Toll Bridge Co. v. Connecticut River Co., 7 Conn. 28, 45 ;
 Chalker v. Chalker, 1 Conn. 79 ; s.c. 6 Am. Dec. 206 ;
 Farley v. Farley, 14 Ind. 331 ;
 Willard v. Henry, 2 N. H. 120 ,
 Bayley v. Homan, 3 Bing. N. C. 915 ; s.c. 32 Eng. C. L. 419.
⁷ Morse v. Hayden, 82 Me. 227 ; s.c. 19 Atl. Rep. 443 ;
 Merrill v. Emery, 27 Mass. (10 Pick.) 507 ;
 Vanhorne's Lessees v. Dorrance, 2 U. S. (2 Dall.) 304, 317 ; bk 1 L. ed. 391 ;
 Laughter's Case, 5 Co. 21.
⁸ Morse v. Hayden, 82 Me. 227 ; s.c. 19 Atl. Rep. 443.

forfeiture of such a condition, as in cases of penalties, the relief being adapted to the nature of each case,¹ even in favor of the heir of the party who was to have performed the condition.² Thus, a forfeiture, incurred by breach of a condition subsequent in a grant of land, to pay certain mortgages thereon and save the grantor harmless against them, will be relieved against in equity upon the ground of accident, mistake, fraud, or surprise, unless the grantee has been guilty of laches.³ In the case of a lease, relief from forfeiture for breach of con-

¹ *Bethlehem v. Annis*, 40 N. H. 34; s.c. 77 Am. Dec. 700.

See: *Walker v. Wheeler*, 2 Conn. 299;

Hancock v. Carlton, 72 Mass. (6 Gray) 39;

Stone v. Ellis, 63 Mass. (9 Cush.) 95, 103;

Sanborn v. Woodman, 59 Mass. (5 Cush.) 36;

Atkins v. Chilson, 52 Mass. (11 Met.) 112;

Underwood v. Staney, 1 Ch. Cas. 77;

Wheeler v. Whitall, 1 Freem. Ch. 9;

Grimstone v. Bruce, 1 Salk. 156; s.c. 2 Vern. 594;

Barnardiston v. Fane, 2 Vern. 366;

Woodman v. Blake, 2 Vern. 222;

Popham v. Bampffield, 1 Vern. 83.

² *Bacon v. Huntington*, 14 Conn. 92;

Lockett v. White, 10 Gill & J. (Md.) 480;

City Bank of Baltimore v. Smith, 3 Gill. & J. (Md.) 265;

Bethlehem v. Annis, 40 N. H. 34; s.c. 77 Am. Dec. 700;

Hayward v. Angel, 1 Vern. 222;

Popham v. Bampffield, 1 Vern. 83.

³ *Hancock v. Carlton*, 72 Mass. (5 Gray) 39;

Stone v. Ellis, 63 Mass. (9 Cush.) 59;

Sanborn v. Woodman, 59 Mass. (5 Cush.) 36;

Atkins v. Chilson, 52 Mass. (11 Met.) 112.

See: *Warner v. Bennett*, 31 Conn. 478;

City Bank of Baltimore v. Smith, 3 Gill. & J. (Md.) 265;

Beaty v. Harkey, 10 Miss. (2

Smed. & M.) 563;

Bethlehem v. Annis, 40 N. H. 34; s.c. 77 Am. Dec. 700;

Skinner v. Dayton, 2 John. Ch. (N. Y.) 226;

Williams v. Angell, 7 R. I. 152;

Goodtitle v. Holdfast, 2 Str. 900;

Hill v. Barclay, 18 Ves. 56; s.c. 11 Rev. Rep. 147.

In *Stone v. Ellis*, *supra*, it is said that a grantee of an estate upon condition, who mortgages to his grantor, and, after a foreclosure by the mortgagee, files his bill to redeem, a breach of the condition having occurred, will be allowed to redeem only upon removing all incumbrances specified in the mortgage, and performing the condition annexed to his deed. The case of *Sanborn v. Woodman*, 59 Mass. (5 Cush.) 36, is more directly to the point, that where the forfeiture is designed to secure the payment of money merely, relief may be given against the forfeiture; and that such relief is not confined to forfeitures occasioned by non-payment of rent, but is equally applicable to a forfeiture in the case of a deed upon condition subsequent, where the condition is to secure the payment of money merely. The proceedings in that case were, however, at law in a writ of entry; and the mode of giving relief was by ordering a stay of proceedings, upon payment of all sums due, as well interest as principal.

Hancock v. Carlton, 72 Mass. (6 Gray) 39, 51.

dition will be extended to the payment of money, where compensation can be made in damages,¹ as in the case of rent;² but not as to other conditions or covenants,³ as for instance, where the forfeiture is incurred by the tenant's aliening or assigning a term,⁴ or by exercising a forbidden trade thereon,⁵ or by his neglecting to insure the premises,⁶ or by his failure to repair,⁷ and the like.⁸ Thus where a lessee incurred the forfeiture of his term by tendering a quarter's rent, through mistake, a day or two before it was due, and omitted to pay it on the quarter day, and the lessor brought a writ of entry against him to recover the premises on the ground of forfeiture for non-payment of the quarter's rent, the court held that the action should be stayed on the lessee's paying to the lessor, or bringing into court for his acceptance, the full amount of the rent in arrear, with interest and costs.⁹ The rule governing this subject is that courts of equity give relief against a forfeiture where the case admits of certain compensation, but not where the sums covenanted to be paid are in the nature of stipulated damages; the court will not interfere unless the party can be clearly and fully indemnified and placed in the same situation as if nothing had happened.¹⁰ Neither

¹ *Walker v. Wheeler*, 2 Conn. 299; *Stone v. Ellis*, 63 Mass. (9 Cush.) 95;

Carpenter v. Westcott, 4 R.I. 225; *Henry v. Tupper*, 29 Vt. 358; *Dunklee v. Adams*, 20 Vt. 415; s.c. 50 Am. Dec. 44;

Woodman v. Blake, 2 Vern. 222.

² *Atkins v. Chilson*, 52 Mass. (11 Met.) 112;

Smith v. Parks, 10 Mod. 383;

Hill v. Barclay, 16 Ves. 405; s.c. 18 Ves. 56; 11 Rev. Rep. 147.

See: *Hancock v. Carlton*, 72 Mass. (6 Gray) 52.

³ *Descarlett v. Dennett*, 9 Mod. 22; *Elliott v. Turner*, 13 Sim. 485.

⁴ *Wafer v. Mocato*, 9 Mod. 112; *Hill v. Barclay*, 18 Ves. 56; s.c. 11 Rev. Rep. 147.

⁵ *Macher v. Foundling Hospital*, 1 Ves. & B. 188.

⁶ *Rolfe v. Harris*, 2 Price 206.

⁷ *Hill v. Barclay*, 18 Ves. 56; s.c. 11 Rev. Rep. 147.

See: *Atkinson v. Chilson*, 52

Mass. (11 Met.) 112;

Barrow v. Isaacs (1891), 1 Q. B. 417; s.c. 60 L. J. Q. B. 179; 64 L. T. 686.

⁸ See: *Descarlett v. Dennett*, 9 Mod. 22;

Wadman v. Calcraft, 10 Ves. 67;

Lovat v. Lord Ranelagh, 3 Ves. & B. 24.

⁹ *Atkins v. Chilson*, 52 Mass. (11 Met.) 112.

¹⁰ *Atkins v. Chilson*, 52 Mass. (11 Met.) 112, 117;

Skinner v. Dayton, 2 John. Ch. (N. Y.) 526.

Where the penalty or forfeiture is designed to secure the payment of a certain sum of money.—It is said in *Atkins v. Chilson*, *supra*, that in all such cases a court of equity will grant relief, on payment of the money secured, with interest; as in case of penalties or forfeitures for the non-payment of rent, and other similar cases.

will the court relieve against the breach of a condition collateral to the grant, or one which cannot be estimated in damages; or where the breach is not the result of inevitable accident, but is willfully or negligently committed or permitted.¹

SEC. 1905. **Same—Who bound by.**—Where an estate is granted upon a condition, the condition annexed becomes a part of the tenure and binds the estate in whosoever hands it may come.² Consequently whoever accepts the estate is bound to the performance of the condition, no matter with what loss such performance may be attended.³ This obligation to perform the condition is binding upon the party coming into the estate, even though such party be a married woman, or an infant, or other person inca-

Baxter v. Lansing, 7 Paige Ch. (N. Y.) 350;

Sanders v. Pope, 12 Ves. 282;

2 Story Eq. Jur. (13th ed.) §§ 1315, 1320.

Stipulations in the alternative for the doing of certain acts or the payment of certain sums of money in lieu thereof will not be enforced by a decree of specific performance of the first alternative.

Skinner v. Dayton, 2 John. Ch. (N. Y.) 526.

See: *Haldeman v. Jennings*, 14 Ark. 329;

Hahn v. Concordia Soc., 42 Md. 460;

City Bank of Baltimore v. Smith, 3 Gill. & J. (Md.) 265;

Jaquith v. Hudson, 5 Mich. 123;

St. Mary's Church v. Stockton, 8 N. J. Eq. (4 Halst.) 520;

Shiell v. McNitt, 2 Paige Ch. (N. Y.) 101;

Bodine v. Glading, 21 Pa. St. 50; s.c. 59 Am. Dec. 749;

Howard v. Hopkyns, 2 Atk. 371;

Coles v. Sims, 5 DeG. M. & G. 1;

Magrane v. Archbold, 1 Dow. Parl. Cas. 107;

French v. Macale, 2 Dru. & W. 269; s.c. 1 Con. & L. 459;

Ranger v. Great Western R. Co., 5 H. L. Cas. 72, 73;

Sainter v. Ferguson, 1 Macn. & G. 286;

Jones v. Green, 3 Younge & J. 298;

1 Pom. Eq. Jur. 492.

¹ *Bacon v. Huntington*, 14 Conn. 92;

City Bank of Baltimore v. Smith,

3 Gill. & J. (Md.) 265;

Hancock v. Carlton, 72 Mass. (6

Gray) 39;

Livingston v. Tompkins, 4 John.

Ch. (N. Y.) 415, 431; s.c. 8 Am.

Dec. 598;

Skinner v. Dayton, 2 John. Ch.

(N. Y.) 526;

Baxter v. Lansing, 7 Paige Ch.

(N. Y.) 350;

Henry v. Tupper, 29 Vt. 358;

Dunklee v. Adams, 20 Vt. 415;

s.c. 50 Am. Dec. 44;

Wafer v. Mocato, 9 Mod. 112;

Descarlett v. Dennett, 9 Mod. 22;

Reynolds v. Pitt, 2 Price 212;

Elliott v. Turner, 13 Sim. Ch.

485;

Hill v. Barclay, 18 Ves. 56; s.c.

11 Rev. Rep. 147.

² *Taylor v. Sutton*, 15 Ga. 103; s.c.

60 Am. Dec. 682;

Wilson v. Wilson, 38 Me. 18; s.c.

61 Am. Dec. 227;

Pickering v. Pickering, 15 N. H.

281;

Hogsboom v. Hall, 24 Wend. (N.

Y.) 146.

³ *Rowell v. Jewett*, 71 Me. 408;

Attorney-General v. Christ's

Hospital, 3 Bro. C. C. 165;

Sinnet v. Herbert, L. R. 7 Ch.

232, 236; s.c. 41 L. J. Ch.

388;

Attorney-General v. Andrews, 3

Ves. 633; s.c. 4 Rev. Rep. 110.

pable of incurring a personal obligation ; because the condition does not charge the person but the land.¹ Thus in *Cross v. Carson*² it is said that a fee simple estate on condition to a man and his heirs in consideration and on condition that they maintain the grantor's idiot son during life, upon breach of the condition by the heirs of the grantee, even though they be infants, the heirs of the grantor may enter and destroy the estate, but until they do so enter the grantee's heirs will hold the land.

¹ *Cross v. Carson*, 8 Blackf. (Ind.) 138 ; s.c. 44 Am. Dec. 742 ;
Garrett v. Sconten, 3 Den. (N. Y.) 334, 340 ;
Phelan v. Kelly, 25 Wend. (N. Y.) 389 ;
 See : *Parker v. Lincoln*, 12 Mass. 16, 18 ;
Fonda v. Sage, 46 Barb. (N. Y.) 109.
² 8 Blackf. (Ind.) 138 ; s.c. 44 Am. Dec. 742.

² Cruise Dig. (4th ed.) 26.

CHAPTER XXIX.

JOINT ESTATES.

SECTION	I.	Estates in severalty.
SECTION	II.	Estates in joint tenancy.
SECTION	III.	Estates in common.
SECTION	IV.	Estates in coparcenary.
SECTION	V.	Estates in entirety.
SECTION	VI.	Estates in partnership.
SECTION	VII.	Incidents common to joint estates.
SECTION	VIII.	Partition of joint estates.

SECTION I.—ESTATES IN SEVERALTY.

SEC. 1906.	Introductory.
SEC. 1907.	Holding in severalty.
SEC. 1908.	Holding jointly.

SECTION 1906. **Introductory.**—The method of holding lands and tenements, with respect to the number and connection of the owners, may be said to be in four different ways, to-wit: in severalty, in joint tenancy, in coparcenary, and in common.¹

SEC. 1907. **Holding in severalty.**—Where property is owned and held by a single person in his own right only, without having any other joined or connected with him in interest, the estate is said to be held in severalty.² The usual or prevailing method of holding real property is in severalty; consequently the general rules and doctrines respecting estates, where nothing appears to the contrary, are presumed to have reference to estates thus held.³

SEC. 1908. **Holding jointly.**—It is not unfrequently the

¹ 2 Cruise Dig. (4th ed.) 363.

² 2 Bl. Com. 179;

² Cruise Dig. (4th ed.) 363.

³ 2 Bl. Com. 179.

case, however, that the title and interest to real property is vested in two or more persons. This gives rise to what are known as joint estates in land which are of three kinds at common law, namely, estates in joint tenancy, estates in coparcenary, and estates in common.¹

SECTION II.—ESTATES IN JOINT TENANCY.

- SEC. 1909. Definition.
- SEC. 1910. Nature of the estate.
- SEC. 1911. How created.
- SEC. 1912. Same—Circumstances requisite.
- SEC. 1913. Same—Same—Unity of interest.
- SEC. 1914. Same—Same—Unity of title.
- SEC. 1915. Same—Same—Unity of time.
- SEC. 1916. Same—Same—Unity of possession.
- SEC. 1917. Incidents of joint tenancy—Survivorship.
- SEC. 1918. Same—Entry.
- SEC. 1919. Same—Not favored in equity.
- SEC. 1920. What may be held in joint tenancy.
- SEC. 1921. Who may be joint tenants.
- SEC. 1922. Same—Trustees.
- SEC. 1923. Same—Mortgagees.
- SEC. 1924. Same—Husband and wife.
- SEC. 1925. Same—Infants.
- SEC. 1926. Same—Executors and administrators.
- SEC. 1927. Same—Corporations.
- SEC. 1928. Obligations and liabilities.
- SEC. 1929. Same—To contribute share of purchase price.
- SEC. 1930. Same—To contribute share of taxes.
- SEC. 1931. Same—To contribute share of incumbrances.
- SEC. 1932. Same—To contribute share of expenses for repairs.
- SEC. 1933. Same—To contribute share of expenses for improvements.
- SEC. 1934. Same—To pay rent.
- SEC. 1935. Same—To account for rents and profits.
- SEC. 1936. Same—To share burdens and losses of common property.
- SEC. 1937. Adverse possession of joint tenant—What constitutes.
- SEC. 1938. Same—Ouster and disseizin.
- SEC. 1939. Same—Same—Effect of ouster.
- SEC. 1940. Same—Statute of limitations.
- SEC. 1941. Actions by and against joint tenants—By tenants.
- SEC. 1942. Same—Against tenants.
- SEC. 1943. Actions between joint tenants—At common law
- SEC. 1944. Same—At law.
- SEC. 1945. Same—In equity.

¹ 2 Bl. Com. 179 ;
 2 Co. Litt. (19th ed.) 194a ;
 2 Cruise Dig. (4th ed.) 334 ;

4 Kent Com. (13th ed.) 357 ;
 2 Co. Litt. (19th ed.) 193a.

SECTION 1909. Definition.—Where two or more persons hold lands or tenements in fee simple, fee tail, for life, for years, at will, or in remainder,¹ jointly between them in equal shares so that all are equally entitled to the enjoyment of the land, or its equivalent in rents and profits, the estate is said to be that of joint tenancy.² In a case of this kind the law will interpret the grant so as to make all its parts take effect, which can only be done by creating an equal interest in all the parties who take under it.³ At common law those grants which define the interest which each is to take does not create a joint tenancy, but a tenancy in common.⁴ In the United States, it is so declared by statute in several of the States of the Union. In some of these States, however, certain cases are especially excepted from the operation of the statutes, thereby leaving them to be governed by the rules of the common law.⁵

SEC. 1910. Nature of the estate.—The distinctive character of an estate by joint tenancy is the right of survivorship, by which, although the estate is limited to the tenants and their heirs, the survivor or survivors take the entire estate to the exclusion of the heirs or representatives of the deceased co-tenant.⁶ The interest of the joint tenants is not only equal and similar, but is one and the same. For the purpose of tenure and survivorship,

¹ 2 Co. Litt. (19th ed.) 183b.

See: *Wiggin v. Wiggin*, 43 N.

H. 561; s.c. 80 Am. Dec. 192;

Campbell v. Heron, 1 Tayl. (N. C.)

199.

An estate in joint tenancy may be had in remainder. Thus if a gift be made to two men, and the heirs, of their two bodies, remainder to them two and their heirs; they are joint tenants of the remainder in fee.

² Cruise Dig. (4th ed.) 364;

1 Inst. 183b.

³ *Martin v. Smith*, 5 Binn. (Pa.) 16;

s.c. 6 Am. Dec. 395;

2 Bl. Com. 179, 180.

⁴ 2 Co. Litt. (19th ed.) 180a;

2 Cruise Dig. (4th ed.) 364.

See: *Shiels v. Stark*, 14 Ga. 529;

Coster v. Lorillard, 14 Wend. (N. Y.) 265, 336;

Aveling v. Knipe, 19 Ves. 441.

⁴ *Craig v. Taylor*, 6 B. Mon. (Ky.) 457.

⁵ *Parsons v. Boyd*, 20 Ala. 112;

Phelps v. Jepson, 1 Root (Conn.) 48; s.c. 1 Am. Dec. 33;

Den ex d. Hardenberg v. Hardenberg, 10 N. J. L. (5 Halst.) 42; s.c. 18 Am. Dec. 371;

Miles v. Fisher, 10 Ohio 1; s.c. 36 Am. Dec. 61;

Sergeant v. Steinberger, 2 Ohio 305, 306; s.c. 15 Am. Dec. 553;

White v. Sayre, 2 Ohio 103, 110;

Walker's Int. Am. L. (4th ed.) 292.

⁶ See: *Post*, § 1917.

each joint tenant is the holder of the whole estate;¹ but for the purpose of alienation, each has only his own share.² Hence, where one enters into possession of the common property his entry and possession will be that of his co-tenants.³ Any one of such joint tenants has not originally a distinct moiety from the other; but, if by any subsequent act, as by alienation or forfeiture of either, the interest becomes separate, and distinct, the joint tenancy instantly ceases. But while the relation continues each of two joint tenants has a concurrent interest in the whole; and, upon the death of his companion, the sole interest in the whole remains to the survivor.⁴ The reason of this is the fact that the interest which the survivor originally had is not divested by the death of his companion. No other person can claim to have a joint estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own; neither can any one claim a separate interest in any part of the tenements, for that would be to deprive the survivor of the right which he had in all and every part, and therefore the survivor's original interest in the whole still remains. As no one can now be admitted, either jointly or severally, to any share with the survivor in the estate, it follows that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate, whatever it may be, created by the original grant.⁵

SEC. 1911. *How created.*—At common law an estate in joint tenancy can be created only by the acts of the parties, and never arises by mere implication of the law; that is, can arise only by purchase and grant. In this connection the word “purchase” includes every mode of coming into an estate, except by inheritance.⁶ Thus two or more persons may come into possession of lands and become joint tenants by disseisin,⁷ by abatement, in-

¹ *Coster v. Lorillard*, 14 Wend. (N. Y.) 265, 336.

² *Rector v. Waugh*, 17 Mo. 13; s.c. 57 Am. Dec. 251.

³ See: *Post*, § 1918.

⁴ See: *Post*, § 1917.

⁵ 2 Bl. Com. 183.

⁶ *Greer v. Blanchard*, 40 Cal. 194, 197.

⁷ *Putney v. Dresser*, 43 Mass. (2 Met.) 583;

Allen v. Holton, 37 Mass. (20 Pick.) 458;

trusion, and usurpation.¹ At common law, if an estate be granted to a plurality of persons and their heirs, without any restrictive, exclusive, or explanatory words, this constitutes them joint tenants in fee of the lands thus conveyed.² Freeman says³ that at an early day it was questioned whether a legacy could be held in joint tenancy, but that the rule was soon established that bequests as well as conveyances should be deemed to pass estates in joint tenancy, where the contrary intention was not apparent from the will itself.⁴

SEC. 1912. **Same—Circumstances requisite.**—The nature of joint tenancy is such that the following requisites are necessary circumstances thereto: (1) unity of interest,⁵ (2) unity of title,⁶ (3) unity of time,⁷ and (4) unity of possession,⁸ known as “the four unities.” In other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at the same time, and held by one and the same undivided possession.⁹

SEC. 1913. **Same—Same—Unity of interest.**—With respect to unity of interest, one joint tenant cannot be entitled to one period of duration, or quantity of interest, and the other to a different one.¹⁰ Thus one cannot be tenant for life, and the other for years; one cannot be tenant in

2 Co. Litt. (19th ed.) 180b.

Joint disseisors—Character of tenancy—Massachusetts doctrine.—

Whether joint disseisors, entering without title or color of title are joint tenants or tenants in common is an unsettled question in Massachusetts.

See: *Fowler v. Thayer*, 58 Mass. (4 Cush.) 111.

¹ 2 Co. Litt. (19th ed.) 181a.

² 2 Bl. Com. 180.

See: *Whitridge v. Barry*, 42 Md. 140, 151;

Hannan v. Towers, 3 Har. & J. (Md.) 147; s.c. 5 Am. Dec. 427;

Webster v. Vandevanter, 72 Mass. (6 Gray) 428;

Dott v. Willson, 1 Bay (S.C.) L. 457;

Gilbert v. Richards, 7 Vt. 208;

Rigden v. Vallier, 3 Atk. 731.

³ Freeman Co-Ten. & Part. (2d ed.) § 23.

⁴ See: *Martin v. Smith*, 5 Binn. (Pa.) 16; s.c. 6 Am. Dec. 395; *Campbell v. Campbell*, 4 Bro. 15;

Morgan v. Britten, L. R. 13 Eq. Cas. 28; s.c. 1 Moak Eng. Rep. 537;

Armstrong v. Armstrong, L. R. 7 Eq. 518;

Crook v. De Vandes, 9 Ves. 204.

⁵ See: *Post*, § 1913.

⁶ See: *Post*, § 1914.

⁷ See: *Post*, § 1915.

⁸ See: *Post*, § 1916.

⁹ 2 Bl. Com. 180;

2 Cruise Dig. (4th ed.) 366, § 11.

See: *Overton v. Lacy*, 6 T. B. Mon. (Ky.) 13; s.c. 17 Am. Dec. 111.

¹⁰ 2 Bl. Com. 181.

fee, and the other tenant in tail.¹ It has, however, been said that where an estate is limited to two persons, and to the heirs of one of them, they are joint tenants for life.² If a man demises lands to two persons, to hold to the one for life, and to the other for years, they are not joint tenants. The reason is, in the first place, because an estate of freehold cannot stand in jointure with a term of years, and a reversion upon a freehold cannot stand in jointure with a freehold and inheritance in possession.³ In the second place, a right of action, or a bare right of entry, cannot stand in jointure with a freehold or inheritance in possession; therefore, if one tenant make a feoffment of the moiety, this is a discontinuance of that moiety; and the other joint tenant remains in possession of the freehold and inheritance of the other moiety, which, for the time, constitutes a severance of the jointure.⁴

SEC. 1914. **Same—Same—Unity of title.**—Unity of title being required, the estate of joint tenants must be created by the same act or instrument; as by one and the same grant, or other conveyance or assurance, or by one and the same disseisin;⁵ for a joint tenancy cannot arise by descent or act of law, as has been already observed,⁶ but only by purchase or acquisition of the party.⁷

¹ 2 Co. Litt. (19th ed.) 188a.

² 2 Cruise Dig. (4th ed.) 366, § 12.

See: *Cary v. Willis*, 2 Pr. Wms. 530.

³ 1 Inst. 188a.

Right of action and entry in jointure—Lord Coke.—It is, however, said by Lord Coke, that a right of action and a right of entry may stand in jointure. For at common law, the alienation of the husband was a discontinuance to the wife of one moiety, and a disseisin of the other; so, as after the death of the husband, the wife had a right of action to one moiety, and the other joint tenant a right of entry into the other; but they were joint tenants of the right, because they might join in a

writ of right.

1 Inst. 188a.

The case put by Lord Coke is, where a husband and wife and a third person purchased land to them and their heirs, whereby the husband and wife acquired a moiety and the third person the other moiety, and the husband alienated the whole to a stranger in fee, and died. Here, the wife had a right of action only, the husband's alienation having discontinued her estate, by the common law; and the third person had a right of entry.

1 Inst. 187b.

⁴ 1 Inst. 188a.

⁵ 2 Bl. Com. 181.

⁶ See: *Ante*, § 1911.

⁷ 2 Cruise Dig. (4th ed.) 367, § 16.

SEC. 1915. **Same—Same—Unity of time.**—The unity of time requisite for the creation of an estate in joint tenancy requires that the estate become vested in all the joint tenants at one and the same instant, as well as by one and the same title.¹ Thus where lands are demised to A for life, remainder to the right heirs of B and C, and B has issue and dies, and afterwards C has issue and dies, the issues of B and C are not joint tenants; because the one moiety vested at one time and the other moiety at another time.² But where a man made a feoffment in fee, to the use of himself for life; then to the use of every one of his issue female, and to the heirs of their bodies; then to the issue of one daughter at one time, of a second daughter at another time, and of a third daughter at another time; so that this was to vest severally in them, and afterwards to all, it was adjudged that they were joint tenants, notwithstanding the fact that they came in at several times; but the reason of this was, because the root was joint.³

SEC. 1916. **Same—Same—Unity of possession.**—In respect to unity of possession, joint tenants are said to be seized *per my et per tout*; that is, each of them has the entire possession, as well of every part as of the whole.⁴ They have not one of them a seisin of one half, and the other of the remaining half; neither can one be exclusively seized of one acre and his companion of another; but each has an undivided moiety of the whole, not the whole of an undivided moiety. From this it follows that the possession and seisin of one joint tenant was the possession and seisin of the other.⁵ But this rule is in some

¹ 2 Bl. Com. 181;

2 Co. Litt. (19th ed.) 188a;

2 Cruise Dig. (4th ed.) 367.

² 1 Inst. 188a.

Joint estates—Vesting at different times.—Lord Coke, however, says, that in some cases there may be joint tenants, and yet the estate may vest in them at several times. Thus, if a man makes a feoffment, to the use of himself, and of such wife as he shall afterwards marry, for

term of their lives; and after he takes a wife, they are joint tenants; and yet they come to their estates at several times.

1 Inst. 188a.

See: Gilb. Uses, 71.

³ Blandford v. Blandford, 3 Bulst. 101.

⁴ Overton v. Lacy, 6 T. B. Mon. (Ky.) 13; s.c. 17 Am. Dec. 111;

2 Bl. Com. 182.

⁵ 2 Cruise Dig. (4th ed.) 369, § 26.

measure modified by the statute of William IV.,¹ which provides that “when any one or more of several persons, entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt, of or by such last-mentioned person or persons, or any of them.”

SEC. 1917. *Incidents of joint tenancy—Survivorship.*—The union and entirety of interest which exists between joint tenants has given rise to the principal incident of this estate, heretofore noticed,² which is the right of survivorship; that is, upon the death of one of the joint tenants his share vests in the survivor or survivors, until there be but one survivor, when the estate becomes one in severalty in him, and descends to his heirs upon his death.³ But in most of the states of the Union the presumption is that all tenants holding jointly hold as tenants in common, unless a clear intention to the contrary is manifest.⁴ The right of survivorship takes place in estates for years as well as in freehold estates;⁵

¹ 3 & 4 Will. IV., c. 27, § 12.

² See : *Ante*, § 1910.

³ 2 Bl. Com. 179, 183 ;

1 Prest. Est. 130.

See : *Truesdell v. White*, 13 Bush (Ky.) 616 ;

Barclay v. Hendrick, 3 Dana (Ky.) 378 ;

Pope v. Anderson, 13 La. An. 538 ;

Haughabaugh v. Honald, 1 Const. (S. C.) 90 ;

Bell v. Deas, 2 Strobb. (S. C.) Eq. 24.

⁴ *Parsons v. Boyd*, 20 Ala. 112 ;

PHELPS v. JEPSON, 1 Root (Conn.) 48 ; s.c. 1 Am. Dec. 33 ;

Purdy v. Purdy, 3 Md. Ch. Dec. 547 ;

Webster v. Vandeventer, 72 Mass. (6 Gray) 428 ;

Appleton v. Boyd, 7 Mass. 131 ;

Den ex d. Hardenberg v. Hardenberg, 10 N. J. L. (5 Halst.) 42 ; s.c. 18 Am. Dec. 371 ;

Miles v. Fisher, 10 Ohio 1 ; s.c. 36 Am. Dec. 61 ;

Sergeant v. Steinberger, 2 Ohio 305, 306 ; s.c. 15 Am. Dec. 553 ;

Bambaugh v. Bambaugh, 11 Serg. & R. (Pa.) 191 ;

University of Vermont v. Reynolds, 3 Vt. 543.

⁵ *Lease to Several—Survivorship.*—

Littleton says that if “a lease of lands or tenements be made to many for term of years, he which surviveth of the lessees shall have the tenements only, during the term, by force of the same lease.” And this benefit of survivorship takes

and a trust of a term in joint tenancy goes to the survivor in equity as well as in law.¹ The right of survivorship, however, is not favored in equity² and is opposed to the policy of the law in this country, the rule of survivorship, in the case of joint trustees, having been abolished by statute in many of the states;³ yet the right of survivorship may be expressly conferred by will or deed.⁴

SEC. 1918. **Same—Entry.**—Another distinctive incident of joint tenancy is the fact that the entry and possession of one joint tenant inures to the benefit of all.⁵ The reason for this is that the possession of one joint tenant is the possession of all the others.⁶ And where one joint tenant acquires title by the purchase of outstanding incumbrances, he will be deemed to have taken them for the benefit of all.⁷ On a like principle the payment of

place on a lease for years or two, though one of the lessees dies before entry.

2 Co. Litt. (18th ed.) 182a;

1 Inst. 46b.

¹ See: *Aston v. Smallman*, 2 Vern. 556; s.c. 2 Pr. Wms. 530.

² *Rigden v. Vallier*, 3 Aik. (Vt.) 734.

³ *Phelps v. Jepson*, 1 Root (Conn.) 48; s.c. 1 Am. Dec. 33;

Lowe v. Brooks, 23 Ga. 325;

Nichols v. Denny, 37 Miss. 59;

Miles v. Fisher, 10 Ohio 1; s.c. 36 Am. Dec. 61;

Sergeant v. Steinberger, 2 Ohio 305; s.c. 15 Am. Dec. 553;

Jones v. Cable, 114 Pa. St. 386; s.c. 7 Atl. Rep. 791.

⁴ *Jones v. Cable*, 114 Pa. St. 386; s.c. 7 Atl. Rep. 791. In this case the court say: "It is plain that this was the intention of the testator for the devise over to the children does not take effect until after 'their death,' which evidently means the death of the survivor. It is true the act of 1812 has abolished joint tenancy in this state, but that act has never been held to prevent a testator creating a joint tenancy by the express language of his will or by necessary implication. On the contrary, was held in *Arnold v. Jack's Ex'rs.*, 24 Pa. St. 57, that, while survivorship, as an inci-

dent to joint tenancy was abolished by the act of 1812, it may be expressly given by will or deed. We think survivorship results as a necessary implication from this will, so far as the life-estate is concerned."

See: *Lentz v. Lentz*, 2 Phila. (Pa.) 117.

⁵ *Small v. Clifford*, 38 Me. 213;

Terrell v. Martin, 64 Tex. 121;

Wiswall v. Wilkins, 5 Vt. 87.

⁶ *Taylor v. Cox*, 2 B. Mon. (Ky.) 429.

See: *Young v. Adams*, 14 B. Mon. (Ky.) 127; s.c. 58 Am. Dec. 654;

Lindley v. Groff, 37 Minn. 338;

s.c. 34 N. W. Rep. 26;

Davis v. Givens, 71 Mo. 94;

Alexander v. Kennedy, 19 Tex.

488; s.c. 70 Am. Dec. 358.

Post, § 1937 *et seq.*

⁷ *Brittin v. Handy*, 20 Ark. 381; s.c. 73 Am. Dec. 497;

Thurston v. Masterson, 7 Dana (Ky.) 228;

Gossom v. Donaldson, 18 B. Mon. (Ky.) 230; s.c. 68 Am. Dec. 723;

Page v. Webster, 8 Mich. 263; s.c. 77 Am. Dec. 446;

Lloyd v. Lynch, 28 Pa. St. 419; s.c. 70 Am. Dec. 137.

See: *Burgett v. Taliaferro*, 118 Ill. 503; s.c. 9 N. E. Rep. 334;

Wilson v. Peelle, 78 Ind. 384;

taxes, or the purchase of the title at tax sale, by one joint tenant will inure to the benefit of all.¹

SEC. 1919. **Same—Not favored in equity.**—Title by joint tenancy was favored by the English law prior to the abolition of tenures,² but since that event it has not been favorably regarded,³ and the courts are inclined to seize upon every word indicating an intention to give a separate interest to each tenant,⁴ and such an estate will never be inferred where the testator meant there should be a division.⁵ In this country the matter is generally regulated by statute, and tenants take a general interest unless a different tenure is clearly expressed or implied in the instrument creating the estate. A grant devised to two or more persons is deemed to be a tenancy in common;⁶ and in some of the states an estate in joint tenancy is now known.⁷

SEC. 1920. **What may be held in joint tenancy.**—Joint tenancies are usually regarded as applicable to lands and

- Coleman v. Coleman, 3 Dana (Ky.) 398; s.c. 28 Am. Dec. 86;
 Gilman v. Stetson, 18 Me. 428;
 Picot v. Page, 26 Mo. 398;
 Burhans v. Van Zandt, 7 Barb. (N. Y.) 91.
 Anderson v. Clanch (Tex.), 6 S. W. Rep. 760.
¹ Chickering v. Faile, 38 Ill. 342;
 Smith v. Smith, 68 Iowa 608; s.c. 27 N. W. Rep. 780;
 Williams v. Gray, 3 Me. (3 Greenl.) 207; s.c. 14 Am. Dec. 234;
 Hardy v. Gregg (Miss.), 2 So. Rep. 358;
 Halsey v. Blood, 29 Pa. St. 319.
 See: Lomax v. Gindele, 117 Ill. 527; s.c. 7 N. E. Rep. 483;
 Weare v. Van Meter, 42 Iowa 128; s.c. 20 Am. Rep. 616;
 Minter v. Durham, 13 Oreg. 470; s.c. 11 Pac. Rep. 231.
² See: Martin v. Smith, 5 Binn. (Pa.) 16; s.c. 6 Am. Dec. 395, 400;
 Rigden v. Vallier, 3 Atk. 734;
 4 Kent Com. (13th ed.) 361.
³ Martin v. Smith, 5 Binn. (Pa.) 16; s.c. 6 Am. Dec. 395;
 Bambaugh v. Bambaugh, 11 Serg. & R. (Pa.) 191;
 Rigden v. Vallier, 3 Atk. 734;
 Fisher v. Wigg, 1 Pr. Wms. 14.
⁴ Partridge v. Colegate, 3 Har. & McH. (Md.) 399;
 Duncan v. Forrer, 6 Binn. (Pa.) 193;
 Galbraith v. Galbraith, 3 Serg. & R. (Pa.) 392.
⁵ Hart v. Marks, 4 Bradf. (N. Y.) 161;
 Martin v. Smith, 5 Binn. (Pa.) 16; s.c. 6 Am. Dec. 395;
 Gordon v. Atkinson, 1 De Gex & S. 478;
 Barley v. Cook, 3 Drew 662;
 Robertson v. Fraser, L. R. 6 Ch. App. 699.
 Ryves v. Ryves, L. R. 11 Eq. 541.
⁶ Miller v. Miller, 16 Mass. 59;
 Nichols v. Denny, 37 Miss. 59;
 Evans v. Brittain, 3 Serg. & R. (Pa.) 135;
 Wiswall v. Wilkins, 5 Vt. 87.
⁷ Phelps v. Jepson, 1 Root (Conn.) 48; s.c. 1 Am. Dec. 33;
 Wilson v. Fleming, 13 Ohio 68;
 Miles v. Fisher, 10 Ohio 1; s.c. 36 Am. Dec. 61.
 See: Benedict v. Gaylord, 11 Conn. 332, 337; s.c. 29 Am. Dec. 299.

tenements, but are also applicable to chattels personal as well as chattels real. All kinds of chattels, whether of a corporeal or an incorporeal nature, and whether chattels personal or chattels real, may be vested in two or more persons so as to constitute them joint owners;¹ so also may an inchoate as well as a perfect right.²

SEC. 1921. **Who may be joint tenants.**—All natural persons may be joint tenants, but bodies politic and bodies corporate cannot be joint tenants with each other, for the reason that each being perpetual there can be no survivorship between them;³ neither can the sovereign or a corporation whether sole or aggregate be joint tenants with a natural person,⁴ for the reason that there is no mutuality of survivorship between them.⁵

SEC. 1922. **Same—Trustees.**—The general rule is that co-trustees are joint tenants of the estate under their

¹ See : *Trammell v. Harrell*, 4 Ark. 602 ;

Crocker v. Carson, 33 Me. 436 ;

People's Bank v. Keech, 26 Md.

521 ; s.c. 90 Am. Dec. 118 ;

Lowe v. Miller, 3 Gratt. (Va.)

205 ; s.c. 46 Am. Dec. 188 ;

Gilbert v. Richards, 7 Vt. 203 ;

Pitts v. Hall, 3 Blatch. C. C. 201 ;

s.c. Fed. Cas. No. 11193 ;

Ive v. King, 16 Beav. 46 ;

Campbell v. Campbell, 4 Bro. C. C. 15 ;

Ward v. Ward, 6 Ch. (Eng.) 789 ;

Armstrong v. Armstrong, L. R. 7 Eq. 518 ;

2 Co. Litt. (19th ed.) 182a.

2 Kent Com. (13th ed.) 350.

Legacies of chattels—The early English doctrine, as laid down in *Perkins v. Boynton*, 1 Bro. C. C. 118, was against any construction tending to support a joint tenancy in legacies of chattels, and testators were presumed to have intended to confer legacies in the most advantageous manner ; but it was subsequently decided, in *Campbell v. Campbell*, 4 Bro. C. C. 415, that where a legacy is given to two or more persons, they will take a joint tenancy, unless the will con-

tains words to show that the testator intended a severance of the interest, and to take away the right of survivorship. (See : *Ante*, § 1917.) This construction is now universally accepted.

2 Kent Com. (13th ed.) 351.

See : *Putnam v. Putnam*, 4 Bradf. (N. Y.) 308 ;

Dott v. Willson, 1 Bay (S. C.) L. 457 ;

Morgan v. Britten, L. R. 13 Eq. 28 ; s.c. 1 Moak Eng. Rep. 537 ;

Mayn v. Mayn, L. R. 5 Eq. 150 ;

Jackson v. Jackson, 9 Ves. 591 ;

Crooke v. DeVandes, 9 Ves. 197.

² *Lillianskyoldt v. Goss*, 2 Utah 292 ;

Wilkins v. Burton, 5 Vt. 76.

³ *DeWitt v. San Francisco*, 2 Cal. 289 ;

Lyster v. Kirkpatrick, 26 Up. Can. Q. B. 217.

⁴ *Telfair v. Howe*, 3 Rich. (S. C.) Eq. 235 ; s.c. 55 Am. Dec. 637 ;

2 Cruise Dig. (4th ed.) 372.

See : *Post*, § 1927.

⁵ 2 Bl. Com. 184 ;

2 Cruise Dig. (4th ed.) 372.

See : *Telfair v. Howe*, 3 Rich. Eq. 235 ; s.c. 55 Am. Dec. 637.

management,¹ in all those cases where their joint action is contemplated, or where a joint tenancy is necessary to the proper execution of their trust, and courts will construe a tenancy joint if possible, on account of the inconvenience of the trustees holding as tenants in common. In those states where joint tenancy is abolished by statute, an exception is usually made in the case of trustees.² Upon the death of the original trustee the estate devolves upon the survivors,³ and upon the death of the last survivor, if he has made no disposition of the estate by will or otherwise, it devolves upon his heirs, if real estate, and upon his executors or administrators, if it be personal property.⁴

SEC. 1923. **Same—Mortgages.**—The interest of a mortgagee in lands mortgaged is regarded as an estate in lands, and where lands are mortgaged to two or more persons for a joint debt, the estate is held by them in joint tenancy,⁵ they being joint tenants and not tenants in common of the mortgaged land.⁶ Should one of the

¹ *Webster v. Vandeventer*, 72 Mass. (6 Gray) 428 ;
Appleton v. Boyd, 7 Mass. 131 ;
Franklin Savings Institution v. People's Savings Bank, 14 R. I. 632.

² *Webster v. Vandeventer*, 72 Mass. (6 Gray) 428 ;
 1 *Perry on Trusts* (4th ed.) § 343.

³ *Parsons v. Boyd*, 20 Ala. 112 ;
Gray v. Lynch, 8 Gill (Md.) 403, 423 ;

Warden v. Richards, 77 Mass. (11 Gray) 277, 278 ;

Rabe v. Fyler, 18 Miss. (10 Smed. & M.) 440 ; s.c. 48 Am. Dec. 763 ;

Shook v. Shook, 19 Barb. (N. Y.) 653 ;

Shortz v. Unangst, 3 Watts & S. (Pa.) 45.

⁴ *Powell v. Knox*, 16 Ala. 364 ;
Mauldin v. Armstead, 14 Ala. 702 ;
Richeson v. Ryan, 15 Ill. 13 ;
Gray v. Lynch, 8 Gill (Md.) 403, 404 ;

Webster v. Vandeventer, 72 Mass. (6 Gray) 429 ;

Whiting v. Whiting, 70 Mass. (4 Gray) 236.

Stewart v. Pettus, 10 Mo. 755 ;

Shook v. Shook, 19 Barb. (N. Y.) 653 ;

Moses v. Murgatroyd, 1 John. Ch. (N. Y.) 119 ; s.c. 7 Am. Dec. 478 ;

De Peyster v. Ferrers, 11 Paige Ch. (N. Y.) 13 ;

Jenks v. Backhouse, 1 Binn. (Pa.) 91 ;

Shortz v. Unangst, 3 Watts & S. (Pa.) 45 ;

Watkins v. Specht, 7 Coldw. (Tenn.) 585 ;

King v. Leach, 2 Hare 59.

⁵ *Pearce v. Savage*, 45 Me. 90 ;

Kinsley v. Abbott, 19 Me. 430 ;

Donnels v. Edwards, 19 Mass. (2 Pick.) 617 ;

Appleton v. Boyd, 7 Mass. 131 ;

Martin v. McReynolds, 6 Mich. 72 ;

Deloney v. Hutchison, 2 Rand. (Va.) 183.

Compare : *Randall v. Phillips*, 3 Mas. C. C. 378 ; s.c. Fed. Cas. No. 11555.

⁶ *Webster v. Vandeventer*, 72 Mass. (6 Gray) 428.

See : *Cochran v. Goodell*, 131 Mass. 464, 465 ;

Austin v. Shaw, 92 Mass. (10 Allen) 552 ;

mortgagees die the right to foreclose will survive, and the surviving mortgagee may bring an action to foreclose without making the heirs or personal representatives of the deceased co-mortgagee a party to the suit.¹ But in those cases where the mortgage is given to two or more persons to secure individual debts due to them severally, the tenancy of the estate will be in common and not a joint tenancy,² and each mortgagee has a right to enforce his portion of the claim under the mortgage.³

SEC. 1924. **Same—Husband and wife.**—Because of the peculiar relation existing between a husband and wife, and of their legal unity, they are seized of the estate by entireties and not by moieties,⁴ and as there can be no moieties between husband and wife, they cannot be joint tenants; therefore, where an estate is conveyed to a man and his wife, and their heirs, it is not a joint tenancy; for joint tenants take by moieties, and are each seized of an undivided moiety of the whole. But husband and wife being simply one person, cannot, during the coverture, take separate estates; therefore, upon a purchase made by them both each has the entirety, and they are seized *per tout* not *per my*;⁵ and the husband cannot forfeit or dispose of the estate,⁶ because the whole

Peabody v. Eastern Methodist Soc. in Lynn, 87 Mass. (5 Allen) 540;

Appleton v. Boyd, 7 Mass. 131;

Hill on Trust. (2d Am. ed.) 441, 442.

In Cochran v. Goodell, *supra*, the court say: "Two mortgages from the defendant Goodell to the plaintiffs severally, to secure several obligations, having been given at the same time, the two mortgagees were tenants in common, and their rights were the same as if one mortgage had been made to both, to secure to each his separate debt."

See: Howard v. Chase, 104 Mass. 249;

Burnett v. Pratt, 39 Mass. (22 Pick.) 556.

¹ Appleton v. Boyd, 7 Mass. 131;

Martin v. Reynolds, 6 Mich. 72.

See: King v. Parker, 63 Mass. (9 Cush.) 71, 80;

Earle v. Wood, 62 Mass. (8 Cush.) 430, 448;

Ewer v. Hobbs, 46 Mass. (5 Met.) 1, 3;

Burnett v. Pratt, 39 Mass. (22 Pick.) 556, 557;

Lowell's Appellant, 39 Mass. (22 Pick.) 215, 222;

Norton v. Leonard, 29 Mass. (12 Pick.) 152, 157;

Goodwin v. Richardson, 11 Mass. 469.

See: also, Wiltsie on Mortg. Forc. (2d ed.) § 79.

² Brown v. Bates, 55 Me. 520; s.c. 92 Am. Dec. 613;

Burnett v. Pratt, 39 Mass. (22 Pick.) 556.

³ Burnett v. Pratt, 39 Mass. (22 Pick.) 557.

⁴ Gillan v. Dixon, 65 Pa. St. 395.

See: *Post*, § 1968, *et seq.*

⁵ See: *Post*, §§ 1970, 1974.

⁶ Wales v. Coffin, 95 Mass. (13 Allen) 213;

of it belongs to his wife as well as to him.¹ On the death of either the husband or wife, the whole goes to the survivor.²

SEC. 1925. **Same—Infants.**—Infants may be joint tenants of an estate ;³ and where a mother holds lands in special tail, a child at its birth *eo instanti* becomes a joint tenant with her in the lands.⁴ But the doctrine that where a deed is made to a wife and her child or children thereafter to be born, on the birth of a child it *eo instanti* becomes a tenant in common with the mother, is denied in *Davis v. Hardin*,⁵ wherein it is held that in such a case the mother takes a life estate with remainder in fee to her child or children.

SEC. 1926. **Same—Executors and administrators.**—Executors and administrators being regarded in law as one person, joint executors, or administrators are said to be possessed of the estate, each as of the entirety ; and consequently the act of one is the act of all.⁶ Hence where one of such executors or administrators sells the property or securities of the testator to an innocent purchaser, who has no reason to suspect a breach of trust, such purchaser will be entitled to hold the same, not only against the executors or administrators, but also against the creditors and legatees.⁷ But in those cases

Hemingway v. Scales, 42 Miss. 1 ;
s.c. 2 Am. Rep. 586 ;

Thomas v. De Baum, 14 N. J. Eq.
(1 McC.) 37 ;

Beach v. Hollister, 5 Thomp. &
C. (N. Y.) 568 ; s.c. 3 Hun (N.
Y.) 519 ;

Bates v. Seely, 46 Pa. St. 248 ;

Stuckey v. Keefe's Exrs., 26 Pa.
St. 397.

See : *Post*, § 1976.

¹ **Bond and mortgage to husband and wife—Survivorship.**—Thus, if a promissory note or bond is made to husband and wife, with a mortgage to them for collateral security, the debt and estate survive to the wife, as joint tenant ; and this, as well in law as in equity.

See : *Draper v. Jackson*, 16 Mass.
480 ;

Varnem v. Abbot, 12 Mass. 474 ;

Fox v. Fletcher, 8 Mass. 274 ;

Shaw v. Hearsay, 5 Mass. 521 ;

Christ's Hospital v. Budgin, 2
Vern. 683 ;

Coppin v. 2 Pr. Wms. 496.

See : *Post*, § 1974.

² *Stuckey v. Keefe's Exrs.*, 26 Pa.
St. 397.

See : *Post*, § 1975.

³ See : *Bacon's Abridgment. Tit.*
Joint Tenant, B.

⁴ *Powell v. Powell*, 5 Bush (Ky.)
619 ; s.c. 96 Am. Dec. 372.

⁵ 80 Ky. 672.

⁶ *Bryan's Exrs. v. Thompson's*
Admr., 7 J. J. Marsh. (Ky.)
587.

⁷ *Beecher v. Buckingham*, 18 Conn.
110 ; s.c. 44 Am. Dec. 580 ;

Saunders v. Saunders, 2 Litt.
(Ky.) 315 ;

Shaw v. Berry, 35 Me. 279 ; s.c.
58 Am. Dec. 702 ;

where the execution of a power is coupled with an interest, the tenure of an executor will be like that of an ordinary trustee having a similar power, and co-executors hold as joint tenants,¹ with the right of survivorship;² because the joint executors have an interest in the estate.³ Hence it has been held that where co-executors take the residue of an estate in their official capacity, they become joint tenants with the right of survivorship.⁴

SEC. 1927. Same—Corporations.—In the case of corporations, we have already seen,⁵ property cannot be held by joint tenancy. One reason for this is the fact that corporations being perpetual, there can be no survivorship between them;⁶ another reason is because they are seized by different rights and in different capacities.⁷ It has been said that upon whatever reasons it be founded the rule is established beyond doubt that bodies politic or corporate cannot be joint tenants with each other or with a natural person.⁸

SEC. 1928. Obligations and liabilities.—In the case of joint owners or owners in common the general rule is that each is charged with the care and management of

Sutherland v. Brush, 7 John. Ch. (N. Y.) 17; s.c. 11 Am. Dec. 383;

Hestell v. Bogert, 9 Paige Ch. (N. Y.) 52, 57;

Simpson v. Gutteridge, 1 Madd. Ch. 609; s.c. 16 Rev. Rep. 276.

¹ Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528; s.c. 49 Am. Dec. 189. It is said in this case that a deed to three persons vests title in them as tenants in common, though they are described as executors, there being nothing in the deed to show that the estate was intended to be vested in them as trustees.

² See: *Ante*, § 1915.

³ Henderson v. Henderson, Temp. Talb. 129;

Adams v. Buckland, 2 Vern. 514.

⁴ Flanders v. Clarke, 3 Atk. 509; s.c. 1 Ves. Sr. 9;

Baldwin v. Johnson, 3 Bro. C. C.

455;

Frewen v. Relfe, 2 Bro. C. C. 220; Knight v. Gould, 2 Myl. & K. 299, 303;

Griffiths v. Hamilton, 12 Ves. 298;

White v. Williams, 3 Ves. & B. 72.

⁵ See: *Ante*, § 1921.

⁶ See: De Witt v. San Francisco, 2 Cal. 289.

⁷ Freeman Co. Ten. & Part. (2d ed.) § 15.

⁸ De Witt v. San Francisco, 2 Cal. 289;

Telfair v. Howe, 32 Rich. (S. C.) Eq. 235, 242; s.c. 55 Am. Dec. 637;

Lyster v. Kirkpatrick, 26 Up. Can. Q. B. 217;

Bennett v. Holbeck, 3 Saund. 319; Angel & Ames on Corp. (11th ed.)

§ 85;

2 Co. Litt. (19th ed.) 190a;

2 Cruise Dig. (4th ed.) 372.

the common estate, and that one is not entitled to charge against another a compensation for his individual services in managing or taking care of joint property, or for his mere valuable or unequal services in such regard, except as the result of a direct agreement, unless, from all the circumstances, a mutual understanding to that effect is satisfactorily shown ;¹ and such an understanding or agreement will not be extended beyond its express terms.²

SEC. 1929. **Same—To contribute share of purchase price.**—A joint tenant or tenant in common is under obligations to contribute his share of the purchase price of the common property, and where one of the co-tenants has paid all of the purchase price or more than his share thereof his co-tenants will be required to contribute their proportionate shares respectively ;³ and upon their failure to do so, the co-tenant making such payment will have a lien upon the common property for his re-imbursement.⁴

SEC. 1930. **Same—To contribute share of taxes.**—It is the duty of each of joint tenants and tenants in common to contribute their share of the expenses connected with the owning and operating of the common property ; consequently where a joint tenant or a tenant in common has paid the taxes upon the whole of the common estate,⁵ or has purchased the property at a tax-sale,⁶ he is en-

¹ *Fuller v. Fuller*, 23 Fla. 236 ; s.c. 2 So. Rep. 426 ;
Hamilton v. Conine, 28 Md. 635 ; s.c. 92 Am. Dec. 724 ;
Bradford v. Kimberly, 3 John. Ch. (N. Y.) 431, 434 ;
Franklin v. Robinson, 1 John. Ch. (N. Y.) 157 ;
Philips v. Turner, 2 Dev. & B. (N. C.) Eq. 123 ;
Beatty v. Wray, 19 Pa. St. 516 ; s.c. 57 Am. Dec. 677, 678 ;
Forrer v. Forrer, 29 Gratt. (Va.) 134, 138 ;
Patton v. Calhoun, 4 Gratt. (Va.) 138.
 See : *Reybold v. Dodd Admr.*, 1 Harr. (Del.) 401 ; s.c. 26 Am. Dec. 405.
Thompson v. Newton (Pa.), 7 Atl. Rep. 64 ;
Anderson v. Clanch (Tex.), 6 S. W. Rep. 760.
² See : *Anderson v. Clanch* (Tex.), 6 S. W. Rep. 760.
³ *Leitch v. Little*, 14 Pa. St. 250. See : *Oglesby v. Hollister*, 76 Cal. 136 ; s.c. 18 Pac. Rep. 146.
⁴ *Newbold v. Smart*, 67 Ala. 326 ;
Miller v. McMullin, 68 N. Y. 345 ; s.c. 5 Hun (N. Y.) 572 ;
Leitch v. Little, 14 Pa. St. 250.
⁵ *Morgan v. Herrick*, 21 Ill. 481.
⁶ See : *Post*, § 1918.

titled to receive from his co-tenants their proportion of the sum thus paid, together with interest from the time when paid,¹ because the tax thus paid was a lien upon the land which all the co-tenants are equally bound to discharge;² and the law regards the money paid to discharge this lien as money paid at the request of the other co-tenants and for their use;³ but where a joint tenant or a tenant in common has paid the entire purchase price, and is in possession of the common property, collecting the rents and profits and not accounting therefor, he is under no obligations to pay the taxes assessed to his co-tenant.⁴

SEC. 1931. Same—To contribute share of encumbrance.—Joint tenants and tenants in common, are under obligation to bear proportionately the burdens of the common property; consequently, where one or more of them advances money to pay off incumbrances on the common property,⁵ the others will be required to reimburse him or them in their proportionate shares of the money thus paid,⁶ and will have an equitable lien upon the shares of the other co-tenants for the repayment of such proportionate shares.⁷

¹ *Morgan v. Herrick*, 21 Ill. 481;
Oliver v. Montgomery, 39 Iowa
601;

Kites v. Church, 142 Mass. 586;
s.c. 8 N. E. Rep. 743;

Paine v. Slocum, 56 Vt. 504.

See: *Stover v. Cory*, 58 Iowa 78;
s.c. 6 N. W. Rep. 708;

Bowen v. South Building Prop.,
137 Mass. 274;

Nichols v. Bucknam, 117 Mass.
488;

Dickinson v. Williams, 65 Mass.
(11 Cush.) 258; s.c. 59 Am.
Dec. 142;

Harrison v. Harrison, 56 Miss.
174;

Anderson v. Greble, 1 Ashm.
(Pa.) 136.

² *Dickinson v. Williams*, 65 Mass.
(11 Cush.) 258; s.c. 59 Am.
Dec. 142.

³ *Kites v. Church*, 142 Mass. 586;
s.c. 8 N. E. Rep. 743;

Bowen v. South Building Prop.,
137 Mass. 274;
Nichols v. Bucknam, 117 Mass.
488.

⁴ *Oglesby v. Hollister*, 76 Cal. 136;
s.c. 18 Pac. Rep. 146.

⁵ See: *Ante*, § 1918.

⁶ *Newbold v. Smart*, 67 Ala. 326;
Carter v. Penn, 99 Ill. 390;
Titworth v. Stout, 49 Ill. 78;
Furman v. McMillan, 2 Lea
(Tenn.) 121.

See: *Bryan v. Ramirez*, 8 Cal.
461;

Vogle v. Brown, 120 Ill. 338; s.c.
11 N. E. Rep. 327; 12 N. E.
Rep. 252;

Wall v. Fife, 37 Pa. St. 394;
Paine v. Slocum, 56 Vt. 504.

⁷ See: *Newbold v. Smart*, 67 Ala.
326;

Titworth v. Stout, 49 Ill. 78;
Furman v. McMillan, 2 Lea
(Tenn.) 121.

SEC. 1932. **Same**—To contribute share of expenses for repairs.—Joint tenants and tenants in common, being under obligations to bear proportionately the burden of their common property¹ the general rule is that where one tenant has made necessary repairs upon such property, his co-tenants will be required to contribute their share of the expenses thereof;² and the tenant advancing the money, will be entitled to be reimbursed for such repairs, out of the proceeds of the common property;³ or it may be enforced by lien upon the share of the delinquent co-tenants.⁴ To this general rule, some courts add the limitation that the repairs made must be absolutely necessary to the enjoyment of the property, and to prevent it from going to ruin;⁵ and in others it is held that the tenant making the repairs can enforce contribution only in those cases where he has made the repairs at the request, or with the consent of his co-tenants.⁶ In such cases there can be no recovery, unless

¹ See : *Ante*, § 1931.

² *Fowler v. Fowler*, 50 Conn. 256 ;
Alexander v. Ellison, 79 Ky. 148 ;
Gwinneeth v. Thompson, 26 Mass.
 (9 Pick.) 31 ;

Doane v. Badger, 12 Mass. 65 ;

Cartwright v. Miller, 4 Mass. 559 ;

Peyton v. Smith, 2 Dev. & B. (N.
 C.) Eq. 325 ;

Beatty v. Bordwell, 91 Pa. St. 438 ;

Dech's Appeal, 57 Pa. St. 467 ;

Huston v. Springer, 2 Rawle. (Pa.)
 97, 99 ;

Farrand v. Gleason, 56 Vt. 633 ;

Galusha v. Sinclear, 3 Vt. 394.

³ *Ford v. Knapp*, 102 N. Y. 135 ; s.c.
 55 Am. Rep. 782, rev'g 31 Hun
 (N. Y.) 522.

⁴ *Alexander v. Ellison*, 79 Ky. 148 ;
Galusha v. Sinclear, 3 Vt. 394.

⁵ *Dech's Appeal*, 57 Pa. St. 467 ;
Leigh v. Dickeson, L. R. 12 Q. B.
 Div. 194 ; s.c. 37 Moak Eng.
 Rep. 620, aff'd L. R. 15 Q. B.
 Div. 60 ; 38 Moak Eng. Rep.

⁶ *Calvert v. Aldrich*, 99 Mass. 74 ;
 s.c. 96 Am. Dec. 693.

See : *Coffin v. Heath*, 47 Mass. (6
 Met.) 76, 80 ;

Doane v. Badger, 12 Mass. 65 ;

Loring v. Bacon, 4 Mass. 575 ;

Stackable v. Stackable's Estate,
 65 Mich. 515 ; s.c. 32 N. W.

Rep. 808 ;

Wiggins v. Wiggins, 43 N. H. 561 ;
Mumford v. Brown, 6 Cow. (N.
 Y.) 475 ; s.c. 16 Am. Dec.
 440 ;

Crest v. Jack, 3 Watts (Pa.) 238 ;
 s.c. 27 Am. Dec. 353 ;

Thurston v. Dickinson, 2 Rich.
 (S. C.) Eq. 317 ; s.c. 46 Am.
 Dec. 56 ;

Tenant v. Goldwin, 6 Mod. 311
 s.c. 2 Ld. Raym. 1089 ; 1 Salk.
 21, 360.

The common law doctrine on this subject is stated by Mr. Coke as follows : " If two tenants in common or joint tenants be of an house or mill, and it fall in decay, and the one is willing to repair the same, and the other will not, he that is willing shall have a writ *de reparatione faciendâ*, and the writ saith *ad reparationem et sustentationem ejusdem domûs teneantur*, whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men." 2 Co. Litt. (19th ed.) 200b ; 1 Id. 54b. And in another place he says : " If there be two joint tenants of a wood or arable land, the

there has been previous request to join in making such repairs, in the absence of any provision or agreement binding either party to make such repairs.¹

SEC. 1933. **Same**—To contribute share of expenses for improvements.—While joint tenants are required to contribute their share toward the necessary expenses and repairs for the maintenance of the common property,² yet one joint tenant or tenant in common will not be allowed to erect buildings or make improvements on the common property without the consent of his co-tenants, and then claim to hold the common property until reimbursed a proportionate part of the moneys expended therefor;³ but in such a case, on a partition of the lands thus improved, courts will take into consideration the fact of the improvements made, and where actual partition is made, and it is possible to do so, the improving tenant will be awarded the portion of the land upon which the improvements have been made.⁴ This is upon the ground that one who seeks equity must do equity, and the tenant out of the actual occupation of the land who asks the court to award him partition is entitled to relief only upon condition that the equitable rights of his co-tenants should be respected.⁵ The general rule as above laid down is founded on the general principle that a person

one has no remedy against the other to make enclosure or reparations for safeguard of the wood or corn," but if there be two joint tenants of a house, the one shall have his writ *de reparatione faciendâ* against the other. This is said to be because of "the pre-eminence and privilege which the law gives to houses which are for men's habitation." Bowle's case, 11 Co. 82.

¹ Doane v. Badger, 12 Mass. 65; Converse v. Ferre, 11 Mass. 325; Cartwright v. Miller, 4 Mass. 559.

² At common law either tenant was entitled to his writ, *de reparatione faciendâ* to compel his companion to join in making such repairs.

See: Doane v. Badger, 12 Mass.

65;

Cartwright v. Miller, 4 Mass. 559;

Beaty v. Bordwell, 91 Pa. St. 438; 2 Co. Litt. (19th ed.) 200b.

³ Crest v. Jack, 3 Watts (Pa.) 238; s.c. 27 Am. Dec. 353.

⁴ Ford v. Knapp, 102 N. Y. 135; s.c. 55 Am. Rep. 782.

See: St. Felix v. Rankin, 3 Edw. Ch. (N. Y.) 323;

Town v. Needham, 3 Paige Ch. 545; s.c. 24 Am. Dec. 246;

Re Heller, 3 Paige Ch. (N. Y.) 199;

Conklin v. Conklin, 3 Sandf. Ch. (N. Y.) 64.

⁵ Ford v. Knapp, 102 N. Y. 135; s.c. 55 Am. Rep. 782.

See: Taylor v. Baldwin, 10 Barb. (N. Y.) 582, aff'g 10 Barb. (N. Y.) 626;

Swan v. Swan, 8 Price 518.

cannot be judicially compelled to incur a debt for the improvement of his property against his consent and in accordance with the views and wishes of another beneficiary interested therein.¹ But in those cases where improvements are made at the instance or request, or with the consent, of the co-tenant out of possession, he will be liable to contribute his just share,² together with interest thereon,³ except in those cases where the co-tenant makes improvements different from those agreed upon.⁴ Where a joint tenant having authority to do so, improves the property in good faith, he cannot be held responsible to the other co-tenants for errors of judgment in making the improvements, but will be entitled to contribution.⁵

SEC. 1934. *Same*—To pay rent.—It is a well-settled principle of the common law that the mere occupation by a joint tenant of the entire estate does not render him liable to his co-tenant for the use and occupation of any part of the common property. The reason is easily found. The right of each to occupy the premises is one of the incidents of a tenancy in common. Neither tenant can lawfully exclude the other. The occupation of one, so long as he does not exclude the other, is but the exercise of a legal right. If, for any reason, one does not choose to assert the right of a common enjoyment, the other is not obliged to stay out; and if the sole occupation of one could render him liable therefor to the other, his legal right to the occupation would be dependent upon the caprice or indolence of his co-tenant, and this the law would not tolerate.⁶ But where the

¹ *Morgan v. Morgan*, 32 La. An. 532.

² See: *Young v. Polack*, 3 Cal. 208; *Bazemore v. Davis*, 55 Ga. 504; *Sears v. Munson*, 23 Iowa 380; *Bayley v. Denny*, 23 La. An. 255; *Walter v. Greenwood*, 29 Minn. 87; s.c. 12 N. W. Rep. 145; *Stevens v. Thompson*, 17 N. H. 103;

Taylor v. Baldwin, 10 Barb. (N. Y.) 582, aff'g 10 Barb. (N. Y.) 626;

Coakley v. Mahar, 36 Hun (N. Y.) 157;

Dech's Appeal, 57 Pa. St. 467; *Houston v. McCluney*, 8 W. Va. 135.

³ *Sears v. Munson*, 23 Iowa 380;

Young v. Polack, 3 Cal. 208.

⁴ *Conrad v. Starr*, 50 Iowa 470.

⁵ *Reed v. Jones*, 8 Wis. 421.

See: *Hall v. Piddock*, 21 N. J. Eq. (6 C. E. Gr. 311; *Post*, § 1936.

⁶ *Fielder v. Childs*, 73 Ala. 567;

Hamby v. Wall, 48 Ark. 135; s.c. 2 S. W. Rep. 705;

Pico v. Columbet, 12 Cal. 414; s.c. 73 Am. Dec. 647;

occupying tenant excludes his co-tenants, such exclusion will be regarded as an ouster,¹ and in such case the occupying tenant may be held liable to account for use and occupation² to the extent of the use of which he has deprived his co-tenant.³ But where a joint tenant or tenant in common of real estate occupies the whole estate under an agreement, either oral or in writing, to pay his co-tenants for the occupation, the latter may recover therefor.⁴ And where one of two or more joint tenants, or tenants in common, receives rent from a third party for the use and occupation of the estate, he will be liable to account therefor,⁵ to the extent of what he has received in excess of his own share.⁶

Varnum *v.* Leek, 65 Iowa 751;
s.c. 23 N. W. Rep. 151;

Reynolds *v.* Wilmeth, 45 Iowa 693;

Austin *v.* Barrett, 44 Iowa 488;

Beenel *v.* Beenel, 23 La. An. 150;

Israel *v.* Israel, 30 Md. 120, 124;

s.c. 96 Am. Dec. 571;

Sargent *v.* Parsons, 12 Mass. 149, 152;

Everts *v.* Beach, 31 Mich. 136;

s.c. 18 Am. Rep. 169;

Hause *v.* Hause, 29 Minn. 252;

s.c. 13 N. W. Rep. 43;

Kean *v.* Connelly, 25 Minn. 222;

s.c. 33 Am. Rep. 458;

Sailer *v.* Sailer, 41 N. J. Eq. 398;

s.c. 5 Atl. Rep. 319;

Barrell *v.* Barrell, 25 N. J. Eq.

(10 C. E. Gr.) 173;

Davidson *v.* Thompson, 22 N. J.

Eq. (7 C. E. Gr.) 83;

Izard *v.* Bodine, 11 N. J. Eq. (3

Stock.) 403, 404; s.c. 69 Am.

Dec. 595;

McMahon *v.* Burchell, 2 Phil.

(Pa.) 126;

Akin *v.* Jefferson, 65 Tex. 137;

Anderson *v.* Clanch (Tex.), 6 S.

W. Rep. 760;

Henderson *v.* Eason, 17 Ad. & E.

N. S. (17 Q. B.) 701, 718; s.c.

79 Eng. C. L. 701;

Freem. Co-Ten. & Part. (2d ed.)

§ 258;

4 Kent Com. (13th ed.) 369.

¹ Noble *v.* McFarland, 51 Ill. 226;

Varnum *v.* Leek, 65 Iowa 751;
s.c. 23 N. W. Rep. 151;

² Varnum *v.* Leek, 65 Iowa 751,
s.c. 23 N. W. Rep. 151;

Sears *v.* Sellew, 28 Iowa 501;

Holmes *v.* Best, 58 Vt. 547; s.c. 5

Atl. Rep. 385;

Hayden *v.* Merrill, 44 Vt. 336;

s.c. 8 Am. Rep. 723;

Wisnall *v.* Wilkins, 5 Vt. 87;

Almy *v.* Daniels, 15 R. I. 312; s.c.

4 Atl. Rep. 753; 10 Atl. Rep.

654;

Scantlin *v.* Allison, 32 Kan. 376;

s.c. 4 Pac. Rep. 618;

Scarborough *v.* Smith, 18 Kan.

399.

³ Crane *v.* Waggoner, 27 Ind. 52;

s.c. 89 Am. Dec. 493;

Barrell *v.* Barrell, 25 N. J. Eq.

(10 C. E. Gr.) 173;

Osborn *v.* Osborn, 62 Tex. 495.

⁴ Kites *v.* Churce, 142 Mass. 586;

s.c. 8 N. E. Rep. 743;

Davies *v.* Skinner, 58 Wis. 638,

s.c. 46 Am. Rep. 665; 17 N. W.

Rep. 427.

⁵ Gayle *v.* Johnston, 80 Ala. 395;

Pope *v.* Harkins, 16 Ala. 321;

Muller *v.* Boggs, 25 Cal. 175;

Goodenow *v.* Ewer, 16 Cal. 461;

s.c. 76 Am. Dec. 540;

Austen *v.* Barrett, 44 Iowa, 488;

Burch *v.* Burch, 82 Ky. 622;

Cutler *v.* Currier, 54 Me. 81;

Dyer *v.* Wilber, 48 Me. 287;

Buck *v.* Spofford, 31 Me. 34;

⁶ Irvine *v.* Hanlin, 10 Serg. & R. (Pa.) 219;

Jones *v.* Massey, 14 S. C. 292.

SEC. 1935. **Same**—To account for rents and profits.—We have seen in the foregoing section that a tenant in common who receives rents for the use and occupation of the common estate is liable to account to the extent of the amount received by him in excess of the share to which he is entitled; and where there is a liability of such tenant to account for crops grown upon the common estate, his liability extends only to that which he has received of the proceeds in excess of his share.¹ Where

Mayhew v. Durfee, 138 Mass. 584;

Medford v. Frazier, 58 Miss. 241;

Hannan v. Osborn, 4 Paige Ch. (N. Y.) 336;

Irvine v. Hanlin, 10 Serg. & R. (Pa.) 219;

Pearson v. Carlton, 18 S. C. 47;

Jones v. Massey, 14 S. C. 292;

Holmes v. Best, 58 Vt. 547.

See: *Post*, § 1935.

¹ Bird v. Bird, 15 Fla. 424; s.c. 21 Am. Rep. 296;

Peck v. Carpenter, 73 Mass. (7 Gray) 283; s.c. 66 Am. Dec. 477;

Roseboom v. Roseboom, 15 Hun (N. Y.) 309;

Almy v. Daniels, 15 R. I. 312; s.c. 10 Atl. Rep. 654; 4 Atl. Rep. 618;

Pearson v. Carlton, 18 S. C. 47;

Lyles v. Lyles, 1 Hill (S. C.) Eq. 76.

In Bird v. Bird, *supra*, Judge WESTCOTT says: "In Coke's Littleton (2 Co. Litt., 19th ed., 200b) the common law upon the subject of tenants in common is thus announced: 'If one tenant in common maketh his companion his bailiff of his part, he shall have his action of account against him. But although one tenant in common, without being made bailiff, take the whole profits, no action lies against him.' It was manifestly unjust to permit one tenant in common thus to take the whole profits of the common estate without accounting, and it was the purpose of the statute of 4 Ann. c. 16, to correct that evil. That statute, which is in force in this state, enacted that an action of account shall lie by

one tenant in common against another who has actually received more than his share of the profits. Under the statute of Ann. it was no longer necessary that one tenant in common should take the profits as bailiff by appointment to make him responsible. It was only necessary that he should receive more than his just share of the profits. By this act, and without appointment by his cotenant, he became bailiff, and was responsible for what he actually received beyond his just share. The English courts, however, held that there was not a receiving within the meaning of the statute in cases where one tenant in common had enjoyed more of the benefit of the subject or made more by its occupation than the other, and restricted the statute to cases only where one tenant in common receives money, or something else, from another person, to which both cotenants are entitled by reason of their being tenants in common, and in proportion to their interest as such, and of which the one receives and keeps more than his just share according to that proportion. Mere occupancy by one tenant in common, under this decision, involved no liability to account to another tenant in common. These are the views announced by Baron Parke in 9 English Law and Equity 339.

The same view has obtained in the United States, in the state of Massachusetts, 12 Mass. 156; California, 12 Cal. 422; New York, 18 Barb. (N. Y.) 265;

one co-tenant has any dealings or transactions with or concerning the common property whereby a profit accrues, he will be liable to account to his co-tenants for their just shares of such profits;¹ and where a portion of the common property is consumed by one of the joint tenants, he will be liable to account to his co-tenant for his share of such profit.²

SEC. 1936. Same—To share burdens and losses of common property.—Joint tenants and tenants in common, being equally interested in the common estate, are required to bear their proportionate share of the expenses of operating and conducting the same;³ the expenses for necessary improvements,⁴ and all other burdens incident to the ownership of the estate.⁵ All the joint tenants are charged with the duty to look after, superintend, and care for the property, and where loss occurs through the carelessness, inattention, or error of judgment on the part of the co-tenant in charge of the common property, such loss must be borne equally by the co-tenants,⁶ unless the act on the part of the co-tenant in charge amounts to a positive wrong or a nuisance, in which case the co-tenant in charge alone must bear the loss, whether the injury

Kentucky, 7 J. J. Marsh (Ky). 139; Maryland, 30 Md. 126; New Jersey, 3 Stockt. 404; and Missouri, 29 Mo. 366. A different doctrine has prevailed in the states of Virginia, 16 Gratt. 21, 52; Vermont, 44 Vt. 347; South Carolina, 1 McMull. 69; and Georgia, 14 Ga. 436. In these states the occupying tenant has been held responsible for what he has realized beyond his just proportion, and has been sometimes charged with a yearly rental valuation."

¹ Dickinson v. Williams, 65 Mass. (11 Cush.) 256, 260; s.c. 59 Am. Dec. 142;

Miller v. Miller, 26 Mass. (9 Pick.) 34.

See: Fanning v. Chadwick, 20 Mass. (3 Pick.) 420, 426; s.c. 15 Am. Dec. 233;

Jones v. Harridan, 9 Mass. 540,

note;

Brigham v. Eveleth, 9 Mass. 538;

Linch v. Broad, 70 Tex. 92; s.c. 6 S. W. Rep. 751;

Anderson v. Clanch (Tex.), 6 S. W. Rep. 760.

² Lewis v. Clark, 59 Vt. 363; s.c. 8 Atl. Rep. 158.

³ See: *Ante*, § 1932.

⁴ See: *Ante*, § 1933.

⁵ Wilton v. Tazwell, 86 Ill. 29;

Griffith v. Robinson, 14 Ill. App. 377;

Pipkin v. Allen, 29 Mo. 229;

Marsh v. Hand, 40 Hun (N. Y.) 339;

Elliott v. McKay, 4 Jones (N. C.) L. 59.

⁶ See: Hall v. Piddock, 21 N. J. Eq. (C. E. Gr.) 311;

Moody v. Buck, 1 Sandf. (N. Y.) 304;

Reed v. Jones 8 Wis. 421.

Ante, § 1933.

inflicted falls on one of his co-tenants or upon a third person.¹

SEC. 1937. **Adverse possession of joint tenant—What constitutes.**—The general rule is that the entry or possession of one joint tenant or tenant in common is in support of the title of all,² yet where such a tenant enters without claiming adversely to his co-tenant, his possession may afterwards become adverse by notorious acts and claim of title to the whole.³ To constitute an adverse possession there must be an actual ouster,⁴ or some notorious and unequivocal act on the part of the co-tenant indicating an intention to hold the common property adversely.⁵ Mere exclusive possession by one co-tenant is not adverse,⁶ where peaceable, and there has been no actual ouster or act indicating a hostile holding,⁷ except in those states where it is only necessary in order to constitute adverse possession that the property be held as one's own.⁸ The prevailing rule is that it must affirmatively appear that the

¹ See : *Howard v. Donahue*, 60 Cal. 264 ;

Shepherd v. Young, 2 La. An. 238 ;

Crocker v. Carson, 33 Me. 436 ;

Simpson v. Seavey, 8 Me. (8 Greenl.) 138 ; s.c. 22 Am. Dec. 228 ;

Byam v. Bickford, 140 Mass. 31 ; s.c. 2. N. E. Rep. 687.

² *Northrop v. Marquam*, 16 Oreg. 173 ; s.c. 18 Pac. Rep. 449.

See : *Ante*, § 1918.

Post, § 1951.

³ *Millard v. McMullin*, 68 N. Y. 345.

See : *Sherman v. Kane*, 86 N. Y. 57, 69 ;

Jackson v. Brink, 5 Cow. (N. Y.) 483.

In *Sherman v. Kane*, *supra*, the court say : " When there is a disclaimer by the grantor of the title of the grantee subsequent to the delivery of the grant, an adverse possession may be acquired, and it is not necessary that such possession should be hostile in its inception."

Citing : *Millard v. McMullin*, 68 N. Y. 345 ;

Jackson v. Brink, 5 Cow. (N. Y.) 483.

⁴ *Clapp v. Bromagham*, 9 Cow. (N. Y.) 530 ; s.c. 8 Cow. (N. Y.)

746 ;

Jackson v. Tibbitts, 9 Cow. (N. Y.) 241 ;

Linker v. Benson, 67 N. C. 150 ;

Berg v. McLafferty (Pa.), 12 Atl. Rep. 460 ;

Gray v. Givens, 2 Hill (S. C.) Eq. 511 ;

Holley v. Hawley, 39 Vt. 525 ;

Catlin v. Kidder, 7 Vt. 12 ;

Purcell v. Wilson, 4 Gratt. (Va.) 16.

See : *Post*, § 1938.

⁵ *Warfield v. Lindell*, 30 Mo. 272 ; s.c. 77 Am. Dec. 614 ;

Allen v. Hall, 1 McC. (S. C.) Eq. 511 ;

Peeler v. Guilkey, 27 Tex. 355 ;

Purcell v. Wilson, 4 Gratt. (Va.) 16.

⁶ *Owen v. Morton*, 24 Cal. 373.

⁷ See : *Greer v. Tripp*, 56 Cal. 209 ; *Curtis v. King*, 5 Me. (5 Greenl.)

482 ;

Day v. Davis, 64 Miss. 253 ; s.c. 8 So. Rep. 203 ;

Challefoux v. Ducharme, 8 Wis. 287 ; s.c. 4 Wis. 554.

⁸ *Gray v. Bates*, 3 Strobb. (S. C.) L. 498.

common property has been used by the occupying tenant in a manner otherwise than as he is entitled to use it in the usual and legitimate exercise of his right of enjoyment.¹ This rule requires that actual notice of the adverse claim be brought home to the co-tenants out of possession, or that there be open and public acts of so unequivocal a character as to make the possession so visible, hostile, exclusive, and notorious, that notice thereof may be fairly presumed.²

SEC. 1938. **Same—Ouster and disseisin.**—The ouster or disseisin by a joint tenant or a tenant in common of his co-tenants, referred to in the preceding section, is in nature the same as an ouster or disseisin by a stranger,³ and consists in the wrongful dispossession or exclusion of the co-tenants from the enjoyment and control of the property.⁴ Such ouster may be either by abatement, intrusion, discontinuance, or deforcement as well as by disseisin properly so-called. Thus where one joint tenant executes a deed of the entire estate and the grantee causes the deed to be recorded, and enters into possession, claiming title to the entire common estate, and openly exercises acts of ownership, this constitutes a disseisin of the co-tenants.⁵ It has been said that any adverse entry and possession claiming the whole of the common estate, by one joint tenant or those claiming under him, constitutes a disseisin or ouster of the other tenants.⁶ And

¹ *Dodd v. Watson*, 4 Jones (N. C.) Eq. 48; s.c. 72 Am. Dec. 577.

See: *Ball v. Palmer*, 81 Ill. 370;

Squires v. Clark, 17 Kan. 84;

Perkins v. Eaton, 64 N. H. 359; s.c. 10 Atl. Rep. 704;

Thompson v. Gerrish, 57 N. H. 85;

Elliott v. Morris, 1 Har. (S. C.) Eq. 281;

Chandler v. Ricker, 49 Vt. 128.

² *Culow v. Rhodes*, 87 N. Y. 348;

Trustees v. Kirk, 84 N. Y. 215,

220; s.c. 38 Am. Rep. 505;

Northrop v. Marquam, 16 Oreg. 173; s.c. 18 Pac. Rep. 449;

Gray v. Givens, 2 Hill (S. C.) Eq. 511.

³ *Parker v. Proprietor Locks & Canals*, 44 Mass. (3 Met.) 91;

Hoffstetter v. Blattner, 8 Mo. 276.

⁴ *Bath v. Valdez*, 70 Cal. 350, 357;

s.c. 11 Pac. Rep. 724;

Newell v. Woodruff, 30 Conn. 492, 497.

⁵ *Parker v. Proprietors Locks & Canals*, 44 Mass. (3 Met.) 91.

⁶ *Burgett v. Taliaferro*, 118 Ill. 503; s.c. 9 N. E. Rep. 334;

Kinney v. Slattery, 51 Iowa 353;

s.c. 1 N. W. Rep. 626;

Rutter v. Small, 68 Md. 133; s.c. 11 Atl. Rep. 698;

Jackson v. Smith, 13 John. (N. Y.) 406;

Bogardus v. Trinity Church, 4

Paige Ch. (N. Y.) 178, aff'd in

15 Wend. (N. Y.) 111; 3 *Paige Ch. (N. Y.)* 545, 546; s.c. 24 Am. Dec. 246;

when one co-tenant purchases an outstanding title, hostile to the common estate, and claims the entire property under such title, this will constitute an ouster of the co-tenants, where knowledge of such claim is brought home to them.¹

SEC. 1939. **Same—Same—Effect of ouster.**—The effect of an ouster by a joint tenant of his co-tenants will be the same as if the ouster had been by a third person, and will set in operation the statute of limitations;² which will begin to run from the date of such ouster.³ Yet it has been said that a mere adverse possession will not take away the right of entry as between co-tenants.⁴

SEC. 1940. **Same—Statute of limitations.**—We have already

Burton v. Murphy, 2 Tayl. (N. C.) 259.

Disseisin by tenant in common—Distinguished from disseisin by stranger.—This doctrine is fully discussed by Judge STORY in the case of *Prescott v. Nevers*, 4 Mas. C. C. 326, 330; s.c. Fed. Cas. No. 11390. In that case, the defendant had a deed of the whole estate, but his title was only valid as to an undivided quarter part, in common with other owners. But he made an actual entry into the whole, claiming the entirety in fee and of right. And it was held, "that his acts of ownership were such as amounted to a disseisin of the co-tenants; for he entered as sole owner, and his possession was openly and notoriously adverse to them." "There can be no legal doubt," as it is said by the court in that case, "that one tenant in common may disseise another. The only difference between that and other cases is, that acts which, if done by a stranger, would *per se* be a disseisin, are, in the case of tenancies in common, susceptible of explanation, consistently with the real title. Acts of ownership are not, in tenancies in common, necessarily acts of disseisin. It depends upon the intent with which they are done, and their

notoriety."

We consider this a sound distinction, and it is fully supported by the authorities.

See: *Parker v. Proprietors of Locks & Canals*, 44 Mass. (3 Met.) 91.

¹ *Cook v. Clinton*, 64 Mich. 309; s.c. 31 N. W. Rep. 317;

Holley v. Hawley, 39 Vt. 525.

See: *Leonard v. Leonard*, 10 Mass. 281;

Culver v. Rhodes, 87 N.Y. 348; *Clark v. Crego*, 47 Barb. (N.Y.) 599;

Harpending v. Dutch Church, 41 U.S. (16 Pet.) 455; bk. 10 L. ed. 1029;

Dexter v. Arnold, 3 Sumn. C. C. 152; s.c. 7 Fed. Cas. 606.

² *Russell v. Marks*, 3 Met. (Ky.) 37;

Bogardus v. Trinity Church, 4 Paige Ch. (N. Y.) 178, aff'd 15 Wend. (N.Y.) 11;

Black v. Lindsay, 1 Busb. (N. C.) L. 467;

Odom v. Weathersbee, 26 S. C. 244; s.c. 1 S. E. Rep. 890;

Gray v. Givens, 2 Hill (S. C.) Eq. 511;

Terrill v. Murray, 4 Yerg. (Tenn.) 104;

Burleson v. Burleson, 28 Tex. 383.

³ See: *Bergett v. Taliaferro*, 118 Ill. 503; s.c. 9 N. E. Rep. 334;

Northrop v. Marguam, 16 Oreg. 173; s.c. 18 Pac. Rep. 449.

⁴ *Midford v. Hardison*, 3 Murphy (N. C.) 164.

seen that an actual ouster or disseisin by one joint tenant of his co-tenants will set the statute of limitations in operation, and the fraudulent title thus set up may ripen into a valid title by the running of such statute,¹ where such adverse possession has been continued for the period prescribed by the statute, and the co-tenants are not under disability.² The disability of one co-tenant does not save the right of entry to such as are not under disability when the right accrues;³ consequently an adverse possession against two joint tenants, one of whom is under disability and excepted from the operation of the statute, will operate against the other.⁴ In the case of a husband and wife, however, there can be no adverse holding of the premises of which they are in the joint occupancy as a family;⁵ and they cannot ordinarily acquire title against each other by the running of the statute of limitations.⁶ In such case the possession of neither can be regarded as adverse to the other while they jointly reside upon and occupy the premises.⁷

SEC. 1941. Actions by and against joint tenants—By tenants.—The general rule is that all joint tenants must unite in actions against third persons for the possession of lands jointly held, and the failure to so unite will be fatal to recovery.⁸ They must also join in actions for injury to the

¹ See: *Ante*, § 1939.

² See: *Horne v. Howell*, 46 Ga. 9; *Dumont v. Dufore*, 27 Ind. 263;

Kinney v. Slattery, 51 Iowa 353; s.c. 1 N.W. Rep. 626;

Russell v. Marks, 3 Met. (Ky.) 37; *Rutter v. Small*, 68 Md. 133; s.c. 11 Atl. Rep. 698;

Town v. Needham, 3 Paige Ch. (N. Y.) 545; s.c. 24 Am. Dec. 246;

Day v. Howard, 73 N. C. 1;

Hampton v. Wheeler, 99 N. C. 222; s.c. 6 S. E. Rep. 236;

Breeden v. McLaurin, 98 N. C. 307; s.c. 4 S. E. Rep. 136;

Hicks v. Bullock, 96 N. C. 164; s.c. 1 S. E. Rep. 629;

Black v. Lindsay, 1 Busb. (N. C.) L. 467;

Burton v. Murphy, 2 Tayl. (N. C.) L. 259;

Terrell v. Martin, 64 Tex. 121;

Kelly v. Medlin, 26 Tex. 48;

Sturgis v. Holliday, 4 McA. (D. C.) 385.

³ *Griffith v. Euston*, 7 J. J. Marsh. (Ky.) 385.

⁴ *Doolittle v. Blakesley*, 4 Day (Conn.) 265; s.c. 4 Am. Dec. 218.

⁵ *Hendricks v. Rasson*, 53 Mich. 575; s.c. 19 N.W. Rep. 192; *Springer v. Young*, 14 Oreg. 280; s.c. 12 Pac. Rep. 400.

⁶ See: *Springer v. Young*, 14 Oreg. 280; s.c. 12 Pac. Rep. 400.

⁷ *Springer v. Young*, 14 Oreg. 280; s.c. 12 Pac. Rep. 400.

⁸ *Hines v. Frantham*, 27 Ala. 350; *Dewey v. Lambier*, 7 Cal. 347; *Covilland v. Tanner*, 7 Cal. 38; *Webster v. Vandeverter*, 72 Mass. (6 Gray) 428;

May v. Parker, 29 Mass. (12 Pick.) 34; s.c. 22 Am. Dec.

common estate,¹ such as nuisance, trespass, and the like. The reason for this is because the damages belong to them jointly;² consequently, in those cases where they are not jointly interested in the damages, the remedy may be by a several action.³ Where the common estate has been devised for a yearly rental all the tenants must join in an action for the recovery of the rent reserved.⁴ While the general rule is as above set forth, that joint tenants

393, 395;

Stevenson v. Cofferin, 20 N. H. 150;

Malcolm v. Rogers, 5 Cow. (N. Y.) 188; s.c. 15 Am. Dec. 464;

Dawson v. Mills, 32 Pa. St. 302;

Doe d. De Rutzen v. Lewis, 5 Ad. & E. 277; s.c. 2 Hen. & W. 162; 31 Eng. C. L. 613;

Doe d. Poole v. Errington, 1 Ad. & E. 755; s.c. 28 Eng. C. L. 750;

Bacon's Abridgment, 299;

2 Co. Litt. (19th ed.) 200a.

The common law has been modified by statute both in England and this country so as to allow any one or more joint tenants to sue, according as the action relates to the whole or to their separate shares; an ejectment is said to lie on the several demises of three joint tenants.

Doe v. Fenn, 3 Camp. 190.

Same—In this country one tenant in common may sue for and recover the whole premises as against every one but his cotenant; the rights of the cotenants being provided for by judgment in such a case.

Treat v. Reilly, 35 Cal. 129;

Hart v. Robertson, 21 Cal. 346;

Collier v. Corbett, 15 Cal. 183;

Sharon v. Davidson, 4 Nev. 416;

Hardy v. Johnson, 68 U. S. (1 Wall.) 374; bk. 17 L. ed. 502.

¹ *Tucker v. Campbell*, 36 Me. 346;

Bullock v. Hayward, 92 Mass. (10 Allen) 460;

Gilmore v. Wilbur, 29 Mass. (12 Pick.) 120; s.c. 22 Am. Dec. 410;

May v. Parker, 29 Mass. (12 Pick.) 34; s.c. 22 Am. Dec. 393;

Merrill v. Berkshire, 28 Mass. (11 Pick.) 269;

Daniels v. Daniels, 7 Mass. 135;

Lane v. Dobyns, 11 Mo. 105;

De Puy v. Strong, 37 N. Y. 372; s.c. 4 Abb. (N. Y.) Pr. N. S. 340; 3 Keyes (N. Y.) 603;

Winters v. McGhee, 3 Sneed (Tenn.) 128.

² *Parke v. Kilham*, 8 Cal. 77; s.c. 68 Am. Dec. 310;

Bullock v. Hayward, 92 Mass. (10 Allen) 460;

Campbell v. Wallace, 12 N. H. 362; s.c. 37 Am. Dec. 219;

Decker v. Livingston, 15 John. (N. Y.) 479;

Low v. Mumford, 14 John. (N. Y.) 426; s.c. 7 Am. Dec. 469.

See: *De Puy v. Strong*, 37 N. Y. 372; s.c. 4 Abb. (N. Y.) Pr. N. S. 340; 3 Keyes (N. Y.) 603.

³ *Longfellow v. Quimby*, 29 Me. 196; s.c. 48 Am. Dec. 525;

Lathrop v. Arnold, 25 Me. 136; s.c. 43 Am. Dec. 256.

⁴ *Muller v. Boggs*, 25 Cal. 175;

Wall v. Hinds, 70 Mass. (4 Gray) 256; s.c. 64 Am. Dec. 64;

Sherman v. Ballou, 8 Cow. (N. Y.) 304, 308;

Hayden v. Patterson, 51 Pa. St. 261;

Cook v. Brightley, 46 Pa. St. 439;

Weinsteine v. Harrison, 66 Tex. 546; s.c. 1 S. W. Rep. 626;

Powis v. Smith, 5 Barn. & Ald. 851; s.c. 7 Eng. C. L. 462;

Wilkinson v. Hall, 1 Bing. N. C. 713; s.c. 27 Eng. C. L. 831.

South Carolina doctrine.—In some states, however, and particularly in South Carolina, one joint tenant may recover the portion of the common property to which he may show himself entitled.

Boyleston v. Cordes, 4 McC. (S. C.) L. 144;

Watson v. Hill, 1 McC. (S. C.) L. 101.

must unite in an action for damages to the common property, yet where the injury is not a joint one, and the co-tenants are not jointly interested in the damages, it is not necessary that they should all join in an action for its recovery ;¹ and some courts hold that where the action is merely for the possession of the land owned jointly, the possession of one joint tenant being the possession of all, they need not all join in the action.²

SEC. 1942. **Same—Against tenants.**—In all actions respecting common property, joint tenants and tenants in common should be united,³ and if one be sued alone he may plead joint tenancy in abatement.⁴ It is otherwise, however, in all actions of a mere personal nature, such as actions of tort,⁵ or an action for a personal claim ;⁶ and the interest of one joint tenant is subject to levy and sale on execution under a judgment against him for a personal and individual debt,⁷ and the common property may of course be sold under a judgment and execution against all the tenants.⁸ In those cases where the share of a joint tenant in common has been sold to satisfy a personal judgment against him, such sale does not divest the estate of his co-tenant.⁹

SEC. 1943. **Actions between joint-tenants.**—At common law the rule is that joint-tenants, or tenants in common, and coparceners cannot, as a general rule, maintain any action against each other, because they are in the nature of partners ;¹⁰ but by a statute of Westminster,¹¹ one joint-tenant may have an action by writ of waste, against

¹ *Lathrop v. Arnold*, 35 Me. 136 ;

Lee v. Turner, 71 Tex. 264 ; s.c. 9 S. W. Rep. 149.

² *Rabe v. Taylor*, 18 Miss. (10 Smed. & M.) 440.

³ See : *Ante*, § 1941.

⁴ 1 Saund. 290f.

⁵ *Mitchell v. Tarbutt*, 5 Durnf. & E. (5 T. R.) 649, 651 ; s.c. 2 Rev. Rep. 684, 687.

See : *Child v. Sand*, Carth. 294.

⁶ *Lallande v. Wentz*, 18 La. An. 289 ;

Tracy v. Suydam, 30 Barb.

(N. Y.) 110.

⁷ *Waldman v. Broder*, 10 Cal. 378 ;

Blevins v. Baker, 11 Ired. (N. C.) L. 291.

⁸ *Southerland v. Cox*, 3 Dev. (N. C.) L. 394.

⁹ *Southerland v. Cox*, 3 Dev. (N. C.) L. 394.

¹⁰ *Browne on Actions*, 132 ; 45 Law Lib. 99 ; 1 Chit. Pl. 39.

See : *Hamilton v. Conine*, 28 Md. 635 ; s.c. 92 ; Am. Dec. 724.

¹¹ 2 Westm. c. 22.

his co-tenant ;¹ and on proper cause being shown, the commission of waste may be restrained by injunction.² But Lord Coke has observed that this action does not extend to houses or other places for the habitation of man ; for one joint tenant might, after reparation, have had a writ *de reparatione facienda*,³ at common law.⁴ In this country joint tenants, like co-partners, may transact business with each other as individuals ; and each may, in his individual capacity, pursue the ordinary legal or equitable means of redress for any violation of agreement, so long as such agreement does not pertain to the subject matter of the co-tenancy.⁵

SEC. 1944. **Same—At law.**—The general rule in this country is that a joint tenant or a tenant in common cannot maintain an action at law, against his co-tenant, except in those cases where he has been dissiesed or ousted from the common estate by such co-tenant, in which case he may sue in ejectment to recover his share of the property ;⁶ and in case he is successful in such action he may maintain trespass for mesne profits.⁷ In

¹ *Matts v. Hawkins*, 5 Taunt. 20 ; s.c. 14 Rev. Rep. 695.

² *Hawley v. Clows*, 2 Johns. Ch. (N. Y.) 122 ;

Bailey v. Hobson, L. R. 5 Ch. 180 ; s.c. 39 L. J. Ch. 270 ; 22 L. T. 594 ;

Twort v. Twort, 16 Ves. 128, 132 ; s.c. 10 Rev. Rep. 141.

³ The writ *de reparatione facienda* was abolished by the statute of 3 & 4 Will. IV., c. 27, § 36.

⁴ 1 Co. Inst. (19th ed.) 200b.

See : *Fanning v. Chadwick*, 20 Mass. (3 Pick.) 420, 423 ; s.c. 15 Am. Dec. 233 ;

Wheeler v. Harney, Wills 208.

⁵ *Bond v. Hilton*, 1 Busb. (N. C.) L. 308, 309 ; s.c. 59 Am. Dec. 552 ;

Owston v. Ogle, 13 East 538 ; s.c. 12 Rev. Rep. 426.

⁶ *Norris v. Sullivan*, 47 Conn. 474 ;

Gale v. Hines, 17 Fla. 778 ;

Noble v. McFarland, 51 Ill. 226 ;

Bethell v. McCool, 46 Ind. 303 ;

Halford v. Tetherow, 2 Jones (N. C.) L. 393 ;

Peaceable v. Read, 1 East 568.

⁷ *Cook v. Webb*, 21 Minn. 429 ;

Camp v. Homesley, 11 Ired. (N. C.) L. 211 ;

Bennet v. Bullock, 35 Pa. St. 364, 367 ;

Goodtitle v. Tombs, 3 Wils. 118.

Actual ouster—Trespass *quare clausum fregit*.—In those cases

where there has been an actual ouster he may have trespass *quare clausum fregit* against his co-tenant.

Silloway v. Brown, 94 Mass. (12 Allen, 30, 37 ;

Thompson v. Gerrish, 57 N. H. 85 ;

Erwin v. Olmsted, 7 Cow. (N. Y.) 229 ;

McGill v. Ash, 7 Pa. St. 397 ;

Booth v. Adams, 11 Vt. 156 ; s.c. 34 Am. Dec. 680 ;

Murray v. Hall, 7 Man. Gr. & S. 441 ; s.c. 62 Eng. C. L. 439.

The general rule is, however, that one joint tenant cannot maintain trespass *quare clausum fregit* against another unless there has been a total destruction of the subject-matter of

those cases where there has been an actual conversion or destruction of the property by a co-tenant, an action for his proportionate interest may be maintained by the other.¹ It seems that an action may also be maintained in those cases where there has been a misuse of the common property, although such misuse does not amount to the conversion or the total destruction of it;² but one co-tenant cannot maintain ejectment against another who has done no act inconsistent with the rights of the former in the common premises.³ Where one joint tenant occupies the whole common estate, however, or more than his share thereof, he will be liable to account to his co-tenant for rents and profits in an action for an accounting.⁴ If one co-tenant be ousted or ejected by another he may maintain an action for his undivided share,⁵ and have forcible entry and detainer in those cases where the ouster or eviction was accomplished by actual force,⁶ but where such tenant merely occupies the same common property he will not be liable for rents and

the tenancy, or some part thereof.

Maddox v. Goddard, 15 Me. 218; s.c. 33 Am. Dec. 604;

Filbert v. Hoff, 42 Pa. St. 97; s.c. 82 Am. Dec. 493;

Bennet v. Bullock, 35 Pa. St. 364. See: Lawton v. Adams, 29 Ga. 273; s.c. 74 Am. Dec. 59;

Roberts v. McGraw, 11 Bush. (Ky.) 26;

Hastings v. Hastings, 110 Mass. 280, 285;

Cubitt v. Porter, 8 Barn. & C. 268; s.c. 2 Ryan & M. 272; s.c. 15 Eng. C. L. 133.

¹ Bishop v. Blair, 36 Ala. 80;

Strong v. Colter, 13 Minn. 82;

Jones v. Cohen, 82 N.C. 75;

Halford v. Tetherow, 2 Jones (N. C.) L. 393;

Gambill v. Newby, 1 Oreg. 173.

² McLellan v. Jenness, 43 Vt. 183; s.c. 5 Am. Rep. 270.

See: Hyde v. Stone, 9 Cow (N. Y.) 230; s.c. 18 Am. Dec. 501;

Farr v. Smith, 9 Wend. (N. Y.) 338; s.c. 24 Am. Dec. 162;

Agnew v. Johnson, 17 Pa. St. 373; s.c. 55 Am. Dec. 565;

Lowe v. Miller, 3 Gratt. (Va.) 205; s.c. 46 Am. Dec. 188.

³ Lawton v. Adams, 29 Ga. 273; s.c. 74 Am. Dec. 59;

House v. Fuller, 13 Vt. 165; s.c. 37 Am. Dec. 580.

⁴ Pico v. Columbet, 12 Cal. 414; s.c. 73 Am. Dec. 550;

Gowen v. Shaw, 40 Me. 56;

Field v. Craig, 90 Mass. (8 Allen) 357;

Swallow v. Swallow, 31 N. J. Eq. (4 Stew.) 390;

Bucklelew v. Snedeker, 27 N. J. Eq. (12 C. E. Gr.) 82;

Wright v. Wright, 59 How. (N. Y.) Pr. 176;

Roseboom v. Roseboom, 15 Hun (N. Y.) 309;

Graham v. Pierce, 19 Gratt. (Va.) 28; s.c. 100 Am. Dec. 658.

See: Joslyn v. Joslyn, 9 Hun (N. Y.) 388.

⁵ Norris v. Sullivan, 47 Conn. 474; Frakes v. Elliott, 102 Ind. 47;

s.c. N. E. Rep. 195;

Bethell v. McCool, 46 Ind. 303;

Johnson v. Swain, 1 Busb. (N. C.) L. 335;

Warren v. Henshaw, 2 Aik. (Vt.) 141.

⁶ Mason v. Finch, 2 Ill. (1 Scam.) 495;

Eads v. Rucker, 2 Dana (Ky.) 111.

profits of the land received by him, unless the amount received be more than his just share thereof.¹ One tenant may usually maintain an action in case against his co-tenant for any injury to, deprivation of, or destruction of, his rights in the common property ;² but assumpsit will not lie by one joint-tenant or tenant in common against his co-tenant to recover for the use and occupation of the common property, in the absence of an express contract to pay rent ;³ neither can trover be maintained for a mere detention and exclusive use of the common property ;⁴ but if the property be destroyed, or so converted and appropriated as to render any future enjoyment impossible, an action for trover,⁵ or an action for damages may be maintained.⁶

SEC. 1945. **Same—In equity.**—An action in equity may be maintained by one joint tenant or tenant in common against co-tenants in those cases where the several interests have become so complicated as to be incapable of being definitely ascertained and set apart in an

- ¹ *Calhoun v. Curtis*, 45 Mass. (4 Met.) 413 ; s.c. 38 Am. Dec. 380 ;
Keisel v. Earnest, 21 Pa. St. 90.
 See : *Scott v. Guernsey*, 60 Barb. (N. Y.) 163 ; s.c. aff'd 48 N. Y. 106 ;
Jones v. Cohen, 82 N. C. 75.
- ² *Anders v. Meredith*, 7 Dev. & B. (N. C.) L. 199.
 See : *Duncan v. Sylvester*, 24 Me. 482 ; s.c. 41 Am. Dec. 400 ;
Odiorne v. Lyford, 9 N. H. 502 ; s.c. 32 Am. Dec. 387 ;
Chesley v. Thompson, 3 N. H. 9 ; s.c. 45 Am. Dec. 324 ;
Beach v. Child, 13 Wend. (N. Y.) 343.
- ³ *Crow v. Mark*, 52 Ill. 332 ;
Kline v. Jacobs, 68 Pa. St. 57.
- ⁴ *Webb v. Danforth*, 1 Day (Conn.) 301 ;
Leonard v. Scarborough, 2 Ga. 73 ;
Fightmaster v. Beasly, 7 J. J. Marsh. (Ky.) 410 ;
Hinds v. Terry, 1 Miss. (Walk.) 80 ;
Ballou v. Hale, 47 N. H. 347 ; s.c. 93 Am. Dec. 438 ;
- Tyler v. Taylor*, 8 Barb. (N. Y.) 585 ;
Farr v. Smith, 9 Wend. (N. Y.) 338 ; s.c. 24 Am. Dec. 162 ;
Gilbert v. Dickerson, 7 Wend. (N. Y.) 449 ; s.c. 22 Am. Dec. 592 ;
Campbell v. Campbell, 2 Murph. (N. C.) L. 65 ;
Heller v. Hufsmith, 102 Pa. St. 533 ;
- ⁵ *Russell v. Russell*, 62 Ala. 48 ;
Needham v. Hill, 127 Mass. 133 ;
Weld v. Oliver, 38 Mass. (21 Pick.) 559 ;
Perry v. Granger, 21 Neb. 579 ; s.c. 33 N. W. Rep. 261 ;
Hyde v. Stone, 7 Wend. (N. Y.) 354 ; s.c. 22 Am. Dec. 582 ; 9 Cow. (N. Y.) 230 ; s.c. 18 Am. Dec. 501.
- ⁶ *Benedict v. Howard*, 31 Barb. (N. Y.) 569 ;
Grim v. Wicker, 80 N. C. 343 ;
Guyther v. Pettijohn, 6 Ired. (N. C.) L. 388 ; s.c. 45 Am. Dec. 499 ;
Alderson v. Schulze, 64 Wis. 460 ; s.c. 24 N. W. Rep. 492.

action at law.¹ An action may be brought in equity to enforce contribution for needed repairs,² or the payments of common burdens,³ on the estate;⁴ and an action in equity for an accounting is the proper remedy where one tenant has taken the entire possession of the property to the exclusion of the other tenants, or has taken the rents and profits and converted them to his own use.⁵ A court of equity will also enjoin acts injurious to the common property by one of the co-tenants,⁶ and appoint a receiver to take charge of the common property on a proper showing being made.⁷ Courts of equity may also make a partition of the common property among the co-tenants, or direct a sale to be made thereof and distribute the proceeds in those cases where a partition cannot be made.⁸ A suit in equity, however, cannot be maintained in any case where the remedy at law is adequate and complete.⁹

SECTION III.—ESTATES IN COMMON.

SEC. 1946. Definition.

SEC. 1947. Nature of the estate.

SEC. 1948. Same—Independence of interest.

SEC. 1949. Creation of the estate.

SEC. 1950. Incidents of the estate.

¹ *Smith v. King*, 50 Ga. 192.

See: *Smith v. Ausbornie*, 86 Ill. 606;

Worthington v. Staunton, 16 W. Va. 208.

² See: *Ante*, § 1932.

³ See: *Ante*, § 1936.

⁴ *McDearman v. McClure*, 31 Ark. 559;

Eads v. Retherford, 114 Ind. 273; s.c. 16 N. E. Rep. 587.

⁵ See: *Crow v. Mark*, 52 Ill. 332;

Swallow v. Swallow, 31 N. J. Eq. (4 Stew.) 390;

Sherman v. Ballou, 8 Cow. (N. Y.) 304;

DeMott v. Hagerman, 8 Cow. (N. Y.) 220; s.c. 18 Am. Dec. 443;

Wright v. Searles, 59 How. (N. Y.) Pr. 176;

Darden v. Cowper, 7 Jones (N. C.) L. 210; s.c. 75 Am. Dec. 461;

Paine v. Slocum, 56 Vt. 504;

Wiswell v. Wilkins, 4 Vt. 137;

Early v. Friend, 16 Gratt. (Vt.)

21; s.c. 78 Am. Dec. 649;

Denys v. Suckburg, 4 Young & C. 42; s.c. 5 Jur. 21.

⁶ See: *Hihn v. Peck*, 18 Cal. 640;

Arnett v. Munnerlyn, 71 Ga. 14;

Stout v. Curry, 110 Ind. 514; s.c. 11 N. E. Rep. 487;

Obert v. Obert, 5 N. J. Eq. (1 Halst.) 397;

Bailey v. Hobson, L. R. 5 Ch. 180; s.c. 39 L. J. Ch. 270; 22 L. T. 594.

⁷ *Williams v. Jenkins*, 11 Ga. 595.

⁸ *Smith v. Smith*, 4 Rand. (Va.) 95.

See: *Drennen v. Walker*, 21 Ark. 539;

Richardson v. Monson, 23 Conn. 94;

Dinwiddie v. Bell, 95 Ill. 360;

Coleman v. Hutchenson, 3 Bibb (Ky.) 209; s.c. 6 Am. Dec. 649.

⁹ *Adams v. Palmer*, 72 Mass. (6 Gray) 336.

- SEC. 1951. Possession by co-tenant.
 SEC. 1952. Same—Ouster.
 SEC. 1953. Joint estates—Tenancies in common when.
 SEC. 1954. Tenancies in common between husband and wife.
 SEC. 1955. Rights and powers of tenants in common.
 SEC. 1956. Same—To enter into agreements concerning common property.
 SEC. 1957. Same—To occupy common property.
 SEC. 1958. Same—To convey common property.
 SEC. 1959. Same—Same—Whole of property.
 SEC. 1960. Same—Same—Undivided part of property.
 SEC. 1961. Same—Same—Specified part of property.
 SEC. 1962. Same—To lease common property.
 SEC. 1963. Same—To license acts upon common property.

SECTION 1946. **Definition.**—Where two or more persons hold lands or tenements in fee simple, fee tail, or for term of life or years, by several and distinct titles, and occupy the same in common, the only unity existing between them being that of possession, the estate is one in common.¹

SEC. 1947. **Nature of the estate.**—The only unity between tenants in common is that of possession. One tenant in common may hold his part in fee simple, the other in tail, or life, and there may even be an estate in common in an inchoate as well as a perfect right,² so that there is no unity of interest. One may hold by descent, the other by purchase; or the one by purchase from one person, and the other by purchase from another; so that there is no unity of title. The estate of one may have been vested fifty years, that of the other yesterday; so that there is no unity of time.³ Tenants in common having separate and independent freeholds or leaseholds in their respective shares, they may manage and dispose

¹ *Silloway v. Brown*, 94 Mass. (12 Allen) 30, 36;

2 Bl. Com. 191;

2 Co. Litt. (19th ed.) 189a;

2 Cruise Dig. (4th ed.) 399, § 1;

1 Prest. Est. 139.

Tenants in common are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and there-

fore they all occupy promiscuously. This tenancy therefore happens where there is a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time.

2 Bl. Com. 191.

² *Coleman v. Lane*, 26 Ga. 515;
Wilkins v. Burton, 5 Vt. 76.

³ 2 Bl. Com. 191;

2 Cruise Dig. (4th ed.) 399, § 2.

of them as freely as though they were estates in severalty, unity and right of possession merely being all that is requisite between them.¹ There is no presumption that the interest of such tenants are equal,² they having, as we have already seen, several and distinct estates in their respective parts, thus differing essentially from joint tenants, whom, we have already seen,³ hold the land by one joint-tenancy and in one right.⁴ The respective interests of tenants in common may be alienated, mortgaged, or levied upon and sold on execution.⁵

SEC. 1948. **Same—Independence of interests.**—The only interest in common existing between tenants in common being a unity of possession, with an entire disunion of interest, title, and time, if two or more tenants in common join in a conveyance of the estate, it will be treated as a grant by each of his own share of the property,⁶ and in case of breach of covenant of warranty, each cotenant will be liable therefor.⁷ And tenants in common, having several freeholds, are not required to join in an action against their grantor for a breach of the covenant of warranty in his deed;⁸ but they must join in all actions for the recovery of possession of the property,⁹ and in all suits for injury to the possession, such as trespass, nuisance, and the like.

¹ *Lamb v. Danforth*, 59 Me. 322 ;
s.c. 8 Am. Rep. 426 ;

Bernecker v. Miller, 40 Mo. 473 ;
s.c. 93 Am. Dec. 309 ;

Putman v. Ritchie, 6 Paige Ch.
(N. Y.) 390, 398 ;

Story v. Saunders, 8 Humph.
(Tenn.) 663 ;

Spencer v. Austin, 38 Vt. 258.

Tenants in common have several freeholds, and are not obliged to join in an action against their grantor for a breach of the covenants of warranty in his deed.

Lamb v. Danforth, 59 Me. 322 ;
s.c. 8 Am. Rep. 426 ;

Swett v. Patrick, 11 Me. 179 ;

Hammond on Parties, 29.

² *Campau v. Campau*, 44 Mich. 31 ;
s.c. 5 N. W. Rep. 1062 ;

Putman v. Ritchie, 6 Paige Ch.
(N. Y.) 390.

³ See : *Ante*, §§ 1910, 1916.

⁴ 1 Prest. Est. 137

⁵ See : *Post*, § 1950.

⁶ 2 Prest. Abst. 77.

⁷ *Lamb v. Danforth*, 59 Me. 322 ;
s.c. 8 Am. Rep. 426.

⁸ *Lamb v. Danforth*, 59 Me. 322 ;
s.c. 8 Am. Rep. 426.

⁹ *Hines v. Trantham*, 27 Ala. 359 ;
Muller v. Boggs, 25 Cal. 175, 187 ;
Parke v. Kilham, 8 Cal. 77 ; s.c.
68 Am. Dec. 310.

See : *Hillhouse v. Mix*, 1 Root
(Conn.) 246 ; s.c. 1 Am. Dec. 41 ;
Hughes v. Holliday, 3 G. Greene
(Iowa) 30 ;

Harrison v. Botts, 4 Bibb (Ky.)
420 ;

Phillips v. Sherman, 61 Me. 548 ;
Merrill v. Berkshire, 28 Mass. (11
Pick.) 269 ;

Rehoboth v. Hunt, 18 Mass. (1
Pick.) 224 ;

SEC. 1949. **Creation of the estate.**—A tenancy in common may be created by the destruction of an estate in joint tenancy or coparcenary.¹ Thus Littleton says that if a man enfeoffs two joint tenants in fee, and one of them enfeoffs a stranger of his share, such stranger and the other joint tenants become tenants in common;² also that if two persons have an estate in co-parcenary, and one of them aliens his share to a stranger, the latter and the remaining coparcener become tenants in common.³ An estate in common may also be created by a limitation in a will or deed. Thus where land is devised to be cultivated on the shares, the devisees are tenants in common of the crop until the division is made.⁴ Any words in a will denoting quality of interest will be construed by the courts as creating a tenancy in common.⁵ According to the English rule, where two or more persons own land together, and there is no special reason for a different ownership, they are deemed joint tenants;⁶ but in the United States, where two or more persons acquire the same estate by the same act, deed, or devise, they are held to be tenants in common, in the absence of any indication in the instrument creating the estate of a contrary intention.⁷ This change in the doctrine has been effected by statutes, which by their terms are made applicable to estates already created or vested, as well as estates there-

De Puy v. Strong, 37 N. Y. 372;

Austin v. Hall, 13 Johns. (N. Y.) 286; s.c. 7 Am. Dec. 376;

Johnson v. Harris, 5 Hayw. (Tenn.) 113;

Allen v. Gibson, 4 Rand. (Va.) 468;

2 Co. Litt. (19th ed.) 200a.

¹ 2 Bl. Com. 192;

² Cruise Dig. (4th ed.) 399.

³ See: 2 Co. Litt. (19th ed.) 188a, *et seq.*

⁴ 2 Co. Litt. (19th ed.) 195a.

⁵ Gafford v. Stearns, 51 Ala. 434;

Smyth v. Tankersley, 20 Ala. 212;

Strother v. Butler, 17 Ala. 733;

Thompson v. Mawhinney, 17 Ala. 362; s.c. 52 Am. Dec. 176;

Knox v. Marshall, 19 Cal. 617;

Ferrall v. Kent, 4 Gill (Md.) 209;

Carr v. Dodge, 40 N. H. 403;

Tanner v. Hills, 48 N. Y. 662,

rev'g 44 Barb. (N. Y.) 428;

Dinehart v. Wilson, 15 Barb. (N. Y.) 595;

Tripp v. Riley, 15 Barb. (N. Y.) 333;

Aiken v. Smith, 21 Vt. 172.

⁵ Harrison v. Foreman, 5 Ves. 207; s.c. 5 Rev. Rep. 28.

See: Marriott v. Abell, L. R. 7 Eq. 478; s.c. 38 L. J. Ch. 451;

Ackerman v. Burrows, 3 Ves. & B. 54.

⁶ See: *Ante*, § 1909, *et seq.*

⁷ See: Bazemore v. Davis, 55 Ga. 504;

Miller v. Miller, 16 Mass. 59;

Harvey v. Harvey, 72 N. C. 570;

Young v. De Bruhl, 11 Rich. (S. C.) L. 638; s.c. 73 Am. Dec. 127;

Johnson v. Harris, 5 Hayw. (3 Tenn.) 113;

4 Kent. Com. (13th ed.) 361.

after to be granted or devised. These statutes, it has been held, "do not militate with the constitution as retroactive laws;" the reason given being that their operation is to make the estate more valuable.¹ And such an exercise of authority is regarded as clearly within the constitutional authority of the legislature, because the assent of all parties interested in the property may be fairly and properly presumed to an act of legislation which tends to create in them a more favorable tenure or a more valuable interest.²

SEC. 1950. Incidents of the estate.—The incidents per-

¹ *Miller v. Miller*, 16 Mass. 59.

See: *Dunn v. Sergeant*, 101 Mass. 336, 340;

Clarke v. Cordis, 86 Mass. (4 Allen) 466, 475;

Wildes v. Vanvoorhis, 81 Mass. (15 Gray) 139, 147;

Burghardt v. Turner, 29 Mass. (12 Pick.) 534, 539;

Annable v. Patch, 20 Mass. (3 Pick.) 360, 363;

Hills v. Doe, 6 N. H. 328;

Bambaugh v. Bambaugh, 11 Serg. & R. (Pa.) 192.

Massachusetts doctrine—Burnett v. Marshall.—In *Burnett v. Marshall*, 39 Mass. (22 Pick.) 556, the court say: "In conveyancing, our statutes have essentially changed the common law. By their provisions a conveyance to several always creates a tenancy in common, unless the deed of conveyance expressly provides for a joint tenancy. St. 1785, c. 62, § 4; Revised Stat. c. 59, §§ 10, 11. Even the common law now favors tenancies in common. *Rigden v. Vallier*, 2 Ves. Sr. 258; *Haws v. Haws*, 1 Ves. Sr. 13; and the policy of our legislation is decidedly adverse to joint tenancies. The doctrine of survivorship is not in accordance with the genius of our institutions."

See: *Miller v. Miller*, 16 Mass. 59.

Same—Foster v. Foster.—The court say in *Foster v. Foster*, 129 Mass. 559, 564, that "general statutes changing joint tenancies into tenancies in common,

the validity of which has been upheld as applied to tenancies existing at the time of their passage, merely cut off future rights of survivorship, and, while they give the tenant who dies first a more beneficial tenure than he had before, take nothing from the survivor which his co-tenant might not himself defeat in his lifetime by conveying his own interest to a stranger or by suing for partition."

Citing: *Dunn v. Sargent*, 101 Mass. 336, 340;

Burghardt v. Turner, 29 Mass. (12 Pick.) 534, 539;

Miller v. Miller, 16 Mass. 59;

Bambaugh v. Bambaugh, 11 Serg. & R. (Pa.) 191;

4 Kent's Com. (13th ed.) 363, 364.

² *Clark v. Cordis*, 86 Mass. (4 Allen) 466, 475;

Miller v. Miller, 16 Mass. 59;

Holbrook v. Finney, 4 Mass. 566, 568.

In *Dunn v. Sergeant*, 101 Mass.

336, 340, the court say that a

"a more satisfactory reason may perhaps be found in the consideration that the statute severing the joint tenancy and cutting off the right of survivorship did no more than either tenant might have done at common law, by conveying his interest to a stranger, or suing for partition."

Citing: *Bambaugh v. Bambaugh*, 11 Serg. & R. (Pa.) 192, 193;

4 Kent Com. (6th ed.) 363, 364.

taining to an estate in common, are similar to those of all estates held in severalty,¹ and consist in a right to alienate,² so long as such conveyance does not prejudice the estates of the co-tenants;³ a right to lease, to mortgage,⁴ and the like. The estate is also subject to be levied upon and sold under judgment and execution;⁵ and is subject to estates by curtesy and in dower.⁶ Hence the widow of a tenant in common will be entitled to one-

¹ *Gates v. Salmon*, 35 Cal. 576; s.c. 35 Am. Dec. 139;

Blessing v. House, 3 Gill & J. (Md.) 290.

See: *Nichols v. Smith*, 39 Mass. (22 Pick.) 316;

Whitton v. Whitton, 38 N. H. 127; s.c. 75 Am. Dec. 163;

Shepardson v. Rowland, 28 Wis. 108.

² *Brown v. Wellington*, 106 Mass. 318; s.c. 8 Am. Rep. 330;

Butler v. Roys, 25 Mich. 53; s.c. 12 Am. Rep. 218.

One tenant in common cannot convey his estate in part only of the land held in common.

Peabody v. Minot, 41 Mass. (24 Pick.) 329.

The cutting of the grass by the plaintiff's authority, and the sale and delivery of it by him to the defendant, was an appropriation of it which gave the plaintiff a good title to the whole of it, so far as this defendant is concerned; and it is no defense to this action that the co-tenant, after it was cut and removed, forbade the defendant to pay for it.

Brown v. Wellington, 106 Mass. 318; s.c. 8 Am. Rep. 330;

Peck v. Carpenter, 73 Mass. (7 Gray) 283; s.c. 66 Am. Dec. 477;

Calhoun v. Curtis, 41 Mass. (4 Met.) 413; s.c. 38 Am. Dec. 380.

³ *Butler v. Roys*, 25 Mich. 53; s.c. 12 Am. Rep. 218, 220;

Tookers v. Case, 2 Co. 68; s.c. Cro. Eliz. 803.

⁴ *Green v. Arnold*, 11 R. I. 364; s.c. 23 Am. Rep. 466.

Where one of two or more tenants in common mortgages his entire interest in his common

estate, the mortgage will cover the part allotted the mortgagor in any partition subsequently made.

Randall v. Mallett, 14 Me. 51;

Williams College v. Mallett. 12 Me. 398;

Crosby v. Allyn, 5 Me. 453;

Thruston v. Minke, 32 Md. 487.

See: *Lumis v. Reily*, 24 Ill. 307;

Green v. Arnold, 11 R. I. 364; s.c.

23 Am. Rep. 466.

In the case of *Randall v. Mallett*, *supra*, it was held, that where one of several tenants in common mortgages less than his entire interest in the whole of the entire estate, and the estate is afterward divided, the mortgage will cover a proportional interest in the whole of the part allotted to the mortgagor.

⁵ *Griswold v. Johnson*, 5 Conn. 363;

Peabody v. Minot, 41 Mass. (24 Pick.) 329;

Duncan v. Sylvester, 24 Me. 482; s.c. 41 Am. Dec. 400;

Primm v. Walker, 38 Mo. 94, 97;

Boylston Insurance Co. v. Davis, 68 N. C. 17; s.c. 12 Am. Rep. 624;

White v. Sayre, 2 Ohio, 110;

McKey v. Welch, 22 Tex. 390;

Newton v. Howe, 29 Wis. 531; s.c. 9 Am. Rep. 616.

⁶ *Carr v. Givens*, 9 Bush (Ky.) 679; s.c. 15 Am. Rep. 747;

Blossom v. Blossom, 91 Mass. (9 Allen) 254;

Brown v. Adams, 2 Whart. (Pa.) 188;

Sutton v. Rolfe, 3 Lev. 84;

Ham v. Ham, 14 Up. Can. Q. B. 497;

Sterling v. Penlington, 4 Vin. Abr. 511;

2 Cruise Dig. (4th ed.) 409.

third of her husband's estate, which must be assigned in common, because the widow cannot hold the estate otherwise than as her husband had it,¹ unless partition has been made, either by the husband in his life-time, or by process of law before or after his decease, in which case the widow will be bound by such partition whenever it would have bound her husband, and must take her dower in the part set off as his share.² The right of survivorship, however, is not one of the incidents of the estate in common,³ and an agreement between tenants in common, even though in writing, whereby the survivor is to take the estate in the property is invalid,⁴ and on the death of the co-tenant, the estate descends to his heirs.⁵ The general rule is that each tenant in common has the right to manage his estate in any manner he pleases, so long as he does no injury to the rights or estate of his co-tenants.⁶ Thus one tenant in common may separately insure his interest in the premises against fire, and in case of loss, may recover and retain the insurance.⁷ The reason for this is the fact that each co-tenant has the right to protect his interest and guard against any loss by insurance.⁸

SEC. 1951. **Possession by co-tenant.**—The general rule is, that the seisin of one tenant in common is the seisin of all ;⁹ and in those cases in which there is a mixed or

¹ 1 Inst. 34b, 37b.

² Blossom v. Blossom, 91 Mass. (9 Allen) 254, 256.

See: Colton v. Smith, 28 Mass. (11 Pick.) 311, 315 ; s.c. 22 Am. Dec. 375 ;

Potter v. Wheeler, 13 Mass. 504.

³ Putman v. Ritchie, 6 Paige Ch. (N. Y.) 390.

⁴ Hersby v. Clark, 35 Ark. 17 ; s.c. 37 Am. Rep. 1.

⁵ 2 Cruise Dig. (4th ed.) 400.

⁶ Peabody v. Minot, 41 Mass. (24 Pick.) 329.

⁷ Harvey v. Cherry, 76 N. Y. 436.

⁸ Harvey v. Cherry, 76 N. Y. 436, 440 ;

Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47 ; s.c. 20 Am. Rep. 451 ;

Herkimer, Adm'r, v. Rice, 27 N.

Y. 163, 173 ;

Tyler v. Aetna Fire Ins. Co., 12 Wend. (N. Y.) 507.

⁹ Johnson v. Toulmin, 18 Ala. 50 ; s.c. 52 Am. Dec. 212 ;

Southworth v. Smith, 27 Conn. 355 ; s.c. 71 Am. Dec. 72 ;

Pool v. Morris, 29 Ga. 374 ; s.c. 74 Am. Dec. 68 ;

Roddy v. Cox, 29 Ga. 298 ; s.c. 74 Am. Dec. 64 ;

Squires v. Clark, 17 Kan. 84 ;

Young v. Adams, 14 B. Mon. (Ky.) 127 ; s.c. 58 Am. Dec. 654 ;

Thornton v. York Bank, 45 Me. 158 ;

Small v. Clifford, 38 Me. 213 ;

Colburn v. Mason, 25 Me. 434 ; s.c. 63 Am. Dec. 292 ;

Vaughan v. Bacon, 15 Me. 455 ; s.c. 33 Am. Dec. 628 ;

concurrent possession, the legal seisin prevails according to the title.¹ Where one tenant in common has possession of the common property for all his co-tenants, knowledge on his part in respect to matters pertaining to the estate will be regarded as knowledge on the part of his co-tenants;² and a relinquishment of possession of one tenant in common, as to his share in the premises, operates for the benefit of the other co-tenants, and prevents the running of the statute of limitation against them.³ Although the possession of one tenant in common is deemed to be the possession of all, yet if one of such tenants ousts the other, or denies the tenure, his possession becomes adverse.⁴ The possession of one tenant in com-

Brown v. Wood, 17 Mass. 68;
Barnard v. Pope, 14 Mass. 434;
s.c. 7 Am. Dec. 225;

Bernecker v. Miller, 40 Mo. 473;
s.c. 93 Am. Dec. 309;

Warfield v. Lindell, 30 Mo. 272;
s.c. 77 Am. Dec. 614;

Jackson ex d. Bratt v. Tibbitt's, 9
Cow. (N. Y.) 241;

Story v. Saunders, 8 Humph.
(Tenn.) 663;

Alexander v. Kennedy, 19 Tex.
488; s.c. 70 Am. Dec. 358;

Chandler v. Ricker, 49 Vt. 128;

Catlin v. Kidder, 7 Vt. 12;

Challefoux v. Ducharme, 4 Wis.
554; s.c. 8 Wis. 287;

Clymer v. Dawkins, 44 U. S. (3
How.) 674, 698; bk. 11 L. ed.
778;

Harpending v. Dutch Church, 41
U. S. (16 Pet.) 455; bk. 10 L.
ed. 1029;

McClung v. Ross, 18 U. S. (5
Wheat.) 116; bk. 5 L. ed. 46;

Thomas v. Hatch, 3 Sumn. C. C.
170; s.c. Fed. Cas. No.
13899;

Doe v. Presser, Cowp. 217;

Ford v. Gray, 1 Salk. 285; s.c.
Mod. 44;

2 Co. Litt. (19th ed.) 190b, 199b,
319, 364;

2 Cruise Dig. (4th ed.) 529.

¹ *Farrar v. Eastman*, 10 Me. (1 Fair.)
191, 195;

Codman v. Winslow, 10 Mass.
146;

Langdon v. Potter, 3 Mass. 215.

² *Ward v. Warren*, 82 N. Y. 265,
aff'd 15 Hun (N. Y.) 600. In

this case there was the use of a
way across the property which
had for the requisite time been
open, notorious, uninterrupted,
undisputed, under claim of
right and adverse, it was held
the law presumed a grant of
such way from the owner of
the several tenants, and that
such presumption is conclu-
sive.

Parker v. Foote, 19 Wend. (N.
Y.) 309; *Curtis v. Keesler*, 14
Barb. (N. Y.) 511; *Wallace v.
Fletcher*, 30 N. H. (10 Fost.)
434, 446; *Coolidge v. Learned*,
25 Mass. (8 Pick.) 504; *Tracy
v. Atherton*, 36 Vt. 503; *Town-
send v. Downer*, 32 Vt. 183.

Also that the owner of the
several tenants could not be
permitted to defeat such an
easement, but simply showing
that he did not grant it or have
knowledge of its use.

³ *Vaughan v. Bacon*, 15 Me. 455;
s.c. 33 Am. Dec. 628.

⁴ *Colman v. Clements*, 23 Cal. 245;
Newell v. Woodruff, 30 Conn.
492, 498;

Baird v. Baird's Heirs, 1 Dev. &
B. (N. C.) Eq. 524; s.c. 31 Am.
Dec. 399;

Hart v. Gregg, 10 Watts. (Pa.)
185; s.c. 36 Am. Dec. 166;

Harpending v. Dutch Church, 41
U. S. (16 Pet.) 455; bk. 10 L.
ed. 1029;

Willison v. Watkins, 28 U. S. (3
Pet.) 43, 51; bk. 7 L. ed.
596.

mon is regarded as adverse to his co-tenants in all cases where there is some notorious act known expressly or by implication to such co-tenants, by which he claims an exclusive right in and to the common property.¹ The ouster of co-tenants may be inferred from undisturbed possession of another co-tenant for a great length of time, accompanied by notorious acts of exclusive ownership,² but all acts of ownership in tenancies in common are not necessarily acts of disseisin. It depends on the intent with which they are done, and their notoriety. The law does not presume that one tenant in common intends to oust another. The fact must be notorious, and the intent must be established by proof.³ In order to prove that a tenant in common has claimed the whole estate exclusively, it is not necessary to show that he has made an express declaration to that effect;⁴ but it must be shown that his intention was manifested by acts of some kind; for to constitute a disseisin it is not necessary that notice should be sent to the disseisee, or that it be proven that he had any knowledge of the entry and of the ouster committed on his land.⁵ The mere

¹ *Jackson ex d. Bratt. v. Tibbitts*, 9 Cow. (N. Y.) 241.

See: *Abercombie v. Baldwin*, 15 Ala. 363;

Owen v. Morton, 24 Cal. 373, 377;

Goeway v. Urig, 18 Ill. 238;

Bowen v. Preston, 48 Ind. 367;

Small v. Clifford, 38 Me. 213;

Bracket v. Norcross, 1 Me. (1 Greenl.) 89;

Corbin v. Cannon, 31 Miss. 570;

Warfield v. Lindell, 38 Mo. 561; s.c. 90 Am. Dec. 443;

Wood v. Phillips, 43 N. Y. 152;

Forward v. Deetz, 32 Pa. St. 69;

Brock v. Eastman, 28 Vt. 658; s.c. 67 Am. Dec. 733;

Clymer v. Dawkins, 44 U. S. (3 How.) 674; bk. 11 L. ed. 778;

Willison v. Watkins, 28 U. S. (3 Pet.) 43, 52; bk. 7 L. ed. 596;

Harpending v. Dutch Church, 41 U. S. (16 Pet.) 455; bk. 10 L. ed. 1029;

McClung v. Ross, 18 U. S. (5 Wheat.) 116; bk. 5 L. ed. 46;

Doe v. Bird, 11 East 49.

² *Alexander v. Kennedy*, 19 Tex.

488; s.c. 70 Am. Dec. 358.

³ *Corwin v. Davison*, 9 Cow. (N. Y.) 24;

Alexander v. Kennedy, 19 Tex.

488; s.c. 70 Am. Dec. 358;

Prescott v. Nevers, 4 Mas. C. C. 326, 331; s.c. Fed. Cas. No. 11390.

⁴ See: *Lodge v. Patterson*, 3 Watts (Pa.) 74; s.c. 77 Am. Dec. 335.

Alexander v. Kennedy, 19 Tex.

488; s.c. 70 Am. Dec. 358.

⁵ *Alexander v. Kennedy*, 19 Tex.

488; s.c. 70 Am. Dec. 358.

Pennsylvania doctrine.—*Hart v. Gregg*.—In the case of *Hart v. Gregg*, 10 Watts (Pa.) 185; s.c. 36 Am. Dec. 166, it was ruled, in effect, that the mere entry of a co-heir into land of the ancestor claiming it all, and taking the rents and profits for twenty-one years (the term of limitation of Pennsylvania), is no disseisin of the other heirs; there must be some plain, decisive, unequivocal act on the part of the heir so entering, amounting to an adverse and

possession of a tenant in common for a great length of time, while not conclusive evidence of ouster, will be evidence for the jury,¹ which may presume an actual ouster.² In some of the states, undisturbed possession of one tenant in common, receiving the rents and profits for himself, without recognition of the claim of his co-tenants, will be evidence from which an ouster may be presumed.³

SEC. 1952. **Same.—Ouster.**—We have seen in the foregoing section, that the question of ouster is one of intention. It is a question of fact to be determined by a jury.⁴ Where a tenant in common enters into the actual and exclusive possession of the lands, taking the rents and profits to his own use, and openly asserting his own exclusive property in the lands, denying the title of

wrongful possession in himself, and a disseisin of the others.

See: *Law v. Patterson*, 1 Watts & S. (Pa.) 184.

¹ See: *Post*, § 1952.

² *Chambers v. Pleak*, 6 Dana (Ky.) 426, 432; s.c. 32 Am. Dec. 78;

Parker v. Proprietors Locks and Canals, 44 Mass. (3 Met.) 91, 100; s.c. 37 Am. Dec. 121;

Jackson v. Whitbeck, 6 Cow. (N. Y.) 632; s.c. 16 Am. Dec. 454;

Alexander v. Kennedy, 19 Tex. 488; s.c. 70 Am. Dec. 358.

³ See: *Milliken v. Brown*, 10 Serg. & R. (Pa.) 188;

Law v. Patterson, 1 Watts & S. (Pa.) 184;

Hart v. Gregg, 10 Watts (Pa.) 185; s.c. 36 Am. Dec. 166;

Lodge v. Patterson, 3 Watts (Pa.) 74; s.c. 27 Am. Dec. 335.

⁴ *Miller v. Myers*, 46 Cal. 535, 538. Compare: *Newell v. Woodruff*,

30 Conn. 492;

Marcy v. Marcy, 47 Mass. (6 Met.) 360;

Munroe v. Luke, 42 Mass. (1 Met.) 459, 470;

Cummings v. Wyman, 10 Mass. 464;

Culver v. Rhodes, 87 N. Y. 348, 353, 354; s.c. 13 Weekly Dig. 563;

Keyser v. Evans, 30 Pa. St. 507;

Hart v. Gregg, 10 Watts (Pa.)

185; s.c. 36 Am. Dec. 166;

Blackmore v. Gregg, 2 Watts & S. (Pa.) 182;

Purcell v. Wilson, 4 Gratt. (Va.) 16;

Prescott v. Nevers, 4 Mas. C. C. 326, 330; s.c. Fed. Cas. No. 11390.

See: *Cross v. Robinson*, 21 Conn. 379;

Kinney v. Slattery, 51 Iowa 353; s.c. 1 N. W. Rep. 626;

Lloyd v. Gordon, 2 Har. & McH. (Md.) 254;

Van Dyck v. Van Buren, 1 Cai. (N. Y.) 84;

Linker v. Benson, 67 N. C. 150, 160;

Frederick v. Gray, 10 Serg. & R. (Pa.) 182;

Mehaffy v. Dobbs, 9 Watts (Pa.) 363;

Marr v. Gilliam, 1 Cold. (Tenn.) 488;

Peeler v. Guilkey, 27 Tex. 355.

The jury may presume an ouster from an open and exclusive occupancy long continued, as for a long period of years.

Jackson v. Whitbeck, 6 Cow. (N. Y.) 632; s.c. 16 Am. Dec. 454.

See: *Bryan v. Atwater*, 5 Day (Conn.) 181, 188; s.c. 5 Am. Dec. 186.

In one case of thirty-six years;

Doe v. Prosser, Cowp. 217.

any other person, it is an adverse possession and ouster of the other tenants;¹ because an exclusive possession by one tenant in common is deemed to be adverse so as to give effect to the statute of limitations.² The mere silent possession of the property, however, accompanied by no act which can amount to an ouster, or give notice to the co-tenant of an adverse holding will not be sufficient.³ To constitute an ouster, there must be notice of the fact to the co-tenant, or unequivocal facts, so open and public that notice may be⁴ presumed, on the part of a co-tenant upon his title and the invasion of his rights. The adverse possession sets running the statute of limitations, which in the end may operate as a bar; but it does so only upon the theory that the party disseised has slept upon his rights, and by silence and inaction has waived them. The rule is just if the ouster or adverse possession is brought home to the knowledge of the owner, or is of such definite and hostile and public character, that such knowledge may be fairly presumed, but it is unjust and unreasonable if enforced without such limitation.⁵ The authorities plainly recognize the reason and justice of such requirement, and with some differences and variations, have as yet never drifted away from it. Originally an actual disseisin, a palpable

¹ *Cummings v. Wyman*, 10 Mass. 464.

Disseisin of co-tenant—Conveyance and sale on execution.—Where a tenant in common of certain land conveyed the whole, and the grantee entered; and afterwards a creditor of the latter levied and entered upon the whole, claiming to be sole owner, it was held that the co-tenant of the grantor was disseised.

Bigelow v. Jones, 27 Mass. (10 Pick.) 161.

See: *Chiles v. Conley*, 9 Dana (Ky.) 385, 388;

Parker v. Proprs. Locks and Canals Merrimack, 44 Mass. (3 Met.) 91; s.c. 37 Am. Dec. 121;

Kittredge v. Locks and Canals Merrimack, etc., 34 Mass. (17 Pick.) 246;

Watson v. Gregg, 10 Watts (Pa.) 289;

Hart v. Gregg, 10 Watts (Pa.) 185; s.c. 36 Am. Dec. 166;

Phillips v. Gregg, 10 Watts (Pa.) 158;

Bolton v. Hamilton, 2 Watts & S. (Pa.) 294.

² *Munroe v. Luke*, 42 Mass. (1 Met.) 459, 470;

Jackson ex d. Bratt v. Tibbitts, 9 Cow. (N. Y.) 241.

³ *Munroe v. Luke*, 42 Mass. (1 Met.) 459, 470;

McClung v. Ross, 18 U. S. (5 Wheat.) 124; bk. 5 L. ed. 46.

⁴ *Rickard v. Williams*, 20 U. S. (7 Wheat.) 59, 121; bk. 5 L. ed. 398.

⁵ *Culver v. Rhodes*, 87 N. Y. 348, 353; s.c. 13 Weekly Dig. 563. *Trustees, etc., Town of E. Hampton v. Kirk*, 84 N. Y. 215, 220; s.c. 38 Am. Rep. 505.

turning out of the co-tenant, or hindering him from entry seems to have been requisite.¹ The modern rule is content with less, and is well stated in *Hawk v. Senseman*,² where it is said that in order to effect an ouster of a co-tenant there must be "an actual, continued, visible, notorious, distinct, and hostile possession, and must be such that knowledge of its existence is brought home to the co-tenant."³

SEC. 1953. Joint estates—Tenancies in common when.—According to the common-law rule, where the tenants of an estate occupy promiscuously, no one knowing his own severalty and under circumstances which prevents unity of interest,⁴ unity of title,⁵ and unity of time,⁶ as well as unity of possession,⁷ constitutes tenancies in common;⁸ consequently, grantees are

¹ *Culver v. Rhodes*, 87 N. Y. 348, 353; s.c. 13 Weekly Dig. 563; *Reading's Case*, 1 Salk. 392.

² 6 Serg. & R. (Pa.) 21.

³ *Hall v. Stevens*, 50 Mass. (9 Met.) 418.

Bennett v. Bullock, 35 Pa. St. 364;

Long v. Mast, 11 Pa. St. 189.

Challefoux v. Ducharme, 8 Wis. 287; s.c. 4 Wis. 554;

Zeller's Lessee v. Eckert, 45 U. S. (4 How.) 295; bk. 11 L. ed. 979;

McClung v. Ross, 18 U. S. (5 Wheat.) 124; bk. 5 L. ed. 46.

Barr v. Gratz, 17 U. S. (4 Wheat.) 213; bk. 4 L. ed. 553.

New York doctrine—*Culver v. Rhodes*.

It is said in the case of *Culver v. Rhodes*, 87 N. Y. 348, 353, that the uniform current of decision as above given is not broken but diverted by the cases in New York; wherever the acts needful to create an ouster have been stated, they have been an actual and exclusive possession of the whole premises, claiming the whole (*Florence v. Hopkins*, 46 N. Y. 182), taking title from a hostile source, and refusing to let in the co-tenant (*Clapp v. Bromaghan* 9 Cow. (N. Y.) 530; s.c. rev'g 5 Cow. (N. Y.) 295; *Clark v. Crego*, 47 Barb. (N. Y.) 599, 617; *Phelan v. Kelley*, 25 Wend. (N. Y.) 389, 395); an exclusive

possession, exclusive receipt of rents and profits, and exclusive claim of title (*Grim v. Dyar*, 3 Duer (N. Y.) 354); a public claim of the entire title, a notorious act, an open claim of exclusive right (*Smith v. Burtis*, 9 John (N. Y.) 174; *Jackson v. Brink*, 5 Cow. (N. Y.) 483; *Jackson v. Tibbits*, 9 Cow. (N. Y.) 241; *Miller v. Platt*, 5 Duer (N. Y.) 272; or where, upon demand of the co-tenant, his title is denied and possession is refused. *Siglar v. Van Riper*, 10 Wend. (N. Y.) 414, 419. It is impossible to mistake this uniform direction of the cases. If no explicit notice is given to the co-tenant of the denial of his right, the occupant must make his possession so visibly hostile and notorious, and so apparently exclusive and adverse, as to justify an inference of knowledge on the part of the tenant sought to be ousted, and of *laches* if he fails to discover and assert his rights.

Crary v. Goodman, 22 N. Y. 266; s.c. 64 Am. Dec. 506.

⁴ See: *Ante*, § 1913.

⁵ See: *Ante*, § 1914.

⁶ See: *Ante*, § 1915.

⁷ See: *Ante*, § 1916.

⁸ 2 Bl. Com. 191.

tenants in common, where the deeds under which they claim cover the same land, bear the same date, are founded upon surveys recorded and certified on the same day, and purport to have been made upon warrants issued on the same day;¹ and where ejectments are levied simultaneously on the same land by different creditors under executions, such execution creditors become tenants in common in equal proportions, without regard to the amount of their respective executions.² Where this rule of the common law has not been changed by statute in this country, here, as in England, joint estates are tenancies in common where they are not expressly made joint tenancies;³ and this is equally true whether they are acquired by purchase or descent. To this rule

¹ *Young v. De Bruhl*, 11 Rich. (S. C.) L. 638; s.c. 73 Am. Dec. 127.

² *Sigourney v. Eaton*, 31 Mass. (14 Pick.) 414; s.c. 25 Am. Dec. 414.

See: *Davis v. Davis*, 56 Mass. (2 Cush.) 111, 114;

Perry v. Adams, 44 Mass. (3 Met.) 51, 54;

Shove v. Dow, 13 Mass. 524, 529.

Massachusetts doctrine—*Perry v. Adams*. In *Perry v. Adams*, 44 Mass. (3 Met.) 51, the defendants insisted that the levy of the execution of the tenant was so made as to take the case out of the ordinary rule; and that the effect of that levy is only to give the tenant a title in a moiety of one half the estate in the land levied upon. The argument in support of this position arises from the form of the levy by the tenant—the officer certifying that he had extended and levied the execution upon fourteen fifteenths of an undivided half; and it is contended that the estate levied upon is to be held in moieties by the two creditors who seized it simultaneously, and therefore the tenant, having levied upon only fourteen fifteenths of an undivided half, he acquired by his levy only seven fifteenths of that undivided half. The Court

said: "We do not think this is a correct view of the effect of such a levy. An officer, knowing that another execution had been or was to be simultaneously levied on the same land, and under such circumstances as to the lien, that each would take only an undivided moiety, might properly return a seizure on the same of an undivided half; that being the extent of the interest to be appraised, and the extent of the interest passing to the creditor by the levy. In the case of *Durant v. Johnson*, 36 Mass. (19 Pick.) 544, such levy on a proportional share, by one of two simultaneous attaching creditors—the other creditor having made his levy—was held a good levy for the entire interest in the moiety or proportional part upon which he levied. We perceive no objection to such form of returning seizure and levy by the officer, where the whole estate of the debtor is exhausted by several levies made upon simultaneous attachments, or simultaneous seizures on execution where there has been no priority acquired by attachment."

³ As to declaration necessary to create a joint-tenancy, See: *Hershey v. Clark*, 35 Ark. 17; s.c. 37 Am. Rep. 1.

there is a single exception in those states where tenancies by coparcenary still exist.¹

SEC. 1954. **Tenancies in common between husband and wife.**—At common law, the husband and wife are considered as but one person,² and where real estate vests in them after marriage they hold it as one person,³ and are seized of the estate simply *per tout*⁴ and not *per my et per tout*, as joint tenants are,⁵ both being seized of the entire estate, they are called tenants by the entirety, and their estates are estates by entireties.⁶ Although estates

- ¹ *Briscoe v. McGee*, 2 J. J. Marsh. (Ky.) 370 ;
Partridge v. Colgate, 3 Har. & McH. (Md.) 339 ;
Miller v. Miller, 16 Mass. 59 ;
Evans v. Brittain, 3 Serg. & R. (Pa.) 135 ;
Aldrich v. Martin, 4 R. I. 520 ;
Young v. DeBruhl, 11 Rich. (S. C.) L. 638 ; s.c. 73 Am. Dec. 127 ;
Johnson v. Harris, 5 Hayw. (Tenn.) 113 ;
Gilman v. Morrill, 8 Vt. 74 ;
Challefoux v. Ducharme, 8 Wis. 287 ; s.c. 4 Wis. 554 ;
 4 Kent Com. (13th ed.) 367.
² See : *Ante*, §§ 1790, 1795.
³ *Den ex d. Hardenbergh v. Hardenbergh*, 10 N. J. L. (5 Halst.) 42, 45 ; s.c. 18 Am. Dec. 371 ;
Taul v. Campbell, 7 Yerg. (Tenn.) 319 ; s.c. 27 Am. Dec. 508.
⁴ 2 Bl. Com. 186, 182.
⁵ *Topping v. Sadler*, 5 Jones (N. C.) L. 357.
 See : *Post*, § 1968, *et seq.*
⁶ *Robinson v. Eagle*, 29 Ark. 202 ;
Boggs v. Boggs, 54 Ga. 95, 97 ;
Almond v. Bonnell, 76 Ill. 536 ;
Cooper v. Cooper, 76 Ill. 57, 64 ;
Riggin v. Love, 72 Ill. 553 ;
Lux v. Hoff, 47 Ill. 425, 428 ; s.c. 95 Am. Dec. 502 ;
Maurier v. Saunders (5 Gilm.), 6 Ill. 124 ;
Carver v. Smith, 90 Ind. 215, 222 ; s.c. 46 Am. Rep. 210 ;
Hulett v. Inlow, 57 Ind. 412 ; s.c. 26 Am. Rep. 64 ;
Abshire v. State, 53 Ind. 64, 66 ;
McConnell v. Martin, 52 Ind. 434 ;
Anderson v. Tannerhill, 42 Ind. 141 ;
Barnes v. Loyd, 37 Ind. 523 ;
Davis v. Clark, 26 Ind. 424 ; s.c. 89 Am. Dec. 471 ;
Dodge v. Kinzy, 101 Ind. 102 ; s.c. 18 Cent. L. J. 173 ;
Hoffman v. Stigers, 28 Iowa 302, 307 ;
Moore v. Moore, 12 B. Mon. (Ky.) 651 ;
Banton v. Campbell, 9 B. Mon. (Ky.) 587 ;
Cochran v. Kerney, 9 Bush (Ky.) 199 ;
Elliott v. Nicholls, 4 Bush (Ky.) 502, 503 ;
Harding v. Springer, 14 Me. 407, 408 ; s.c. 31 Am. Dec. 61 ;
Greenlaw v. Greenlaw, 13 Me. 182, 186 ;
Fladung v. Rose, 58 Md. 13, 24 ;
Marburg v. Cole, 49 Md. 402, 413 ; s.c. 33 Am. Rep. 266 ;
Brinton v. Hook, 3 Md. Ch. 477 ;
Craft v. Wilcox, 4 Gill (Md.) 504 ;
Commonwealth v. Kennedy, 119 Mass. 211 ;
Abbott v. Abbott, 97 Mass. 136 ;
Wales v. Coffin, 95 Mass. (13 Allen) 213, 217 ;
Lowell Appellants, 39 Mass. (22 Pick.) 215, 221 ;
Varnum v. Abbott, 12 Mass. 474, 479 ; s.c. 7 Am. Dec. 87 ;
Fox v. Fletcher, 8 Mass. 274 ;
Shaw v. Harsey, 5 Mass. 521, 523 ;
Jacobs v. Miller, 50 Mich. 119 ; s.c. 15 N. W. Rep. 42 ;
Wait v. Bovee, 35 Mich. 425, 428 ;
Fisher v. Provin, 25 Mich. 347 ;
Allen v. Tate, 58 Miss. 585 ;
Duff v. Beauchamp, 50 Miss. 531 ;
Hemmingway v. Scales, 42 Miss. 1 ; s.c. 2 Am. Rep. 586 ;
Thornton v. Exchange, 17 Mo. 221 ;

by the entirety have been generally adopted in some of the states,¹ yet in the majority of them such estates do not exist, and a joint estate held by husband and wife is either treated as a joint tenancy, as in Connecticut,² or as a tenancy in common, as is the case in Kentucky,³ in Iowa,⁴ in Ohio,⁵ and elsewhere. In these states, if at any time it is desired to create a joint-tenancy or tenancy in common between husband and wife, a joint estate will be treated as such, if that intention is clearly expressed in the instrument creating the estate.⁶

- Hall v. Stephens, 65 Mo. 670 ;
 s.c. 27 Am. Rep. 302 ;
 Garner v. Jones, 52 Mo. 68 ;
 Gilson v. Zimmerman, 12 Mo.
 385 ;
 Kip v. Kip, 33 N. J. Eq. (6 Stew.)
 213 ;
 Lee v. Zabriskee, 28 N. J. Eq. (1
 Stew.) 422, 428 ;
 Bolles v. State Trust Co., 27 N.
 J. Eq. (12 C. E. Gr.) 308 ;
 Thomas v. De Baum, 14 N. J. Eq.
 (1 McCar.) 37, 78, 80 ;
 Den v. Gardner, 20 N. J. L. (1
 Spen.) 556, 562 ;
 Den ex d. Hardenbergh v. Hard-
 enbergh, 10 N. J. L. (5 Halst.)
 42, 45 ; s.c. 18 Am. Dec. 371 ;
 Clark v. Clark, 56 N. H. 105, 110 ;
 Wentworth v. Remick, 47 N. H.
 226 ; s.c. 90 Am. Dec. 573 ;
 Carter v. Beals, 44 N. H. 408 ;
 Brown v. Gale, 5 N. H. 416 ;
 Bertles v. Nunan, 92 N. Y. 152 ;
 s.c. 44 Am. Rep. 361 ;
 Meeker v. Wright, 76 N. Y. 262 ;
 Wright v. Saddler, 20 N. Y. 320,
 323 ;
 Torrey v. Torrey, 14 N. Y. 430 ;
 Baker v. Lamb, 11 Hun (N. Y.)
 519 ;
 Miller v. Miller, 9 Abb. Pr. (N.
 Y.) N. S. 444 ;
 Farmers & Mechanics' Bank of
 Rochester v. Gregory, 49 Barb.
 (N. Y.) 155, 162 ;
 Jones v. Potter, 89 N. C. 220,
 222 ;
 Gillan v. Dixon, 65 Pa. St. 395 ;
 McCurdy v. Canning, 64 Pa. St.
 39, 40 ;
 French v. Mehan, 56 Pa. St. 286 ;
 Bates v. Seely, 46 Pa. St. 248 ;
 Stackey v. Keefe, 26 Pa. St. 397 ;
 Clark v. Thompson, 12 Pa. St. 274 ;
 Tupper v. Fuller, 7 Rich. (S. C.)
 Eq. 170 ;
 Bomar v. Mullins, 4 Rich. (S. C.)
 Eq. 80 ;
 Berrigan v. Fleming, 2 Lea
 (Tenn.) 271 ;
 Ames v. Norman, 4 Sneed (Tenn.)
 683, 692 ; s.c. 70 Am. Dec. 269 ;
 Taul v. Campbell, 7 Yerg. (Tenn.)
 319 ; s.c. 27 Am. Dec. 508 ;
 Brownson v. Hull, 16 Vt. 309 ;
 s.c. 42 Am. Dec. 517 ;
 Thornton v. Thornton, 3 Rand.
 (Va.) 179, 188 ;
 Bennett v. Child, 19 Wis. 362,
 364 ; s.c. 88 Am. Dec. 692 ;
 Ketchum v. Walsworth, 5 Wis.
 95 ; s.c. 68 Am. Dec. 49 ;
 Allie v. Schmitz, 17 Wis. 160, 169 ;
 N. W. Mut. Life Ins. Co. v. Nel-
 son, 103 U. S. 544 ; bk. 26 L.
 ed. 436 ;
 Myers v. Reed, 17 Fed. Rep. 401 ;
 Doe d. Dormer v. Wilson, 4 Barn.
 & Ald. 303 ; s.c. 6 Eng. C. L.
 303 ;
 Green v. King, 2 W. Bl. 1211 ;
 Doe v. Parrott, 5 Durnf. & East
 (5 T. R.) 652 ;
 Shaver v. Shaver, 31 Up. Can. Q.
 B. 605.
 See : Back v. Andrews, 2 Vern.
 120 ; s.c. Prec. Ch. 1.
¹ See : *Post*, § 1971.
² See : Whittlesey v. Fuller, 11
 Conn. 337.
 See : *Post*, § 1972.
³ Rogers v. Grider, 1 Dana (Ky.) 242.
 See : *Post*, § 1972.
⁴ Hoffman v. Stigers, 28 Iowa 302.
 See : *Post*, § 1972.
⁵ Wilson v. Fleming, 13 Ohio 68.
 Sergeant v. Steinberger, 2 Ohio
 305 ; s.c. 15 Am. Dec. 553.
 See : *Post*, § 1972.
⁶ McDermott v. French, 15 N. J.
 Eq. (2 McC.) 78, 81.

SEC. 1955. Rights and powers of tenants in common.—Any one of several joint tenants of land may collect or release a claim for damages arising out of trespass on the common property ;¹ may give a mortgage on his interest in the estate to secure his own indebtedness ;² may redeem from a mortgage,³ or from a sale of the premises for the nonpayment of taxes,⁴ and thereby extinguish the title of a purchaser at such sale ;⁵ but in such case he must pay the whole of the mortgage debt or the amount due for the taxes.⁶ Where a co-tenant redeems from a mortgage or a tax sale he has the right to retain the share or shares of his co-tenant or co-tenants as security for the repayment of the amount equitably chargeable thereto ; and until such reimbursement has been made to the co-tenant who redeemed, the delinquent co-tenant cannot maintain an action against him for the recovery of the land.⁷

SEC. 1956. Same—To enter into agreements concerning common property.—Tenants in common have the right and power to contract with each other concerning the use of the common property, and those contracts may be enforced in the same manner as agreements between third parties ;⁸

¹ *Hodges v. Heal*, 80 Me. 281 ; s.c. 14 Atl. Rep. 11 ;

Kimball v. Sumner, 62 Me. 305, 310 ;

Bradley v. Boynton, 22 Me. 287 ; s.c. 39 Am. Dec. 582.

² *Ruppe v. Steinbach*, 48 Mich. 465 ; s.c. 12 N. W. Rep. 658.

³ *Crafts v. Crafts*, 79 Mass. (13 Gray) 360.

⁴ *Watkins v. Eaton*, 30 Me. 529 ; s.c. 50 Am. Dec. 637.

⁵ *Watkins v. Eaton*, 30 Me. 529 ; s.c. 50 Am. Dec. 637.

⁶ *Crafts v. Crafts*, 79 Mass. (13 Gray) 360.

⁷ *Watkins v. Eaton*, 30 Me. 529 ; s.c. 50 Am. Dec. 637 ;

Kirkpatrick v. Mathiot, 4 Watts & S. (Pa.) 251.

Maine doctrine—*Watkins v. Eaton*.

—The court say, in *Watkins v. Eaton*, 30 Me. 529 ; s.c. 50 Am. Dec. 637, that the principle is well established and is of frequent application in the re-

demption of mortgages, that one having a legal interest in an estate under incumbrance, may redeem the whole estate when necessary, to enable him to redeem his own share or to relieve his own title from incumbrance, even against the pleasure of a co-tenant or other owner, and may be regarded as the assignee of the incumbrance upon the other shares or interests, and may retain possession of them to secure a reimbursement of the amount equitably chargeable to them.

Wilkins v. French, 20 Me. 111 ; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 146 ;

Jenness v. Robinson, 10 N. H. 215.

⁸ See *Thompson v. Salmon*, 18 Cal. 632 ;

Curtis v. Swearingen, 1 Ill. (Breeze.) 160 ;

Bond v. Hilton, 1 Bus. (N. C.) L. 308 ; s.c. 59 Am. Dec. 552 ;

but tenants in common will not be permitted to enter into contracts that will interfere with the interests of others in the common property.¹

SEC. 1957. Same—To occupy common property.—Where property is owned by several tenants in common, each has an equal right to occupy and enjoy the same;² and on the conveyance by one of such tenant in common of his share of the estate to a stranger, such stranger will hold in connection with the remaining tenants in common, taking the place of his grantor.³ The possession of any one of the number of tenants in common will be regarded as the possession of all;⁴ and a co-tenant thus in possession may have full management and control of the common property, provided he does no injury to his co-tenants.⁵ But one tenant in common is not entitled to the entire possession of the common property as against his co-tenants.⁶

SEC. 1958. Same—To convey common property.—We have already seen that one tenant in common will not be permitted to do any act or so manage the common property as to injure or prejudice the right of his co-tenant,⁷ con-

Luther v. Arnold, 8 Rich. (S. C.)

L. 24; s.c. 62 Am. Dec. 1422.

Kidder v. Rixford, 16 Vt. 169;

s. c. 42 Am. Dec. 504.

Davies v. Skinner, 58 Wis. 658;

s.c. 17 N. W. Rep. 427;

¹ Porter v. Muller, 65 Cal. 512; s.c.

4 Pac. Rep. 531.

² See: Jamison v. Graham, 57 Ill.

94;

Southworth v. Smith, 27 Conn.

355; s.c. 71 Am. Dec. 72;

Richardson v. Richardson, 72 Me. 403;

Osborn v. Schench, 83 N. Y. 201,

aff'g 18 Hun (N. Y.) 202;

Volentine v. Johnson, 1 Hill.

(S. C.) Eq. 49;

Bulger v. Woods, 3 Pinn. (Wis.) 460.

³ See: Barnum v. Landon, 24 Conn. 137;

Adams v. Frothingham, 3 Mass.

352; s.c. 3 Am. Dec. 151.

⁴ See: *Ante*, § 1951.

⁵ Peabody v. Minot, 41 Mass. (24

Pick.) 329;

Miner v. Lorman, 70 Mich. 173;

s.c. 38 N. W. Rep. 18.

⁶ See: Jamison v. Graham, 57 Ill. 94;

Young v. Gammel, 4 G. Greene (Ia.) 207;

Gower v. Quinlan, 40 Mich. 572;

Erwin v. Olmsted, 7 Cow. (N. Y.) 229;

Arnot v. Beadle, 1 Hill & Den.

Supp. (N. Y.) 181;

Blewett v. Coleman, 40 Pa. St. 45;

Warren v. Henshaw, 2 Aik. (Vt.) 141.

⁷ Thus where one of two tenants in common, by will, devised her interest to the other for life-remainder to his heirs, and the other, remaining in possession after her decease, undertook to convey the whole of the estate to one of his heirs only, held, in action by the other heirs, that such heir, or those claiming under him, could not, in

sequently one tenant in common cannot by selling common property, deprive his co-tenants of their interest therein,¹ unless he was duly commissioned to make such sale,² or the sale is duly ratified by the other co-tenants.³ One tenant in common cannot grant an easement in the common property against his co-tenant,⁴ or dedicate a part of the common property to the public, against the acquiescence of his associates.⁵

SEC. 1959. **Same—Same—Whole of property.**—While one tenant in common has not the power to convey the whole estate to the prejudice of his co-tenants, yet his attempt to do so will not as a general rule be void, but the purchaser will take such interest in the property conveyed as the grantee possesses at the time the purchase is made.⁶ Tenants in common may, however, join in conveyance of the common property.⁷

SEC. 1960. **Same—Same—Undivided part of property.**—One tenant in common may convey his undivided interest in the whole or any portion of the common property to a

equity be allowed to hold adversely to the other heirs.

Hicks v. Bullock, 96 N. C. 164; s.c. 1 S. E. Rep. 629.

¹ *People v. Marshall*, 8 Cal. 51; *Carlyle v. Patterson*, 3 Bibb (Ky.) 93;

Sneed v. Warring, 2 B. Mon. (Ky.) 522;

McBeth v. Trabue, 69 Mo. 658;

White v. Brooks, 43 N. H. 402;

Crippen v. Morss, 49 N. Y. 67;

Bigelow v. Topliff, 25 Vt. 273; s.c. 60 Am. Dec. 264.

See: *Bears v. Covilland*, 69 Cal. 617;

Stockey v. Carter, 92 Ill. 129;

Merrill v. Berkshir, 28 Mass. (11 Pick.) 269;

Richey v. Brown, 58 Mich. 455; s.c. 25 N. W. Rep. 547;

City of St. Louis v. Laclede Gas Light Co., 96 Mo. 197; s.c. 9 S. W. Rep. 581;

Hicks v. Bullock, 96 N. C. 164; s.c. 1 S. E. Rep. 629;

Locke v. Alexander, 2 Hawk. (N. C.) 155; s.c. 11 Am. Dec. 750;

Scott v. State, 1 Sneed (Tenn.) 629, 630

² *Sewell v. Holland*, 61 Ga. 608.

See: *Jackson ex d. Erwin v. Moore*, 6 Cow. (N. Y.) 706;

Earsham v. Myers, 1 N. Y. St. R. 901.

³ See: *Wortman v. Guthrie*, 29 Pa. St. 495;

Johnson v. Jones, 85 Ala. 286; s.c. 4 So. Rep. 748.

⁴ *City of St. Louis v. Laclede Gas Light Co.*, 96 Mo. 197; s.c. 9 S. W. Rep. 581;

McBeth v. Trabue, 69 Mo. 642, 658;

Crippen v. Morss, 49 N. Y. 67;

Scott v. State, 1 Sneed (Tenn.) 630.

⁵ *Scott v. State*, 1 Sneed (Tenn.) 629.

See: *Reed v. West*, 82 Mass. (16 Gray) 283.

⁶ *Hager v. Spect*, 52 Cal. 579;

Sewell v. Hollian, 61 Ga. 608;

Sims v. Dame, 113 Ind. 127; s.c. 15 N. E. Rep. 217;

Vandike's Appeal, 57 Pa. St. 9.

⁷ *Doe d. Wilkinsons v. Fleming*, 2 Ohio 301;

Massie's Heirs v. Long, 2 Ohio 287; s.c. 15 Am. Dec. 547.

co-tenant or to a stranger, and his deed will be valid and effectual against his co-tenants.¹ He may also mortgage the whole of his undivided interest or any portion thereof, but such mortgage will have no validity or effect against the interest or rights of his co-tenants.²

SEC. 1961. **Same—Same—Specific part of the property.**—In those cases where the common property consists of several freeholds, one of the tenants in common may convey his undivided interest in any one or more of them without reference to any of the other parcels ;³ but such tenant in common cannot convey his interest in any particular parcel by metes and bounds, and thereby give an interest conflicting with rights and interests of his co-tenants.⁴ The interest of a tenant in common may be sold on execution ;⁵ but a judgment creditor of a co-tenant will not be permitted to sell under such execution any specific portion of the common estate discharged of other rights and interests of the tenants in common.⁶ If such judgment creditor should levy on any specific portion of the common estate by metes and bounds, the levy will be invalid because an encroachment upon the rights of the co-tenants to have the partition of the whole estate.⁷ The

¹ *Primm v. Walker*, 38 Mo. 94.
See: *Gates v. Salmon*, 35 Cal. 576 ; s.c. 95 Am. Dec. 139 ;
Hartford, etc., Ore Co. v. Miller, 41 Conn. 112 ;
Elliot v. Frakes, 90 Ind. 389 ;
Nichols v. Smith, 39 Mass. (22 Pick.) 316 ;
Rector v. Waugh, 17 Mo. 13 ; s.c. 57 Am. Dec. 251 ;
Butler v. Roys, 25 Mich. 53 ; s.c. 12 Am. Rep. 218 ;
Luther v. Arnold, 8 Rich. (N. C.) L. 24 ; s.c. 62 Am. Dec. 422 ;
Shepardson v. Rowland, 28 Wis. 108.

² *Marks v. Sewall*, 120 Mass. 174 ;
Adam v. Briggs Iron Co., 61 Mass. (7 Cush.) 361.

³ *Butler v. Roys*, 25 Mich. 53 ; s.c. 12 Am. Rep. 218.

⁴ *Griswold v. Johnson*, 5 Conn. 363 ;
Mattox v. Hightshue, 39 Ind. 95 ;
Duncan v. Sylvester, 24 Me. 482 ;
s.c. 41 Am. Dec. 400 ;
Tainter v. Cole, 120 Mass. 162 ;
Bartlett v. Harlow, 12 Mass. 348 ;

Ballou v. Hale, 47 N. H. 347 ; s.c. 93 Am. Dec. 438 ;
Smith v. Knight, 20 N. H. 9 ;
Boston, etc., Co. v. Condit, 19 N. J. Eq. (4 C. E. Gr.) 394 ;
Crocker v. Tiffany, 9 R. I. 505 ;
Good v. Coombs, 28 Tex. 34 ;
Boggess v. Meredith, 16 W. Va. 1.
See: *Reinicker v. Smith*, 2 Har. & J. (Md.) 421 ;
Barnhart v. Campbell, 50 Mo. 597 ;
Treon's Lessee v. Emerick, 6 Ohio 391.

⁵ *Butler v. Roys*, 25 Mich. 53 ; s.c. 12 Am. Rep. 218.

⁶ *Bartlett v. Harlow*, 12 Mass. 347, 348 ; s.c. 7 Am. Dec. 76 ;
Porter v. Hill, 9 Mass. 34 ; s.c. 6 Am. Dec. 22 ;
Whilton v. Whilton, 38 N. H. 127.

⁷ *Brown v. Bailey*, 42 Mass. (1 Met.) 254, 256 ;
Bartlett v. Harlow, 12 Mass. 347, 348 ; s.c. 7 Am. Dec. 76 ;
Porter v. Hill, 9 Mass. 34 ; s.c. 6 Am. Dec. 22 ;

general rule is, that where one tenant in common conveys a portion of the common estate by metes and bounds, the deed will be valid and binding against all persons except the co-tenants in common, and as against these it will be voidable only.¹

SEC. 1962. **Same—To lease common property.**—One tenant in common, without express authority from the other co-tenants, cannot execute a valid lease upon the common property;² but a tenant who has entered upon and occupied the common property under a lease from one tenant in common acting without authority, by the subsequent assent of the other co-tenants, will be liable to account to the tenants in common for use and occupation.³ A lease of the common property may be made jointly, by the tenants in common, and they may join in an action in distress for rent,⁴ but they cannot recover in ejectment on a joint demise.⁵

French v. Lund, 1 N. H. 42; s.c. 8 Am. Dec. 31.

Application of rule—Brown v. Bailey.

—In *Brown v. Bailey*, 42 Mass. (1 Met.) 254, the court say, that this rule is adopted for the protection of the rights of the other co-tenants, it shall not be extended further than the accomplishment of that object requires; and it is therefore held, that a conveyance of part by metes and bounds, by a co-tenant, is not void, but voidable only by the other co-tenants. And the same rule applies to a levy on part by metes and bounds, as the estate of a tenant in common, which is in the nature of statute conveyance.

Nichols v. Smith, 39 Mass. (22 Pick.) 316;

Varnum v. Abbot, 12 Mass. 474; s.c. 7 Am. Dec. 87.

¹ *Nichols v. Smith*, 39 Mass. (22 Pick.) 316, 319.

See: *Sutter v. San Francisco*, 36 Cal. 112, 115.

² *Tainter v. Cole*, 120 Mass. 162;

Mussey v. Holt, 24 N. H. (4 Fost.) 248; s.c. 55 Am. Dec. 234;

Godfrey v. Cartwright, 4 Dev. (N. C.) L. 487;

McKinley v. Peter, 111 Pa. St. 283; s.c. 3 Atl. Rep. 27.

³ See: *Codman v. Hall*, 91 Mass. (9 Allen) 335. In this case the court say, that it is an ancient doctrine of the law, that if one party executes his part of an indenture, it shall be his deed, though the other does not execute his part. Com. Dig. Fait. c. 2. And we suppose that when a lease has entered and enjoyed his whole term, he is liable on his covenant to pay rent, though the lessor did not execute the lease.

See: *Petrie v. Bury*, 3 Barn. & C. 353; s.c. 10 Eng. C. L. 166;

Cooch v. Goodman, 2 Ad. & E. N. S. 580; s.c. 42 Eng. C. L. 817.

⁴ *Hoyle v. Stowe*, 2 Dev. (N. C.) L. 318;

Nixon v. Potts, 1 Hawks. (N. C.) L. 469;

Jones v. Gundrim, 3 Watts & S. (Pa.) 531.

⁵ *Taylor v. Perkins*, 1 A. K. Marsh. (Ky.) 253;

Harrison v. Botts, 4 Bibb (Ky.) 420;

Innes v. Crawford, 2 Bibb (Ky.) 412.

SEC. 1963. Same—To license acts upon common property.—One tenant in common not being permitted to do any act which will be injurious to the rights of interest of his co-tenants,¹ will not be permitted to license the doings of an act on the common premises which will be detrimental to the rights and interests of his co-tenants.² But a license to do an act on the common property will be valid in all those cases where the tenant granting the license may be presumed to have acted as an agent of the other tenants, upon authority from them. Thus it has been held that a license by one of two tenants in common, who are also partners in the lumber business, to a third person, to cut timber on the lands held in common, from which the tenants in common procure timber to carry on their business, is good, and confers title to the timber cut by such person, especially where the license is in satisfaction of a demand due from both tenants in common.³

SECTION IV.—ESTATES IN COPARCENARY.

SEC. 1964. Definition.

SEC. 1965. When estate vests.

SEC. 1966. Distinguished from joint tenancies.

SEC. 1967. Incidents of the estate.

SECTION 1964. Definition.—An estate in coparcenary is where lands of inheritance descend from an ancestor to

¹ See : *Ante*, § 1955, *et seq.*

² *Tipping v. Robbins*, 64 Wis. 546 ; s.c. 25 N. W. Rep. 713. In this case it was held that a license by one tenant in common, to prosecute mining on lands held in common, will not bind ascending tenants. The court say, "It is attempted, as we understand the argument of the learned counsel for the defendant, to sustain his right or license upon two distinct and independent grounds : (1) through the Tipping lease given September, 1874, to the Coon Branch Mining Level Company ; and (2) by parol license from the defendant by the plaintiff Fox."

³ *Baker v. Wheeler*, 8 Wend. (N. Y.)

505, 509 ; s. c. 4 Am. Dec. 71 ;

Martyn v. Knowllys, 8 Durnf. & E. (8 T. R.) 145.

In *Martyn v. Knowllys*, *supra*, it is decided that one tenant in common may cut trees proper to be cut, on the land held in tenancy in common, and the remedy of the co-tenant is in an action against the co-tenant cutting the timber, for his share of the value. If one tenant in common may cut himself, he may give license to another ; here the license was given in satisfaction of a fair demand against both tenants in common, and on that ground the plaintiff had title to the logs.

two or more persons, who are called coparceners.¹ All coparceners take but one estate, having unity of interest,² unity of title,³ and unity of possession,⁴ but there need not be unity of time,⁵ for the reason that the heir or heirs of a deceased partner and the surviving partner are coparceners. They sue and are to be sued jointly. They may not have an action for waste against each other, because that can be prevented by partition. Each has a distinct moiety, with no survivorship. Possession being severed by partition, they become tenants in severalty; when one aliens his share they become tenants in common. Where they divide amicably each elects a share by seniority, which is a personal privilege.⁶

SEC. 1965. When estate vests.—At common law an estate in coparcenary arose where a man died seized of an inheritance, and his next heirs were two or more females or their representatives, and such heirs or their representatives, took the estate jointly.⁷ An estate in coparcenary also frequently arises at common law in consequence of gavelkind and other customary descents to all the male children, in which case they are coparceners. Hence, Littleton says that coparceners may be either by the common law or by custom.⁸ Whether the estate in coparcenary arises by particular custom or by descent, the parceners together make but one heir and have but one estate among them.⁹ The rule in this country respecting the descent of lands is different from that of the common law and all the heirs, whether male or female, take as tenants in common and not as coparceners,¹⁰ with the possible exception of the state of Maryland.¹¹ For this

¹ 2 Bl. Com., 187, 190; 3 Id. 227.

² See: *Ante*, § 1913.

³ See: *Ante*, § 1914.

⁴ See: *Ante*, § 1916.

⁵ See: *Ante*, § 1915.

⁶ 2 Bl. Com. 187-190; 3 Id. 227.

⁷ 2 Bl. Com. 188;

2 Co. Litt. (19th ed.) 163a, 165b.

⁸ 2 Co. Litt. (19th ed.) 163a.

See: 2 Cruise Dig. (4th ed.) 391;

2 Bl. Com. 188.

⁹ 2 Bl. Com. 188.

See: *Hoffar v. Dement*, 5 Gill (Md.) 132, 137; s.c. 46 Am. Dec. 628;

Leigh v. Shepherd, 2 Brod. & B. 465; s.c. 6 Eng. C. L. 230.

¹⁰ See: *Malcolm v. Rogers*, 5 Cow. (N. Y.) 188; s.c. 15 Am. Dec. 464;

4 Kent Com. (13th ed.) 367.

¹¹ *Crisfield v. Storr*, 36 Md. 129, 152; s.c. 11 Am. Rep. 480;

Hoffar v. Dement, 5 Gill (Md.) 132; s.c. 46 Am. Dec. 628.

reason the English doctrine relating to the estate in coparcenary has but little practical importance in this country.¹

SEC. 1966. **Distinguished from joint tenancies.**—An estate in coparcenary possesses the characteristics of joint tenancies and tenancies in common. Coparceners, like joint tenants, have unity of interest,² title,³ and possession.⁴ Like joint tenancies, in a conveyance by one co-tenant to another of his share, a simple release without words of inheritance is sufficient,⁵ but like tenancies in common the doctrine of survivorship does not obtain in respect to the respective shares of the tenants; the widow and heirs of a deceased tenant inheriting his share.⁶

SEC. 1967. **Incidents of the estate.**—An estate in coparcenary, like the other estates, has incident thereto the rights of curtesy and dower;⁷ is subject to be devised⁸ and to be partitioned,⁹ and the estate may be dissolved by the alienation of one coparcener to a stranger.¹⁰

SECTION V.—ESTATES IN ENTIRETY.

SEC. 1968. Definition and origin.

SEC. 1969. Distinguished from joint tenancies.

SEC. 1970. Commonlaw rule.

SEC. 1971. Same—In what states in force.

SEC. 1972. Same—In what states changed by statute.

SEC. 1973. Tenants in common—Effect of marriage between.

¹ See: *Gilpin v. Hollingsworth*, 3 Md. 190; s.c. 56 Am. Dec. 737;

Hoffar v. Dement, 5 Gill (Md.) 132; s.c. 46 Am. Dec. 628;

Stevenson v. Cofferin, 20 N. H. 150;

Campbell v. Wallace, 12 N. H. 362; s.c. 37 Am. Dec. 219;

Johnson v. Harris, 5 Hayw. (Tenn.) 113;

Cooles v. Wooding, 2 Patt. & H. (Va.) 189, 197;

Dickerson v. Chesapeake R. Co., 7 W. Va. 412;

4 Kent Com. (13th ed.) 367.

² See: *Ante*, § 1913.

³ See: *Ante*, § 1914.

⁴ See: *Ante*, § 1915.

1 Cruise Dig. (4th ed.) 391.

See: *Manchester v. Doddridge*, 3 Ind. 360;

Gill v. Fauntleroy, 8 B. Mon. (Ky.) 177.

⁵ *Gilpin v. Hollingsworth*, 3 Md. 190; s.c. 56 Am. Dec. 737;

2 Co. Litt. (19th ed.) 273b;

1 Prest. Est. 138.

⁶ 2 Bl. Com. 188.

2 Co. Litt. (19th ed.) 164;

4 Kent Com. (19th ed.) 364.

⁷ 2 Cruise Dig. (4th ed.) 394.

⁸ 2 Prest. Abst. 72.

⁹ Burt. Real Prop., § 318;

2 Cruise Dig. (4th ed.) 394.

See: *Willey v. Bonney*, 31 Miss. 644, 652.

¹⁰ 2 Co. Litt. (19th ed.) 175a;

2 Cruise Dig. (4th ed.) 394.

- SEC. 1974. Husband and wife—Holding by moieties.
- SEC. 1975. Survivorship.
- SEC. 1976. Husband's control—Common law rule.
- SEC. 1977. Same—Modern rule.
- SEC. 1978. Same—Lease by husband.
- SEC. 1979. Same—Conveyance by husband.
- SEC. 1980. Same—Liability for husband's debts.
- SEC. 1981. Same—Wife's inchoate interests.
- SEC. 1982. Community property—Origin and doctrine of.
- SEC. 1983. Same—What constitutes.
- SEC. 1984. Same—Same—Property purchased by husband.
- SEC. 1985. Same—Same—Property purchased by wife.
- SEC. 1986. Same—Liability for debts.
- SEC. 1987. Same—Descent of.
- SEC. 1988. Effect of statute abolishing joint tenures.
- SEC. 1989. Effect of married women enabling statutes.
- SEC. 1990. Effect of divorce.
- SEC. 1991. Effect of partition.

SECTION 1968. **Definition and origin.**—An estate by the entirety is where the whole of the estate, as opposed to the moiety, is held by each tenant.¹ Thus where an estate in fee is given to a man and wife, who are considered but one person in law, they are neither properly joint tenants nor tenants in common, but are seized by entireties *per tout* and not *per my et per tout*,² as joint tenants are.³ Being one person in law they cannot take the estate by moieties, but both are seized of the entirety, the consequence is that neither can dispose of any part without the assent of the other, and the whole remains to the survivor.⁴ This estate had its origin in the common law doctrine that the husband and wife are but one person in law, and that a conveyance to husband and wife is in contemplation of law, a conveyance to but a

¹ Preston says that tenancy by entireties, is where husband and wife take an estate to themselves jointly by grant, or devise, or limitation of use made to them during coverture, or by grant, etc., which is *in fieri* at the time of the marriage, and completed by livery of seisin or attornment during the coverture.

¹ Prest. Est. 131.

² *Gibson v. Zimmerman*, 12 Mo. 381, 385; s.c. 51 Am. Dec. 168.

³ 2 Kent Com. (13th ed.) 132.

⁴ *Hall v. Stephens*, 65 Mo. 676, 670; s.c. 27 Am. Rep. 824;

Shroyer v. Nicknell, 55 Mo. 264, 268;

Gibson v. Zimmerman, 12 Mo. 381, 385; s.c. 51 Am. Dec. 168;

Den ex d. Wyckoff v. Gardner, 20 N. J. L. (1 Spen.) 556; s.c. 45 Am. Dec. 888;

Doe ex d. De Peyster v. Howland, 8 Cow. (N. Y.) 277, 283; s.c. 18 Am. Dec. 445;

Sutliff v. Forgey, 1 Cow. (N. Y.)

single person,¹ and they take but one estate, as a corporation would take.² Consequently where there is a conveyance to a husband and wife and a third person, they will not each be entitled to one-third, but the husband and wife will take one moiety and the third person will take the other moiety.³

SEC. 1969. **Distinguished from joint tenancies.**—Tenancies by the entirety resemble joint tenancies⁴ in possessing the quality of survivorship,⁵ the heirs of the survivor taking to the exclusion of the heirs of the first deceased;⁶ but unlike joint tenancies, the property cannot be conveyed by the husband so as to give title after his death as against the wife surviving him,⁷ and vice versa.⁸ An alienation of a moiety of the estate by either of the tenants will not defeat the right of the survivor, because a severance of the tenancy cannot be had at the will of either the husband or the wife;⁹ but should the

89, 95, aff'g 5 Cow. (N. Y.) 713;

Jackson ex d. Stevens v. Stevens,

16 John. (N. Y.) 110, 115;

Fairchild v. Chastelleux, 1 Pa.

St. 176; s.c. 44 Am. Dec. 117;

2 Bl. Com. 182.

See: *Post*, § 1975.

¹ Ross v. Garrison, 1 Dana (Ky.) 35;

Shaw v. Hearsey, 5 Mass. 521;

Gibson v. Zimmerman, 12 Mo.

381, 385; s.c. 51 Am. Dec. 168;

Dias v. Glover, 1 Hoff. Ch. (N.

Y.) 711;

Taul v. Campbell, 7 Yerg. (Tenn.)

319; s.c. 27 Am. Dec. 508;

Green d. Creu v. King, 2 W. Bl.

121;

Pollock v. Kelly, 6 Ir. C. L. 367.

² Taul v. Campbell, 7 Yerg. (Tenn.)

319; s.c. 27 Am. Dec. 508;

2 Bl. Com. 182;

2 Co. Litt. (19th ed.) 187b;

2 Kent Com. (13th ed.) 132.

³ Back v. Andrew, 2 Vern. 120.

See: Anderson v. Tannehill, 42

Ind. 141;

Chandler v. Cheney, 37 Ind. 391,

401;

Hall v. Stephens, 65 Mo. 670; s.c.

27 Am. Rep. 824.

Doe d. Dormer v. Wilson, 4 Barn.

& Ald. 303; s.c. 6 Eng. C. L. 494.

⁴ See: Chandler v. Cheney, 37 Ind.

391;

Taul v. Campbell, 7 Yerg. (Tenn.)

319, 333; s.c. 27 Am. Dec. 508.

⁵ See: *Ante*, § 1917;

Post, § 1975.

⁶ 1 Prest. Est. 132.

⁷ Bennett v. Child, 19 Wis. 362; s.c.

88 Am. Dec. 692.

See: Den ex d. Wyckoff v.

Gardner, 20 N. J. L. (1 Spen.)

556; s.c. 45 Am. Dec. 388;

Jackson ex d. Suffern v. McCon-

nell, 19 Wend. (N. Y.) 175; s.c.

32 Am. Dec. 439;

Den ex d. Needham v. Branson,

5 Ired. (N. C.) L. 426; s.c. 44

Am. Dec. 45;

Fairchild v. Chastelleux, 1 Pa. St.

176; s.c. 44 Am. Dec. 117;

Miller v. Miller, 1 Meigs (Tenn.)

484; s.c. 33 Am. Dec. 157;

Ketchum v. Walsworth, 5 Wis.

95; s.c. 68 Am. Dec. 49.

⁸ Arnold v. Arnold, 30 Ind. 305;

Harding v. Springer, 14 Me. 407;

s.c. 31 Am. Dec. 61;

Fisher v. Provin, 25 Mich. 342, 347;

Hemingway v. Scales, 42 Miss. 1;

s.c. 2 Am. Rep. 586; 97 Am.

Dec. 425;

Den ex d. Hardenbergh, v. Har-

denberg 10 N. J. L. (5 Halst.)

42; s.c. 18 Am. Dec. 371;

Farmers' and Mechanics Bank of

Rochester v. Gregory, 49 Barb.

(N. Y.) 155.

⁹ Shaw v. Hearsey, 5 Mass. 521.

tenant making the conveyance survive his co-tenant, the conveyance will become effective and pass the title to the whole estate, the same as it would have done had the grantor been seized in fee simple at the time of the conveyance.¹

SEC. 1970. **Common law rule.**—At common law upon a conveyance of land to a husband and wife jointly, though not described as husband and wife in the instrument of conveyance, the grantees take by entirety and not by moieties, and for that reason are called tenants by the entirety as above explained;² and the same is true where a husband and wife succeed to an estate as heirs of the same person.³ Where the estate is held by a conveyance made to husband and wife originally, neither can convey an interest therein so as to affect the right of survivorship⁴ in the other.⁵ We shall hereafter

¹ *Ames v. Norman*, 4 Sneed (Tenn.) 683; s.c. 70 Am. Dec. 269.

See: *Chandler v. Cheney*, 37 Ind. 391;

Jackson ex d. Suffern v. McConnell, 19 Wend. (N. Y.) 175; s.c. 32 Am. Dec. 439;

Barber v. Harris, 15 Wend. (N. Y.) 615;

Bates v. Seely, 46 Pa. St. 248;

Brownson v. Hull, 16 Vt. 309; s.c. 42 Am. Dec. 517;

Ham v. Ham, 14 Up. Can. Q. B. 497.

² *Lux v. Hoff*, 47 Ill. 425; s.c. 95 Am. Dec. 502;

Davis v. Clark, 26 Ind. 424; s.c. 89 Am. Dec. 471;

Babbitt v. Scroggin, 1 Duv. (Ky.) 272;

Harding v. Springer, 14 Me. 407; s.c. 31 Am. Dec. 61;

Marburg v. Cole, 49 Md. 402; s.c. 33 Am. Dec. 266;

Wales v. Coffin, 95 Mass. (13 Allen) 213;

Draper v. Jackson, 16 Mass. 480;

Shaw v. Hearsey, 5 Mass. 521;

Gibson v. Zimmerman, 12 Mo. 381, 385; s.c. 51 Am. Dec. 168;

Bolles v. Trust Co., 27 N. J. Eq. (12 C. E. Gr.) 308;

Den ex d. Hardenbergh v. Hardenbergh, 10 N. J. L. (5 Halst.) 42; s.c. 18 Am. Dec. 371;

Wright v. Sadler, 20 N. Y. 320;

Torrey v. Torrey, 14 N. Y. 430;

Doe ex d. De Peyster v. Howland 8 Cow. (N. Y.) 277; s.c. 18 Am. Dec. 445;

Ward v. Krumm, 54 How. (N. Y.) Pr. 95;

Den ex d. Needham v. Branson, 5 Ired. (N. C.) L. 426; s.c. 44 Am. Dec. 45;

Stuckey v. Keefe, 26 Pa. St. 397;

Fairchild v. Chastelleux, 1 Pa. St. 176; s.c. 44 Am. Dec. 117;

Taul v. Campbell, 7 Yerg. (Tenn.) 319; s.c. 27 Am. Dec. 508;

Brownson v. Hull, 16 Vt. 309; s.c. 42 Am. Dec. 517;

Ketchum v. Walsworth, 5 Wis. 95; s.c. 68 Am. Dec. 49;

2 Bl. Com. 182;

2 Cruise Dig. (4th ed.) 508, §§ 34, 35;

4 Kent Com. (13th ed.) 362;

1 Prest. Est. 131;

³ *Gillan v. Dixon*, 65 Pa. St. 395.

⁴ See: *Post*, § 1975.

⁵ *Lux v. Hoff*, 47 Ill. 425; s.c. 95 Am. Dec. 502;

Mariner v. Saunders, 10 Ill. (5 Gilm.) 124;

Davis v. Clark, 26 Ind. 424; s.c. 89 Am. Dec. 471;

Baker v. Stewart, 40 Kan. 442; s.c. 2 L. R. A. 434; 19 Pac. Rep. 904; 10 Am. St. Rep. 213;

sec.,¹ that the husband has the right of control over such estates whether they are held under grant or given by will; and the husband may even convey the land;² but where the land is given by will the right of survivorship will prevail over any attempted alienation by the husband.³

SEC. 1971. Same—In what states in force.—The common law rule has been unchanged by statute and is still in force in Arkansas,⁴ Indiana,⁵ Kansas,⁶ Maine,⁷ Maryland,⁸ Michigan,⁹ Missouri,¹⁰ New Jersey,¹¹ New

Babbitt v. Scroggin, 1 Duv. (Ky.) 272;

Harding v. Springer, 14 Me. 407; s.c. 31 Am. Dec. 61;

Marburg v. Cole, 49 Md. 402; s.c. 33 Am. Dec. 266;

Wales v. Coffin, 95 Mass. (13 Allen) 213, 215;

Draper v. Jackson, 16 Mass. 480; Fox v. Fletcher, 8 Mass. 274;

Shaw v. Hearsay, 5 Mass. 521;

Fisher v. Provin, 25 Mich. 342, 350; Hemingway v. Scales, 42 Miss.

1; s.c. 2 Am. Rep. 586; 97 Am. Dec. 425;

Hall v. Stephens, 65 Me. 670; s.c. 27 Am. Rep. 824;

Zornitlein v. Bram, 100 N. Y. 12; s.c. 2 N. E. Rep. 388; 1 Cent. Rep. 66;

Wright v. Saddler, 20 N. Y. 320; Torrey v. Torrey, 14 N. Y. 430;

Doe ex d. De Peyster v. Howland, 8 Cow. (N. Y.) 277; s.c. 18 Am. Dec. 445;

Den ex d. Needham v. Branson, 5 Ired. (N. C.) L. 426; s.c. 44 Am. Dec. 45;

McCurdy v. Canning, 64 Pa. St. 39; Fairchild v. Chastelleux, 1 Pa.

St. 176; s.c. 44 Am. Dec. 117; Taul v. Campbell, 7 Yerg. (Tenn.)

319; s.c. 27 Am. Dec. 508; Brownson v. Hull, 16 Vt. 309;

s.c. 42 Am. Dec. 517; Ketchum v. Walsworth, 5 Wis.

95; s.c. 68 Am. Dec. 49.

¹ See: *Post*, § 1976, *et seq.*

² See: *Post*, § 1979.

³ Simonton v. Cornelius, 98 N. C. 433; s.c. 4 S. E. Rep. 38; 2 Bl. Com. 182.

⁴ Kline v. Ragland, 47 Ark. 111; s.c. 14 S. W. Rep. 474;

Robinson v. Eagle, 29 Ark. 202.

⁵ Enyeart v. Kepler, 118 Ind. 34;

s.c. 20 N. E. Rep. 539; 10 Am. St. Rep. 94;

Carver v. Smith, 90 Ind. 222; s.c. 46 Am. Rep. 210;

Jones v. Chandler, 40 Ind. 588;

Arnold v. Arnold, 30 Ind. 305;

Davis v. Clark, 26 Ind. 424; s.c. 89 Am. Dec. 471.

⁶ Shinn v. Shinn, 42 Kan. 1; s.c. 21 Pac. Rep. 813;

Baker v. Stewart, 40 Kan. 442; s.c. 19 Pac. Rep. 904; 2 L. R.

A. 434; 10 Am. St. Rep. 213.

Changed by statute in 1891, Laws 1891, p. 349.

See: *Post*, § 1972.

⁷ Harding v. Springer, 14 Me. 407; s.c. 31 Am. Dec. 61.

⁸ Marburg v. Cole, 49 Md. 402; s.c. 33 Am. Rep. 266;

Hannan v. Towers, 3 Har. & J. (Md.) 147.

In Maryland a husband and wife may be made tenants in common or joint tenants according to the express terms of the grant.

Fladung v. Rose, 58 Md. 13; s.c. 26 Alb. L. J. 478;

Marburg v. Cole, 49 Md. 402; s.c. 33 Am. Rep. 266.

⁹ Speir v. Opfer, 73 Mich. 35; s.c. 40 N. W. Rep. 909;

Jacobs v. Miller, 50 Mich. 119; s.c. 15 N. W. Rep. 42;

Manwaring v. Powell, 40 Mich. 371; Aetna Ins. Co. v. Resh, 40 Mich. 241;

Fisher v. Provin, 25 Mich. 347.

¹⁰ Garner v. Jones, 52 Mo. 68; Gibson v. Zimmerman, 12 Mo.

381, 385; s.c. 51 Am. Dec. 168.

The Spanish law of community property once prevailed in Missouri. See: Childress v. Cutter, 16 Mo.

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¹¹ Buttlar v. Rosenblath, 42 N. J. Eq.

York,¹ North Carolina,² Pennsylvania,³ Tennessee,⁴ Vermont,⁵ and Wisconsin.⁶

SEC. 1972. Same—In what states changed by statute.—* The common law rule in relation to husband and wife holding estates by the entirety has been changed or modified by statute in Alabama,⁷ Arizona,⁸ Cali-

651; s.c. 59 Am. Rep. 52; 9 Atl. Rep. 695;

Den ex d. Wyckoff v. Gardner, 20 N. J. L. (1 Spen.) 556; s.c. 45 Am. Dec. 388;

Den ex d. Hardenbergh v. Hardenbergh, 10 N. J. L. (5 Halst.) 42; s.c. 18 Am. Dec. 371.

¹ Bertles v. Nunan, 92 N. Y. 152; s.c. 44 Am. Rep. 361;

Doe ex d. De Peyster v. Howland, 8 Cow. (N. Y.) 277; s.c. 18 Am. Dec. 445;

Jackson ex d. Suffern v. McConnell, 19 Wend. (N. Y.) 175; s.c. 32 Am. Dec. 439.

See: *Post*, § 1972.

In New York husband and wife may make partition under the statute which is as follows: "Wherever husband and wife shall hold any lands or tenements as tenants in common, joint tenants, or as tenants by entireties, they may make partition or division of the same between themselves, and such partition or division, duly executed under their hands and seals, shall be valid and effectual; and when so expressed in the instrument of partition or division, such instrument shall bar the right of dower of the wife in and to the lands and tenements partitioned or divided to the husband."

² N. Y. Rev. Stat. Codes L. 2169, § 67; Laws, 1880, c. 472, § 11.

³ Simonton v. Cornelius, 98 N. C. 433; s.c. 4 S. E. Rep. 38.

Jones v. Potter, 89 N. C. 220;

Lang v. Barnes, 87 N. C. 329;

Todd v. Zachary, 1 Busb. (N. C.) Eq. 286;

Motley v. Whitmore, 2 Dev. &

B. (N. C.) L. 537;

Woodford v. Higly, 1 Wins. (N. C.) L. No. 1237.

³ Fleek v. Zillhaver, 117 Pa. St. 213; s.c. 12 Atl. Rep. 420;

Gillan v. Dixon, 65 Pa. St. 395, 398;

McCurdy v. Canning, 64 Pa. St. 39;

French v. Mehan, 56 Pa. St. 286, 288;

Martin v. Jackson, 27 Pa. St. 504; s.c. 67 Am. Dec. 489;

Stuckey v. Keefe, 26 Pa. St. 392, 399;

Johnson v. Hart, 6 Watts & S. (Pa.) 319; s.c. 40 Am. Dec. 565.

⁴ Berrigan v. Fleming, 2 Lea (Tenn.) 271;

Ames v. Norman, 4 Sneed (Tenn.) 683; s.c. 70 Am. Dec. 269;

Taul v. Campbell, 7 Yerg. (Tenn.) 319; s.c. 27 Am. Dec. 508.

⁵ Brownson v. Hull, 16 Vt. 309; s.c. 42 Am. Dec. 517.

⁶ Smith v. Smith, 23 Wis. 176; s.c. 99 Am. Dec. 153;

Bennett v. Child, 19 Wis. 362; s.c. 88 Am. Dec. 692;

Ketchum v. Walsworth, 5 Wis. 95; s.c. 68 Am. Dec. 49.

⁷ Ala. Acts 1847-48, p. 79, Code 1852, § 1997, Code 1886, § 2341. Under this statute a deed to husband and wife jointly makes them tenants in common. Walthall v. Goree, 36 Ala. 728.

⁸ Arizona.—Revised Statutes 1887, § 2102 provides that: All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise, or descent, or earned by the wife and her minor children while

* The author desires to specifically acknowledge his indebtedness for much of the material in this section to Ballard's Annual of the Law of Real Property, a work which has been found to be thoroughly and accurately prepared, and must become invaluable to the profession.

fornia,¹ Colorado,² Connecticut,³ the Dakotas,⁴ Delaware,⁵ Florida,⁶ Georgia,⁷ Idaho,⁸ Illinois,⁹ Iowa,¹⁰ Kansas,¹¹

she has lived or may live separate and apart from her husband, shall be deemed the common property of the husband and wife, and, during the coverture, may be disposed of by the husband only.

- ¹ In California a husband and wife may hold property as joint tenants in common, or as community property.

See: Deering's Civ. Code, § 161; also Acts 1889, p. 328.

Barber v. Babel, 36 Cal. 11, 16.

- ² Colorado General Statutes, § 200, abolishes all tenancies except as to executors and trustees.

- ³ In Connecticut the common law rule was never adopted, and a conveyance of land to husband and wife makes them joint tenants.

Whittlesey v. Fuller, 11 Conn. 337;

Benedict v. Gaylord, 11 Conn. 332, 337; s.c. 29 Am. Dec. 299.

- ⁴ The Dakotas.—The compiled laws, 1887, are the laws of both the North and South Dakota, with such statutes as have heretofore been passed, and by Comp. L., § 2593, a husband and wife may hold real or personal property together as joint tenants or tenants in common, but § 2692 provides that a joint tenancy can be created only by an instrument expressly so providing.

- ⁵ Under Delaware Revised Code 1874, p. 527, § 1, joint tenancy between husband and wife can be created by an instrument so declaring.

- ⁶ By McClellan's Dig. 1881, c. 92, § 11, the right of survivorship between husband and wife is abolished.

- ⁷ Georgia Code of 1882, § 2300, declares that joint tenancy does not exist in this state, and all such estates, under the English law, will be held to be tenancies in common under this Code; and § 2301 provides that whenever two or more persons, from any cause, are entitled to the possession simultaneously, of any property in

this state, a tenancy in common is created. Under these statutes it has been held that a husband and wife may be tenants in common.

Hathorn v. Maynard, 65 Ga. 168.

- ⁸ In Idaho the law of community property prevails the same as in California with substantially the same enactments. Idaho Rev. Stat. 1889, § 2907, provides that every interest in real estate granted or devised to two or more persons, other than executors or trustees, as such constitutes a tenancy in common, unless expressly declared in the grant or devise to be otherwise.

- ⁹ In Illinois, since the passage of the married women's enabling act which went into force April 24th, 1861, a conveyance to husband and wife makes them tenants in common.

Mittel v. Karl, 133 Ill. 65; s.c. 24 N. E. Rep. 553; 8 L. R. A. 655; Cooper v. Cooper, 76 Ill. 57.

Before the passage of the married women's act the common law rule prevailed.

Harrer v. Wallner, 80 Ill. 197;

Almond v. Bonnell, 76 Ill. 536;

Lux v. Hoff, 47 Ill. 425; s.c. 95 Am. Dec. 502;

Mariner v. Saunders, 10 Ill. (5 Gilm.) 124.

- ¹⁰ Iowa Code 1888, § 1943, which is a re-enactment of Rev. Stat. 1843, p. 204, § 5, declares that conveyances to two or more in their own right, create a tenancy in common, unless a contrary intent is expressed. It has been held under this statute a deed to husband and wife makes them tenants in common.

Hoffman v. Stigers, 28 Iowa 302; Chase v. Abbott, 20 Iowa 151.

- ¹¹ Tenancies by entireties—Kansas doctrine—Chief Justice Horton. In Kansas Chief Justice HORTON, in dissenting opinions in the case of Shinn v. Shinn, 42 Kan. 1; s.c. 21 Pac. Rep. 813; and Baker v. Stewart, 40 Kan. 442; s.c. 19 Pac. Rep. 904; 2 L. R. A. 434; 10 Am. St. Rep. 2112,

Kentucky,¹ Louisiana,² Massachusetts³, Minnesota,⁴

maintained with considerable force that the common law doctrine of tenancies by the entirety was wholly out of line with the statutes³ judicial decisions and the conditions and wants of the people of the state.

Same—Statutory enactment.—Subsequently the legislature passed the following statute: "If partition be not made between joint tenants or joint owners of estates in entirety, whether they be such as might have been compelled to make partition or not, or whatever kind the estate or thing holden or possessed be, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise and shall be subject to debts or charges and be considered to every other intent and purpose as if such joint tenant or tenants of estate entirety had been or were tenants in common; but nothing in this act shall be taken to effect any trust estate."

Kan. Laws, 1891, p. 349.

¹ **Kentucky—Statutes and decisions.**—Kentucky General Statutes c. 52, Art. 4, § 13 (Act 1851, p. 222), provides that, "If real estate be conveyed or devised to husband and wife, unless a right by survivorship is expressly provided for, there shall be no mutual right to the entirety by survivorship between them; but they shall take as tenants in common, and the respective moieties be subject to curtesy or dower, with all other incidents to such a tenancy." Prior to the passage of this statute the common law was in force.

Exchange & Deposit Bank v. Stone, 80 Ky. 109, 114;
Cochran v. Kerney, 9 Bush (Ky.) 199;
Croan v. Joyce, 3 Bush (Ky.) 454;
Rogers v. Grider, 1 Dana (Ky.) 242;
Babbitt v. Scroggins, 1 Duv. (Ky.) 272.

² **Louisiana Doctrine—Community property—Civil Code.** In Louisiana the doctrine of community property prevails; the statute providing that, "Every marriage contracted in this state superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary." Vorhies Rev. Civ. Code, § 2399; Civ. Acts, 1852, § 200.

³ **Massachusetts doctrine—Statutes and decisions.**—In Massachusetts it is provided by statute that where there are conveyances to two or more persons, or to husband and wife, that they shall take estates in common and not in joint tenancy except in those cases where it is expressly provided that they shall take the lands jointly or as joint tenants or in joint tenancy or to them and the survivor of them.

See: Supp. to the Mass. Stat. p. 307, § 1;
Laws 1885, chap. 237, p. 679, § 1, Approved May 15th, 1885.

The common law prevailed in Massachusetts prior to the passage of this statute.

Pray v. Stebbins, 141 Mass. 219;
s.c. 4 N. E. Rep. 824; 55 Am. Rep. 462;
Pierce v. Chace, 108 Mass. 254;
Wales v. Coffin, 95 Mass. (13 Allen) 213.

⁴ **Minnesota—Statute and Construction.**—By Minnesota Statutes 1891, § 3958, 3959 all grants or devises of land to two or more persons creates an estate in common and not in joint tenancy, unless expressly declared to be in joint tenancy, except in the case of mortgages or devises or grants made in trust or to executors.

The Supreme Court have held that under this statute a grant or a devise to a husband and wife makes them tenants in common unless the instrument expressly creates a joint tenancy.

Wilson v. Wilson, 43 Minn. 398; s.c. 45 N. W. Rep. 710.

Mississippi,¹ Montana,² Nevada,³ New Hampshire,⁴
New Mexico,⁵ New York,⁶ Ohio,⁷ Oklahoma,⁸ Ore-

¹ **Mississippi Revised Code 1880**, § 1197, being the same as Miss. Rev. Code, § 2301, provides that, "All conveyances or devises of lands, made to two or more persons, or to a husband and wife, shall be construed to create estates in common, and not in joint tenancy or entirety, unless it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy, with the right to the survivor or survivors; provided this provision shall not apply to mortgages or devises or conveyances made in trust."

Prior to the passage of this statute the common law rule prevailed.

Hemingway v. Scales, 42 Miss. 1; s.c. 97 Am. Dec. 425; 2 Am. Rep. 526.

See: *Gresham v. King*, 65 Miss. 387; s.c. 4 So. Rep. 120.

² **Montana Compiled Statutes 1888**, p. 664, § 227, provides that, "Every interest in real estate granted or devised to two or more persons, other than executors and trustees, as such, shall be a tenancy in common, unless expressly declared in the grant or devise to be otherwise."

³ **In Nevada community property prevails** the same as in California, and all property acquired after marriage, by either husband or wife, or both, except as provided in sections fourteen and fifteen of this act, is community property.

Nev. Gen. Stat. 1885, § 500.

See: *Youngworth v. Jewel*, 15 Nev. 45.

The Nev. Gen. Stat. 1885, § 506 declares that a husband or wife may hold real or personal property, as joint tenants, tenants in common, or as community property.

⁴ **In New Hampshire**, since the married women's acts, Acts 1860, c. 2342, husband and wife take as tenants in common (*Clark v. Clark*, 56 N. H. 105). Before

this statute was passed the common law rule prevailed.

Wentworth v. Remick, 47 N. H. 226; s.c. 90 Am. Dec. 573.

⁵ **New Mexico Compiled Laws 1884**, § 2764. "All interest in any real estate, either granted or bequeathed to two or more persons other than to executors or trustees, shall be held in common, unless it be clearly expressed in said grant or bequest that it shall be held by both parties."

⁶ **By Statute in New York** it is provided that, "Whenever husband and wife shall hold any lands or tenements as tenants in common, joint tenants, or as tenants by entireties, they may make partition or division of the same between themselves, and such partition or division, duly executed under their hands and seals, shall be valid and effectual; and when so expressed in the instrument of partition or division, such instrument shall bar the right of dower of the wife in and to the lands and tenements partitioned or divided to the husband."

2 N. Y. Rev. Stat. Codes & L. 2169, § 67.

See: *Ante*, § 1971.

⁷ **In Ohio joint tenancies are viewed** with disfavor in this state, and the Supreme Court hold that a conveyance to husband and wife makes them tenants in common.

Farmers & Merchants' National Bank v. Wallace, 45 Ohio St. 152; s. c. 12 N. E. Rep. 439;

Wilson v. Fleming, 13 Ohio 68;

Sergeant v. Steinberger, 2 Ohio 305; s.c. 15 Am. Dec. 553.

Same—The doctrine of survivorship is unknown, and a devise to husband and wife makes them tenants in common, and not tenants by entirety.

Wilson v. Fleming, 13 Ohio 68.

⁸ **In Oklahoma**.—By the statute no

gon,¹ Rhode Island,² South Carolina,³ Texas,⁴ Virginia,⁵

estates in joint tenancy can be held or claimed under any grant, devise or conveyance whatsoever, unless the premises therein mentioned shall be therein so expressly declared to pass, except in case of executor and trustees. And every estate in lands, tenements, or hereditaments held by two or more, other than executor or trustees, shall be deemed to be tenancy in common, unless otherwise expressly declared.

Oklahoma Stat., § 1724.

¹ The Oregon statute abolishes joint tenancy, and all persons having an undivided interest in real property are declared to be tenants in common.

See: Hill's Ann. Laws of Oreg., § 2991.

In *Myers v. Reed*, 9 Sawy. C. C. 133; s.c. 17 Fed. Rep. 401, it is held that the common law as to tenants by entireties still prevails in Oregon.

² Rhode Island Public Statutes, c. 172, § 1, provides that, "All gifts, grants, feoffments, devises, and other conveyances of any lands, tenements, and hereditaments, which shall be made to two or more persons, whether they be husband and wife or otherwise, and whether for life, for years, in tail or in fee, shall be taken, deemed, and adjudged to be estates in common and not in joint tenancy, unless it is or shall be therein expressly said that the grantees, feoffees, or devisees shall have or hold the same lands, tenements, or hereditaments as joint tenants or in joint tenancy, or to them and the survivors or survivor of them, or unless other words be therein used manifestly showing it to be the intention of the parties to such gifts, grants, feoffments, devises, or other conveyances, that such lands, tenements, and hereditaments shall vest and be holden as joint estates in common."

³ By South Carolina General Statutes
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1882, §§ 1829, 1830, 1851, the right of survivorship between joint tenants is abolished, and partition may be enforced.

⁴ In Texas the doctrine of community property prevails and all property owned by husband and wife is presumed to be community property (Sayles' Stat. 1889, Art. 2853), and upon the death of the wife the husband occupies the relation of a surviving partner in an ordinary partnership.

Moody v. Smoot, 78 Tex. 119; s.c. 14 S. W. Rep. 285.

Texas statute provides that, "All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise, or descent, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only."

Sayles' Stat. (1889), Art. 2852.

⁵ Virginia Code 1887, § 2430, which is a re-enactment of Rev. Code (1849), p. 608, c. 116, § 18, provides: "When any joint tenant shall die, whether the estate be real or personal, or, whether partition could have been compelled or not, his part shall descend to his heirs or pass by devise, or go to his personal representative, subject to debts, curtesy, dower, or distribution, as if he had been a tenant in common. And if, hereafter, any estate, real or personal, be conveyed or devised to a husband and wife, they shall take and hold the same by moieties in like manner as if a distinct moiety had been given to each by a separate conveyance."

Prior to the passage of this statute the common law prevailed.

Thornton v. Thornton, 3 Rand. (Va.) 179;

Norman v. Cunningham, 5 Gratt. (Va.) 63;

Farmers' Bank v. Corder, 32 W. Va. 233; s.c. 9 S. E. Rep. 220.

Washington,¹ West Virginia,² and Wyoming.³

SEC. 1973. Tenants in common—Effect of marriage between.—We have seen in a preceding section that where property is deeded to a husband and wife as joint tenants that they take by the entirety;⁴ but where two tenants in common subsequently marry, the character of their estate is not thereby changed, and they will continue to hold as tenants in common.⁵

SEC. 1974. Husband and wife—Holding by moieties.—At common law a husband and wife is regarded as but one person,⁶ and real estate is held by them in moieties,⁷

¹ In Washington the disabilities of married women are completely removed by statute (Wash. Code 1881, §§ 2380-2395) and the doctrine of community property prevails, and all the property acquired after marriage by either husband or wife or both is community property (Wash. Code 1881, § 2409) except such as may come to either the husband or wife by gift, devise, or inheritance, or is acquired solely in which case it remains separate property. Wash. Code 1881, § 2400, 2408.

² West Virginia Code 1887, p. 617, § 18, provides that, "When any joint tenant shall die, whether the estate be real or personal, or, whether partition could have been compelled or not, his part shall descend to his heirs or pass by devise, or go to his personal representative, subject to debts, curtesy, dower, or distribution, as if he had been a tenant in common. And if hereafter an estate of inheritance be conveyed or devised to a husband and his wife, one moiety of such estate, shall, on the death of either, descend to his or her heirs, subject to debts, curtesy, or dower, as the case may be."

³ Wyoming Revised Statutes 1887, §§ 1558-1566 so completely obliterate the common law idea of the unity of husband and wife that it is thought they will

hold as tenants in common upon a joint conveyance.

⁴ *Ante*, § 1970.

See: *Post*, § 1974.

⁵ Chandler v. Cheney, 37 Ind. 391; Bevins v. Cline, 21 Ind. 37; Babbitt v. Scroggin, 1 Duv. (Ky.) 272; McDermott v. French, 15 N. J. Eq. (2 McC.) 78, 80; Den ex d. Hardenbergh v. Hardenbergh, 10 N. J. L. (5 Halst.) 42; s.c. 18 Am. Dec. 371; Ames v. Norman, 4 Sneed. (Tenn.) 683; s.c. 70 Am. Dec. 269; Moody v. Moody, Amb. 649; 2 Cruise Dig. (4th ed.) 511; 1 Inst. 187 b.

⁶ Wells v. Caywood, 3 Colo. 487, 491; Hoker v. Boggs, 63 Ill. 161, 162; Long v. Kinney, 49 Ind. 235, 238; O'Ferrall v. Simplot, 4 Iowa 381, 389; Winebrinner v. Weisiger, 3 T. B. Mon. (Ky.) 32, 34; Trader v. Lowe, 45 Md. 1, 14; Burdeno v. Amperse, 14 Mich. 91, 92; s.c. 90 Am. Dec. 225; Frissell v. Rozier, 19 Mo. 448, 449; Aultman v. Obermeyer, 6 Neb. 260, 263; Patterson v. Patterson, 45 N. H. 164, 166; White v. Wager, 25 N. Y. 328, 329, aff'g 32 Barb. (N. Y.) 250; Barron v. Barron, 24 Vt. 375, 398; 1 Bl. Com. 442; 1 Co. Litt. (19th ed.) 112b; 2 Kent Com. (13th ed.) 129; Litt. § 168.

⁷ Shaw v. Hearsay, 5 Mass. 521, 522;

they taking as but one person.¹ There has been some question raised whether the doctrine of tenancy by the entirety is founded upon the common law idea of the unity of husband and wife, above set out;² but the weight of authority is thought to be to the effect that at common law a husband and wife could not be made joint tenants or tenants in common of lands, although the instrument creating the estate expressly declared that they should so hold.³ In *Pollock v. Kelley*,⁴ the court say that it is a solecism to speak of a grant to a husband and wife as an estate of joint tenancy; but there are a number of representative American cases holding that a husband and wife may hold as tenants in common, apt words being used to create the estate.⁵ These latter cases seem to all rest upon a passage found in *Preston on Estates*⁶ which reads as follows: "In the point of fact, and agreeable to natural reason, free from artificial deductions the husband and wife are distinct and individual persons; and accordingly, when lands are granted to them as tenants in common, thereby treating them without any respect to their social union,

Den ex d. Hardenbergh v. Hardenbergh, 10 N. J. L. (5 Halst.)

42, 45; s.c. 18 Am. Dec. 371;

Barber v. Harris, 15 Wend. (N. Y.) 615;

Johnson v. Hart, 6 Watts & S. (Pa.) 319; s.c. 40 Am. Dec. 565;

Doe d. Dormer v. Wilson, 4 Barn. & Ald. 303; s.c. 6 Eng. C. L. 494;

Atcheson v. Atcheson, 11 Beav. 485, 491; s.c. 18 L. J. Ch. (N. S.) 230;

Gordon v. Whieldon, 11 Beav. 170; s.c. 18 L. R. Ch. (N. S.) 5;

Wylde v. Wylde, 2 DeG. M. & G. 724;

Back v. Andrews, 2 Vern. 120;

Bricker v. Whalley, 1 Vern. 233; 2 Co. Litt. (19th ed.) 187a.

Compare: Warrington v. Warrington, 2 Hare 54;

Paine v. Wagner, 12 Sim. 184.

¹ *Den ex d. Hardenbergh v. Hardenbergh*, 10 N. J. L. (5 Halst.) 42, 45; s.c. 18 Am. Dec. 371.

² See: 2 Bl. Com. 182;

2 Cruise Dig. (4th ed.) 508, §§ 34, 35;

4 Kent Com. (13th ed.) 362.

³ *Barber v. Harris*, 15 Wend. (N. Y.) 615;

McCurdy v. Canning, 64 Pa. St. 39;

French v. Mehan, 56 Pa. St. 287; *Stuckey v. Keefe's Exr.*, 26 Pa. St. 400;

Johnson v. Hart, 6 Watts & S. (Pa.) 319; s.c. 40 Am. Dec. 565;

Estate of Mitcheson, 15 Phila. (Pa.) 597;

Pollock v. Kelley, 6 Ir. L. R. (N. S.) 373.

⁴ 6 Ir. L. R. (N. S.) 373.

⁵ *Hadlock v. Gray*, 104 Ind. 596; s.c. 4 N. E. Rep. 167;

Baker v. Stewart, 40 Kan. 442; s.c. 19 Pac. Rep. 904; 2 L. R. A. 434; 10 Am. St. Rep. 213;

Fladung v. Rose, 58 Md. 13;

McDermott v. French, 15 N. J. Eq. (2 McC.) 78;

Moody v. Moody, Amb. 649.

⁶ 1 Prest. Est. 132.

they will hold by moieties, as other distinct and individual persons would do."¹

SEC. 1975. **Survivorship.**—One of the distinctive characteristics of an estate in entirety is the right of survivorship giving the entire interest in the land.² Hence where an estate is conveyed to a husband and his wife, each takes the entirety, and not a share which can be separated; and the husband cannot alienate or forfeit the estate, and on his death the whole estate becomes the wife's.³ The reason for this is because, as we have already seen, both husband and wife hold their estate *per tout et non per my*,⁴ which has been said to be a fifth unity added to

¹ 1 Ball. Ann. L. R. Prop., § 237;

Preston's statement of the doctrine in his work on Abstracts of Titles is not so free from doubt, as he says: "And even a husband and wife may, by express words, so the law is understood, be made tenants in common by a gift to them during coverture."

⁶ Prest. Abst. 41.

² Pierce v. Chase, 108 Mass. 258;

Simonton v. Cornelius, 98 N. C. 433; s.c. 4 S. E. Rep. 38;

Long v. Barnes, 87 N. C. 329;

McCurdy v. Canning, 64 Pa. St. 286;

² Bl. Com. 182.

North Carolina Code, c. 204, § 1326, abolishing survivorships in joint tenancies does not apply to the case of husband and wife.

Woodford v. Higby, 1 Wins. (N. C.) L. No. 1, 237;

Todd v. Zachary, 1 Busb. (N. C.) Eq. 286;

Motley v. Whitmore, 2 Dev. & B. (N. C.) Eq. 537.

³ Moore v. Moore, 12 B. Mon. (Ky.) 651;

Elliot v. Nichols, 4 Bush (Ky.) 502;

Croan v. Joyce, 3 Bush (Ky.) 454;

Babbitt v. Scroggin, 1 Duv. (Ky.) 272;

Harding v. Springer, 14 Me. 407;

Hannan v. Towers, 3 Har. & J. (Md.) 147;

Wales v. Coffin, 95 Mass. (13 Allen) 213;

Gibson v. Zimmerman, 12 Mo.

385; s.c. 51 Am. Dec. 168;

Den ex. d. Hardenbergh v. Hardenbergh, 10 N. J. L. (5 Halst.)

42; s.c. 18 Am. Dec. 371;

Wright v. Saddler, 20 N. Y. 320;

Jackson v. Stevens, 16 John. Ch. (N. Y.) 110;

Rogers v. Benson, 5 John. Ch. (N. Y.) 431;

Dickinson v. Codwise, 1 Sandf. Ch. (N. Y.) 214;

Jackson v. McConnell, 19 Wend. (N. Y.) 175;

Todd v. Zachary, 1 Busb. (N. C.) Eq. 286;

Motley v. Whitmore, 2 Dev. & B. (N. C.) L. 537;

Needham v. Branson, 5 Ired. (N. C.) L. 426;

Woodford v. Higby, 1 Wins. (N. C.) L. No. 1, 237;

French v. Mehan, 56 Pa. St. 286;

Diver v. Diver, 56 Pa. St. 106;

Bates v. Seeley, 46 Pa. St. 248;

Martin v. Jackson, 27 Pa. St. 504;

Stackey v. Keefe, 26 Pa. St. 397;

Fairchild v. Chastelleaux, 1 Pa. St. 176;

Taul v. Campbell, 7 Yerg. (Tenn.) 319; s.c. 27 Am. Dec. 508;

Brownson v. Hull, 16 Vt. 309; s.c. 42 Am. Dec. 517;

Bennett v. Child, 19 Wis. 362;

Ketchum v. Walsworth, 5 Wis. 95; s.c. 68 Am. Dec. 49.

⁴ Doe v. Parrott, 5 Durnf. & E. (5 T. R.) 654;

Purefoy v. Rogers, 2 Lev. 39;

Back v. Andrew, 2 Vern. 120;

Bro. Abr. tit. *Cui in Vita*, 8;

2 Co. Litt. (19th ed.) 187;

Litt., § 665.

the four common law unities recognized in joint tenancy, that is, unity of person;¹ consequently a deed to a husband and his wife and "the survivor of them, in his or her own right," gives each grantee an estate for life, with remainder in fee to the survivor.² Where the grant defines the kind or quality of the estate, they will take as tenants by entirety; but when it appears from the words of the grant or devise that it was the intent to create a tenancy in common, they will so hold. No particular form of words is necessary to make them tenants in common. It is sufficient if expressions are used which cannot be operative unless the wife is admitted to an equal present enjoyment of the estate with her husband and which indicate an intention that her possession shall not be subservient to his exclusive control.³ A husband and wife may be made joint tenants by apt words used in the conveyance to them.⁴

SEC. 1976. Same—Husband's control—Common law doctrine.—At common law the right to the possession and control of the joint estate during the lives of the husband and wife is in the husband, the same as when the wife is sole seized;⁵ and this right of the husband is not affected by statutes enabling married women to hold and dispose of their property as if sole, unless expressly so stated;⁶ but he cannot defeat the right of the wife to

¹ *Topping v. Sadler*, 5 Jones (N. C.) L. 357;

Freem. Co. Ten. & Part., § 64.

² *Mittel v. Karl*, 133 Ill. 65; s.c. 24 N. E. Rep. 553; 8 L. R. A. 655.

³ *Miner v. Brown*, 133 N. Y. 308; s.c. 31 N. E. Rep. 24.

⁴ *Jooss v. Fey*, 129 N. Y. 17; s.c. 29 N. E. Rep. 136.

⁵ *Barber v. Harris*, 15 Wend. (N. Y.) 616;

French v. Mehan, 56 Pa. St. 287, 288;

Fairchild v. Chastelleux, 1 Pa. St. 176; s.c. 44 Am. Dec. 117;

Ames v. Norman, 4 Sneed (Tenn.) 683; s.c. 70 Am. Dec. 269;

Bennett v. Child, 19 Wis. 362; s.c. 88 Am. Dec. 692.

It has recently been said (See: 1 Bull. Ann. L. R. Prop., § 240) that the confusion in the law

upon the subjects of this section perhaps has no parallel, unless it be the Doctrine of the Trinity. Only one thing is definitely settled and that is, that the husband or wife cannot during the life of the other, make a complete disposition of the entire estate.

Pierce v. Chace, 108 Mass. 254; *Wales v. Coffin*, 95 Mass. (13 Allen) 213;

Den ex d. Needham v. Branson, 5 Ired. (N. C.) L. 426; s.c. 44 Am. Dec. 45;

French v. Mehan, 56 Pa. St. 287, 288.

⁶ *Robinson v. Eagle*, 29 Ark. 202; *Hulett v. Inlow*, 57 Ind. 412; s.c. 26 Am. Rep. 64;

Rogers v. Grider, 1 Dana (Ky.) 242;

the estate on surviving him.¹ The husband has only such rights as are incident to his own property.² He may lease the joint estate,³ may convey the same,⁴ and the land is liable to be sold under execution for his debts;⁵ but in some states the crops raised on land owned by husband and wife together cannot be sold on execution against the husband alone.⁶ If the husband survives the wife, his conveyance of the land to a stranger will be as absolute as if the estate had been one in severalty, and the sale under execution will then carry the fee.⁷

SEC. 1977. Same—Modern rule.—The common law rule in relation to the husband's control of the joint estates of himself and wife is not thoroughly in accordance with the spirit of the times in which we live, or of our institutions, and for that reason does not meet with universal approval in our modern decisions. The doctrine was very exhaustively considered in *Chandler v. Cheney*⁸ in which the court say: "As between husband and wife there is but one owner, and that is neither the one nor the other, but both together. The estate

Marburg v. Cole, 49 Md. 402; ² *Pray v. Stebbins*, 141 Mass. 223; s.c. 33 Am. Rep. 266;

Pray v. Stebbins, 141 Mass. 219, s.c. 55 Am. Rep. 462; 1

New Eng. Rep. 521;

Fisher v. Provin, 25 Mich. 347;

McDuff v. Beauchamp, 50 Miss. 531;

Den ex d. Hardenbergh v. Hardenbergh, 10 N. J. L. (5 Halst.)

49; s.c. 18 Am. Dec. 371;

Bertles v. Nunan, 92 N. Y. 152; s.c. 44 Am. Rep. 361;

Barber v. Harris, 15 Wend. (N. Y.) 615;

Bennett v. Child, 19 Wis. 362; s.c. 88 Am. Dec. 692.

See: *Cooper v. Cooper*, 76 Ill. 57;

Hoffman v. Stigers, 28 Iowa 302;

Clark v. Clark, 56 N. H. 105;

¹ *Arnold v. Arnold*, 30 Ind. 305;

Hemingway v. Scales, 42 Miss. 1;

s.c. 2 Am. Rep. 586; 97 Am. Dec. 425.

A mortgage by the husband of land held by entireties, the wife not joining therein, is void.

Chandler v. Cheney, 37 Ind. 391.

² *Pray v. Stebbins*, 141 Mass. 223; s.c. 55 Am. Rep. 462; 1 New.

Eng. Rep. 521.

³ See: *Post*, § 1978.

⁴ See: *Post*, § 1979.

⁵ But such sale will affect the wife's right of survivorship.

French v. Mehan, 56 Pa. St. 286.

⁶ *Patton v. Rankin*, 68 Ind. 245; s.c. 34 Am. Rep. 254;

Montgomery v. Hickman, 62 Ind. 598;

Marburg v. Cole, 49 Md. 402; s.c. 33 Am. Rep. 266.

⁷ *Barber v. Harris*, 15 Wend. (N. Y.) 615;

Den ex d. Needham v. Branson, 5 Ired. (N. C.) L. 426; s.c. 44

Am. Dec. 45;

Ames v. Norman, 4 Sneed (Tenn.) 683; s.c. 70 Am. Dec. 269;

Taul v. Campbell, 7 Yerg. (Tenn.) 319; s.c. 27 Am. Dec. 508;

Bennett v. Child, 19 Wis. 362, 364; s.c. 88 Am. Dec. 692;

1 Prest. Est. 135.

⁸ 37 Ind. 391.

belongs as well to the wife as to the husband. Then, how can the husband possess any interest separate from the wife, or how can he alienate or encumber the estate, when all the authorities agree that the wife can neither convey nor encumber such estate. We are of the opinion that from the peculiar nature of this estate, and from the legal relation of the parties, there must be unity of estate, unity of possession, unity of control, and unity in conveying or encumbering it ; and it necessarily and logically results that it cannot be seized and sold upon execution for the separate debts of either the husband or the wife. The estate is placed beyond the exclusive control of either of the parties, or the reach of creditors, unless it can be successfully attacked and set aside for fraud. Any other rule would create injustice and hardship. If the husband can dispose of the estate during their joint lives, the wife is deprived of the enjoyment without her consent. * * * The property belongs as much to the wife as to the husband, and she has just as clear, undoubted, and equitable a right to the use and enjoyment of the property during the existence of the marriage, as she has to succeed to the estate upon the death of her husband. The opposite doctrine is full of absurdities and gross injustice. If the doctrine contended for by the appellant is correct, the husband may, without the consent and concurrence of his wife, lease the property to a stranger, and compel his wife and children to leave the comfortable home that belongs as much to her as to him, and compel them to live in some miserable hovel, while the husband spends his time in riotous living upon the rent derived from the joint estate. In such a case, the wife can have no relief except in the death of her husband. If the husband has a life estate separate and distinct from his wife, then he may mortgage such estate, or it may be seized and sold upon execution for his debts. In either event, the purchaser would acquire just the same interest that the husband had. The purchaser would be entitled to the possession during the life of the husband to the exclusion of the wife. The right of the wife to the joint

enjoyment of the estate, during the marriage, is as valuable and sacred as the right of taking the entire estate by survivorship upon the death of the husband. The rights of the wife in the joint property are as sacred as those of the husband, and should be as firmly secured, guarded, and protected by law as are his. There is an equity in equality, but there is gross iniquity and injustice in permitting the husband to deprive the wife of the use and enjoyment of an estate that does not belong exclusively to either, but to both, and which belongs as much to the wife as to the husband."¹

SEC. 1978. **Same—Lease by husband.**—While there is some conflict among the modern decisions in relation to the right of the husband to the control of the estate held by him and his wife in entireties,² yet the great weight of authority is to the effect that where a husband and wife receive or hold land in fee by the entireties, the husband may make a lease of the same, which lease will be good against the wife during the coverture, and will fail only in the event of his wife surviving him.³

¹ The doctrine laid down in *Chandler v. Cheney*, 37 Ind. 391, has been repeatedly followed in Indiana.

See : *Dodge v. Kinzy*, 101 Ind. 102;

Barren Creek Ditching Co. v. Beck, 99 Ind. 247;

Carver v. Smith, 90 Ind. 222; s.c. 46 Am. Rep. 210;

Patton v. Rankin, 68 Ind. 245; s.c. 34 Am. Rep. 254;

Simpson v. Pearson, 31 Ind. 1; s.c. 99 Am. Dec. 577;

Davis v. Clark, 26 Ind. 424; s.c. 89 Am. Dec. 471.

It has recently been said that, "An examination of the cases which hold that the husband has exclusive control over an estate held by entireties will show that wherever a reason has been given for the rule, it is, that the common law gave the husband such control over the wife's separate real estate, therefore, he had the same rights over the undefinable interest she had in an estate held by entireties. Hence, we find that in most of the states where

the statutes have clothed the wife with the power to manage, control, and use her separate real estate, the courts, following the logic of the situation, have extended this right to estates by entireties to the extent of denying the right of the husband or his creditors to deprive her of the use and enjoyment of her interest in such an estate during the life of her husband." It is so held in

Shinn v. Shinn, 42 Kan. 1; s.c. 21 Pac. Rep. 813;

Buttler v. Rosenblath, 42 N. J. Eq. 651; s.c. 9 Atl. Rep. 695; 59 Am. Rep. 52;

Ball Am. L. Real Prop. (1892);

McCurdy v. Canning, 64 Pa. St. 39, 41.

See : 1, § 242.

² See : *Ante*, §§ 1976, 1977.

³ *Pray v. Stebbins*, 141 Mass. 219; s.c. 4 N. E. Rep. 824; 55 Am. Rep. 462;

Washburn v. Burns, 34 N. J. L. 18, 20;

Den ex d. Wyckoff v. Gardner, 20 N. J. L. (1 Spen.) 556; s.c. 45 Am. Dec. 388;

SEC. 1979. **Same—Conveyance by husband.**—The husband, having the possession and control of the estate held by himself and wife by the entireties, may make a conveyance thereof; but such conveyance by the husband alone, during coverture, of the whole estate will not affect the wife's right thereto on surviving him.¹ In those cases where the husband conveys directly to his wife, however, such title as he has in the land, this will of course give her the entire estate.²

SEC. 1980. **Same—Liability for husband's debts.**—We have already seen that the joint estate of the husband and wife held by entireties is liable to sale on execution for payment of the debts of the husband;³ but a purchaser at such execution sale, or on a foreclosure sale, will take the title subject to the wife's right of survivorship.⁴ Under a statute exempting a wife's land from attachment or execution for the debts of the husband, no portion or interest therein of the land thus held by entirety, can be taken for the debts of the husband.⁵ It is said, however, that estates by the entireties must not be made use of for the purpose of defrauding creditors, and that where the manifest purpose of such a conveyance is to defeat the collection of the debts of the husband, his

Bertles v. Nunan, 92 N. Y. 152;
s.c. 44 Am. Rep. 361;

Jackson ex d. Suffern v. McCon-
nell, 19 Wend. (N. Y.) 175;
s.c. 32 Am. Dec. 439;

Barber v. Harris, 15 Wend. (N.
Y.) 615;

Topping v. Sadler, 5 Jones (N. C.)
L. 357;

Fairchild v. Chastelleux, 1 Pa.
St. 176; s.c. 44 Am. Dec. 117;
Ames v. Norman, 4 Sneed (Tenn.)
683; s.c. 70 Am. Dec. 269;

Pollock v. Kelly, 6 Ir. C. L. 367;
Godfrey v. Bryan, L. R. 14 Ch.
Div. 516;

Ward v. Ward, L. R. 14 Ch. Div.
506.

¹ Ames v. Norman, 4 Sneed (Tenn.)
683; s.c. 70 Am. Dec. 269.

See: *Ante*, § 1975.

² Enyeart v. Kepler, 118 Ind. 34;
s.c. 20 N. E. Rep. 539.

³ Cochran v. Kerney, 9 Bush (Ky.)

199, 200;

Hall v. Stephens, 65 Mo. 670; s.c.
27 Am. Rep. 302;

Brown v. Gale, 5 N. H. 416;

Washburn v. Burns, 34 N. J. L.
(5 Vr.) 18;

Barber v. Harris, 15 Wend. (N.
Y.) 615;

Staepeler v. Knerr, 5 Watts (Pa.)
181;

Ames v. Norman, 4 Sneed (Tenn.)
683; s.c. 70 Am. Dec. 269;

Bennett v. Child, 19 Wis. 362;
s.c. 88 Am. Dec. 693.

⁴ Hulett v. Inlow, 57 Ind. 412; s.c.
26 Am. Rep. 64;

Hall v. Stephens, 65 Mo. 670; s.c.
27 Am. Rep. 302;

French v. Mehan, 56 Pa. St. 286;
Ames v. Norman, 4 Sneed (Tenn.)
683; s.c. 70 Am. Dec. 269.

⁵ Corinth v. Emery, 63 Vt. 505; s.c.
22 Atl. Rep. 618; 25 Am. St.
Rep. 780.

interest in such estate will be subjected to claims of his creditors.¹

SEC. 1981. Same—Wife's inchoate interests.—The wife's contingent right of survivorship is an interest in the land which will be protected by the courts, and she may require mortgaged premises to be sold in parcels, or in the inverse order of their alienation, as may be thought best for the protection of her rights.² Where the wife joins the husband in the execution of a mortgage upon his land, to secure his debt, when her inchoate interest in the land becomes perfect, from any cause, she may compel the mortgagee to resort to the two-thirds of the land not owned by her before the sale of her one-third for the payment of the mortgage debt.³

SEC. 1982. Community property—Origin of doctrine of.—In that portion of the territory acquired by the United States in what is known as the "Louisiana purchase" the doctrine of community of interest prevails; and in Arizona, California, Louisiana, New Mexico, and Texas, a species of partnership is created in husband and wife by the contract of marriage, in the acquisition of property made or received during the continuance of that relation. The property thus acquired is known as community property.⁴ The doctrine of community property had its origin in the civil law, but those States and Territories which have adopted it took it directly from the old French, Spanish, or Mexican law.⁵

SEC. 1983. Same—What constitutes.—In those states in which the doctrine of community property prevails, all

¹ *Newlove v. Callaghan*, 86 Mich. 207; s.c. 48 N. W. Rep. 1096; 49 N. W. Rep. 214; 24 Am. St. Rep. 123.

² *Crosby v. Farmers' Bank of Andrew Co.*, 107 Mo. 436; s.c. 17 S. W. Rep. 1004.

In *Indiana* where land of a bankrupt was sold under an order of court made in bankruptcy proceedings, it was held that the wife's inchoate interest vested at the time of the sale

and she became the absolute owner.

Powers v. Nesbit, 127 Ind. 497; s.c. 27 N. E. Rep. 501.

³ *Kelley v. Canary*, 129 Ind. 460; s.c. 29 N. E. Rep. 11.

⁴ *Anderson L. Dict.* 214.

⁵ *Fuller v. Ferguson*, 26 Cal. 546; *Buchanan's Estate*, 8 Cal. 507; *Saul v. His Creditors*, 5 Mart. (La.) N. S. 569; s.c. 16 Am. Dec. 212; *Hall v. Hall*, 52 Tex. 294, 298.

property acquired either by the husband or wife during the existence of the community, is presumed to be community property;¹ but this presumption can be overcome by clear and conclusive proof that the purchase was made with the separate funds of either husband or wife,² the burden always being on the party claiming the land to be separate property.³ The fact that the land is the separate property of either husband or wife may be established by parol evidence.⁴

SEC. 1984. Same—Same—Property purchased by husband.—The general rule in relation to community property is that all property acquired by purchase, or apparent onerous title, whether the conveyance be in the name of the husband or wife, or in the name of both, is presumed to be community property.⁵ Where the property consists

¹ *Althof v. Conheim*, 38 Cal. 230; s.c. 99 Am. Dec. 363;

Meyer v. Kinzer, 12 Cal. 247; s.c. 73 Am. Dec. 538;

Murphy's Heirs v. Jurey, 39 La. An. 785; s.c. 2 So. Rep. 575;

Stauffer v. Morgan, 39 La. An. 632; s.c. 2 So. Rep. 98;

Higgins v. Johnson's Heirs, 20 Tex. 389; s.c. 70 Am. Dec. 394;

Cooke v. Bremond, 27 Tex. 457; s.c. 86 Am. Dec. 626.

² *Ramsdell v. Fuller*, 28 Cal. 37; s.c. 87 Am. Dec. 103;

Meyer v. Kinzer, 12 Cal. 247; s.c. 73 Am. Dec. 538;

Morris v. Hastings, 70 Tex. 26; s.c. 8 Am. St. Rep. 570; 7 S. W. Rep. 649;

Chapman v. Allen, 15 Tex. 278; *Huston v. Curl*, 8 Tex. 239; s.c. 58 Am. Dec. 110;

Love v. Robertson, 7 Tex. 6; s.c. 56 Am. Dec. 41.

³ *McDonald v. Badger*, 23 Cal. 398; s.c. 83 Am. Dec. 123;

Smith v. Smith, 12 Cal. 216; s.c. 73 Am. Dec. 533;

Stauffer v. Morgan, 39 La. An. 632; s.c. 2 So. Rep. 98;

Gogreve v. Dehon, 41 La. 244; s.c. 6 So. Rep. 31.

In Louisiana recitals in the deed affixing the character of the estate as a separate estate do not relieve from the burden to

rebut the presumption of community property.

Burns v. Thompson, 39 La. An. 377; s.c. 1 So. Rep. 913;

Bachino v. Coste, 35 La. An. 570; *Shaw v. Hill*, 20 La. An. 531;

s.c. 96 Am. Dec. 420;

Huntington v. Legros, 18 La. An. 126;

Forbes v. Forbes, 11 La. An. 326.

In Texas recitals in a deed to the effect that the estate is the separate property of the wife rebuts the presumption that it is community property.

Morrison v. Clark, 55 Tex. 487;

Kirk v. Houston Direct Navigation Co., 49 Tex. 213.

⁴ *Peck v. Brummagin*, 31 Cal. 440; s.c. 89 Am. Dec. 195;

Peck v. Vandenberg, 30 Cal. 11, 42;

Hall v. Hall, 52 Tex. 294;

Johnson v. Burford, 39 Tex. 242, 249;

Story v. Marshall, 24 Tex. 305; s.c. 76 Am. Dec. 106;

Dunham v. Chatham, 21 Tex. 231; s.c. 73 Am. Dec. 228;

Higgins v. Johnson's Heirs, 20 Tex. 389; s.c. 70 Am. Dec. 394.

⁵ *Duruty v. Musacchia*, 42 La. An. 357; s.c. 7 So. Rep. 555;

Kirby v. Moody, 84 Tex. 201; s.c. 19 S. W. Rep. 453;

Duncan v. Bickford, 83 Tex. 322; s.c. 18 S. W. Rep. 598;

of accumulations after marriage, resulting from the ordinary use of the property owned by the husband at the time of the marriage, such property will not be community property;¹ and in a case where the land is purchased by the husband and partly paid for before marriage, the remaining payment being made shortly after marriage, no presumption arises that the money used in making the final payment was community funds, and the property will not be community property.² The same is true of property purchased by the husband in his own name after the dissolution of the community.³

SEC. 1985. Same—Same—Property purchased by wife.—Where real estate is purchased by the wife during coverture the presumption is that it is community property, which presumption prevails until overcome by adjudication.⁴ The mere fact that the wife holds the legal title does not prevent the real estate from being community property; and a purchaser from the husband, in the absence of notice that the land was purchased with the wife's separate means, takes a good title.⁵ Where land is purchased by a married woman in her own name with money borrowed and secured by mortgage on her separate property, but paid by a sale of a part of the lands purchased, it is community property;⁶ but where

Gaston v. Wright, 83 Tex. 282; s.c. 18 S. W. Rep. 576.

The California Supreme Court say: "The principle in law is established without question that real estate acquired by purchase during the existence of a married relation, no matter whether the deed be taken in the name of the husband or wife or both, creates the presumption that such is common property. While this presumption is not conclusive, the burden of proof rests upon the party affirming the fact to be to the contrary, and such fact must be established by clear and convincing evidence.

Morgan v. Lones, 78 Cal. 58, 62; s.c. 20 Pac. Rep. 248;

Ramsdell v. Fuller, 28 Cal. 37, 42; s.c. 87 Am. Dec. 103.

In Louisiana property purchased becomes the property of the husband where the parties do not reside in the state, were not married there, and at the time of the marriage did not contemplate residing there.

Armorer v. Case, 9 La. An. 288; s.c. 61 Am. Dec. 209.

¹ *Re Higgins*, 65 Cal. 407; s.c. 4 Pac. Rep. 389.

² *Watts' Guard. v. Miller*, 76 Tex. 13; s.c. 13 S. W. Rep. 16; *Medlanka v. Downing*, 59 Tex. 32.

³ *Golding v. Golding*, 43 La. An. 555; s.c. 9 So. Rep. 638.

⁴ *Duruty v. Musacchia*, 42 La. An. 357; s.c. 7 So. Rep. 555.

⁵ *Stiles v. Japhet*, 84 Tex. 91; s.c. 19 S. W. Rep. 450.

⁶ *Yesler v. Hochstettler*, 4 Wash. St. 349; s.c. 30 Pac. Rep. 398.

the purchase is made partly with money belonging to her separate funds, and partly with money borrowed by her for that purpose, it becomes in part the separate property of the wife, and in part community property.¹ In those cases where the property is purchased during marriage with community funds, the husband making the purchase and directing the conveyance to be made to his wife for the purpose of a gift, the land becomes her separate property.² It is not necessary in order that property may maintain its status as separate property that it should be preserved in specie or in kind ; yet when it has undergone mutations and assumed other conditions, it is not absolutely necessary, in order to maintain its character as separate property, that it be clearly traced and located.³

SEC. 1986. **Same—Liability for debts.**—We have already seen that property held by husband and wife as tenants by the entirety, is liable to be levied upon and sold under execution in payment of the husband's debts ;⁴ and community real estate is subject to execution, to pay the individual debts of either the husband or wife.⁵ Thus it has been held in Washington that a statute giving each spouse the power to devise, without restriction, one-half of the community property,⁶ does not operate to release the interest of a deceased spouse in such property from liability for his or her separate debts.⁷

¹ *Loring v. Stuart*, 79 Cal. 200 ; s.c. 21 Pac. Rep. 651 ;

Schuyler v. Broughton, 70 Cal. 282 ; s.c. 11 Pac. Rep. 719.

² *Jackson v. Torrence*, 83 Cal. 521 ; s.c. 23 Pac. Rep. 695 ;

Peck v. Brummagin, 31 Cal. 441 ; s.c. 89 Am. Dec. 195.

A deed of property held as community property from the husband to the wife, vests it in her as her separate estate.

Carter v. McQuade, 83 Cal. 274 ; s.c. 23 Pac. Rep. 348 ;

Lewis v. Simon, 72 Tex. 470 ; s.c. 10 S. W. Rep. 554 ;

Hall v. Hall, 52 Tex. 299 ;

Story v. Marshall, 24 Tex. 305 ; s.c. 76 Am. Dec. 106 ;

Fitts v. Fitts, 14 Tex. 443, 444.

³ *Dimmick v. Dimmick*, 95 Cal. 323 ; s.c. 30 Pac. Rep. 547.

⁴ See : *Ante*, § 1980.

⁵ *Stockand v. Bartlett*, 4 Wash. St. 730 ; s.c. 31 Pac. Rep. 24.

⁶ Wash. Code, 1881, § 2411.

⁷ *Columbia National Bank v. Embree*, 2 Wash. St. 331 ; s.c. 26 Pac. Rep. 257.

Under Washington Code, § 2410, giving the husband the management and control of the community real estate, he may subject it to a mechanic's lien by virtue of a contract for the erection of a building thereon. *Littell & Smythe Mfg. Co. v. Miller*, 3 Wash. St. 480 ; s.c. 28 Pac. Rep. 1035.

SEC. 1987. **Same—Descent of.**—The interest of husband and wife in their community property is equal, without regard to the fact that it was conveyed in terms to one of them only; but the title of the wife, where land is conveyed to the husband only, is merely equitable where the rights of a *bona fide* purchaser from the husband are concerned; and a vendee of the husband, after the death of the wife, who purchased without notice that the land was community property, and without knowledge of facts sufficient to put him on inquiry, acquires title as against the heirs of the wife.¹ In some of the states, as in California,² upon the death of the wife the community property passes to the surviving husband;³ and on the death of the husband, that portion of the community property on which the homestead is situated vests absolutely in the surviving wife.⁴

SEC. 1988. **Effect of statutes abolishing joint tenure.**—We have already seen⁵ that in many of the states of the Union statutes have been passed restricting or abolishing joint tenancies. A tenancy by the entirety, however, is not, strictly speaking, a joint tenancy, and for that reason it has been held that statutes abolishing survivorship and joint tenancies, or providing that conveyances or devises to two or more shall create an estate in common, except in those cases where a contrary intention appears from the instrument, have no application to tenancies by the entireties.⁶

¹ *Patty v. Middleton*, 82 Tex. 586; s.c. 17 S. W. Rep. 909;

McDougal v. Bradford, 80 Tex. 558; s.c. 16 S. W. Rep. 619.

² See: Cal. Civ. Code, § 1401.

³ *Dean v. Parker*, 88 Cal. 283; s.c. 26 Pac. Rep. 91.

⁴ *Sheehy v. Miles*, 93 Cal. 288; s.c. 28 Pac. Rep. 1046.

⁵ See: *Ante*, § 1910, *et seq.*

⁶ *Robinson v. Eagle*, 29 Ark. 202; *Elliott v. Nichols*, 4 Bush (Ky.) 502;

Croan v. Joyce, 3 Bush (Ky.) 454; *Rogers v. Grider*, 1 Dana (Ky.) 242;

Marburg v. Cole, 49 Md. 402; s.c. 33 Am. Rep. 266;

Craft v. Wilcox, 4 Gill (Md.) 504; *Hemingway v. Scales*, 42 Miss. 1; s.c. 97 Am. Dec. 425; 2 Am. Rep. 585;

Gibson v. Zimmerman, 12 Mo. 385; s.c. 51 Am. Dec. 168;

Buttler v. Rosenblath, 42 N. J. Eq. 651; s.c. 9 Atl. Rep. 685; 59 Am. Rep. 52;

McDermott v. French, 15 N. J. Eq. (2 McC.) 78;

Thomas v. De Baum, 14 N. J. Eq. (1 McC.) 37;

Den ex d. Hardenbergh v. Hardenbergh, 10 N. J. L. (5 Halst.) 42; s.c. 18 Am. Dec. 371;

Bertles v. Nunan, 92 N. Y. 152; s.c. 44 Am. Rep. 361;

SEC. 1989. Effect of married women enabling statutes.—In many of the states of the Union statutes have been passed enabling married women to deal with their separate property as though they were sole. In some of the states it has been held that the effect of such statutes is to convert a tenancy by entirety into a tenancy in common;¹ so that where lands have been conveyed to a husband and wife jointly without any statement in the deed as to the manner in which the grantees shall hold, they are tenants in common;² in other states, however, it is held that the common-law rule by which a conveyance to husband and wife constitutes them tenants by the entirety, the survivor taking the whole estate, is not changed by the abolition of joint tenancies, nor by the acts enabling married women to acquire and hold property separate from their husbands.³ In such states it is held that the

Wright v. Sadler, 20 N. Y. 320;
Rogers v. Benson, 5 John. Ch.
(N. Y.) 437;
Motley v. Whitmore, 2 Dev. &
B. (N. C.) L. 537;
McCurdy v. Canning, 64 Pa. St.
39;
Diver v. Diver, 56 Pa. St. 106;
Taul v. Campbell, 7 Yerg. (Tenn.)
319; s.c. 27 Am. Dec. 508;
Brownson v. Hull, 16 Vt. 309;
s.c. 42 Am. Dec. 517;
Ketchum v. Walsworth, 5 Wis.
95; s.c. 68 Am. Dec. 49;
We have already seen (*ante*, §
1972) that in many of the states,
such as Indiana, Vermont, and
Wisconsin, the statutes ex-
pressly exempt from their
operation conveyances to hus-
band and wife.

In Iowa it has been held that the
peculiar language of the stat-
ute makes the local rule the
reverse of that given in the
text.

Hoffman v. Stigers, 28 Iowa 302.

- ¹ Walthall v. Goree, 36 Ala. 728;
Cooper v. Cooper, 76 Ill. 57;
Hoffman v. Stigers, 28 Iowa 302;
Clark v. Clark, 56 N. H. 105;
Meeker v. Wright, 76 N. Y. 262;
s.c. 7 Abb. (N. Y.) N. S. 299,
rev'g s.c. 11 Hun (N. Y.) 533;
overruling prior New York
cases.

² Meeker v. Wright, 76 N. Y. 262;

s.c. 7 Abb. N. S. (N. Y.) 299,
rev'g 11 Hun (N. Y.) 533; dist'g
Torrey v. Torrey, 14 N. Y. 430;
disap'g Goelet v. Gori, 31 Barb.
(N. Y.) 314;
Miller v. Miller, 9 Abb. (N. Y.)
Pr. N. S. 444;
Beach v. Hollister, 3 Hun (N. Y.)
514; s.c. 5 Thomp. & C. (N. Y.)
568;
Freeman v. Barber, 3 Thomp. &
C. (N. Y.) 574; s.c. 1 Hun (N.
Y.) 433.
See: Bertles v. Nunan, 92 N. Y.
152, 162; s.c. 44 Am. Dec. 361;
Thompson v. Commissioners, 79
N. Y. 54, 63.

New York doctrine — Meeker v. Wright.—In Meeker v. Wright, 76 N. Y. 262, the court say that since the passage of the married women's act in New York (Laws 1860, c. 90) lands conveyed to a husband and wife jointly, without any statement in the deed as to the manner in which the grantees shall hold, makes them tenants in common.

See: Arnstett v. Arnstett, 3 Law Bull. 53.

Compare: Torrey v. Torrey, 14 N. Y. 430.

³ Marburg v. Cole, 49 Md. 402; s.c. 33 Am. Rep. 266.

To same effect Hulett v. Inlow, 57 Ind. 412; s.c. 26 Am. Rep. 64;

married women enabling statutes are intended merely to preserve the wife's right to deal with her property as though sole, to protect it from liability for the debts of her husband, and to authorize her to devise and bequeath it without changing the common-law rule as to the nature of the tenancy by which it is held.¹

SEC. 1990. Effect of divorce.—Where a decree of absolute divorce is granted, separating husband and wife, the effect will be to destroy the tenancy by entireties, and the husband and wife will hold the estate in joint tenancy.² The reason of this is apparent. It is difficult

Craft v. Wilcox, 4 Gill (Md.) 504 ;
Shaw v. Hearsey, 5 Mass. 521 ;
Meeker v. Wright, 75 N. Y. 262 ;
Farmers' & Merchants' Bank of
Rochester v. Gregory, 49 Barb.
 (N. Y.) 155 ;

Jackson v. Stevens, 16 John. (N.
 Y.) 110 ;

Rogers v. Benson, 5 John. Ch. (N.
 Y.) 481 ;

McCurdy v. Canning, 64 Pa. St.
 39 ;

Diver v. Diver, 56 Pa. St. 106 ;

Bates v. Seely, 46 Pa. St. 248 ;

Brownson v. Hull, 16 Vt. 309 ;

Thornton v. Thornton, 3 Rand.
 (Va.) 179 ;

4 Kent Com. (13th ed.) 362.

See : *Robinson v. Eagle*, 29 Ark.
 202 ;

Carver v. Smith, 90 Ind. 222 ; s.c.
 46 Am. Rep. 210 ;

Anderson v. Tannchill, 42 Ind.
 141 ;

Jones v. Chandler, 40 Ind. 588 ;

Chandler v. Cheney, 37 Ind. 401 ;

Arnold v. Arnold, 30 Ind. 305 ;

Davis v. Clark, 26 Ind. 424 ;

Baker v. Stewart, 40 Kan. 442 ;
 s.c. 19 Pac. Rep. 904 ; 2 L. R.

A. 434 ; 10 Am. St. Rep. 213 ;

Pray v. Stebbins, 141 Mass. 219 ;
 s.c. 4 N. E. Rep. 424 ; 55 Am.

Rep. 462 ;

Fisher v. Provin, 25 Mich. 347 ;

McDuff v. Beauchamp, 50 Miss.
 531 ;

Hemingway v. Scales, 42 Miss. 1 ;
 s.c. 2 Am. Rep. 586 ; 97 Am.

Dec. 425 ;

Garner v. Jones, 52 Mo. 68 ;

Buttler v. Rosenblath, 43 N. J.
 Eq. 651 ; s.c. 9 Atl. Rep. 695 ;
 59 Am. Rep. 52 ;

Zornlein v. Bram, 100 N. Y. 12 ;
 s.c. 2 N. E. Rep. 388 ;

Bertles v. Nunan, 92 N. Y. 152 ;
 s.c. 44 Am. Rep. 361 ;

Goelett v. Gori, 31 Barb. (N. Y.)
 314 ;

Lang v. Barnes, 87 N. C. 329 ;

Farmers' Bank v. Corder, 32 W.
 Va. 233 ; s.c. 9 S. E. Rep. 220 ;

Bennett v. Child, 19 Wis. 363,
 365 ; s.c. 88 Am. Dec. 693 ;

In re Shaver, 31 Up. Can. Q. B.
 605.

¹ *Robinson v. Eagle*, 29 Ark. 202 ;
Diver v. Diver, 56 Pa. St. 106.

² *Thornley v. Thornley*, 68 L. T.
 Rep. N. S. 199 ; s.c. 47 Alb. L.
 J. 344.

See : *Burns v. Lewis*, 86 Ga. 591 ;
 s.c. 13 S. E. Rep. 123 ;

Chapman v. Chapman, 48 Kans.
 636 ; s.c. 29 Pac. Rep. 1071 ;

Moran v. Somes, 154 Mass. 200 ;
 s.c. 28 N. E. Rep. 152 ;

Stelz v. Shreck, 128 N. Y. 263 ;
 s.c. 28 N. E. Rep. 510 ; 26 Am.

St. Rep. 475 ; 13 L. R. A. 325 ;
 34 Cent. L. J. 10 ;

Kirkwood v. Donnau, 80 Tex.
 645 ; s.c. 16 S. W. Rep. 428 ;

26 Am. St. Rep. 770 ;

Berg v. Ingalls, 79 Tex. 522 ; s.c.
 15 S. W. Rep. 579 ;

Fields v. Fields, 2 Wash. St. 441 ;
 s.c. 27 Pac. Rep. 267.

In Georgia, on the dissolution of a marriage by absolute divorce, the wife ceases to be a member of the husband's family as effectually as if she were dead. She is therefore no longer a beneficiary of a homestead set apart in his property. Her right to use or enjoy the property as a

to conceive of anything which more effectually destroys the common-law fictional-unity of husband and wife, upon which all authorities agree that this estate rests, than the statutes enabling a married woman to hold and convey her separate real estate ; but the same court which rendered the opinion quoted from, holds that these statutes have nothing to do with estates by entirety.¹

In *Lewis' Appeal*,² however, it is said that the estate created by a conveyance to husband and wife "in entirety," and the right of survivorship attendant thereon, is not affected by a decree of absolute divorce.³ Since

homestead terminates with the expiration of the coverture.

Burns v. Lewis, 86 Ga. 591 ; s.c. 13 S. E. Rep. 123.

In *Kansas*, it has been held that divorce obtained by the wife excludes her from any interest in her husband's property, not specially mentioned, reserved, or provided for in the decree.

Chapman v. Chapman, 48 Kans. 636 ; s.c. 29 Pac. Rep. 1071 ;

In *Missouri*, where a husband obtained a divorce from his wife who resided in Massachusetts, for a cause other than adultery, it was held that, upon the granting of such divorce she became entitled to the immediate possession of all her real estate, in like manner as if her husband were dead.

Moran v. Somes, 154 Mass. 200 ; s.c. 28 N. E. Rep. 152.

In *Texas*, under *Tex. Rev. Stat.*, art. 2864, a court rendering a decree of divorce may make such division of the property of the parties as to it seems just and proper, but where such order is made community property held by husband and wife as a homestead will therefore be held by them as tenants in common, and it may be partitioned.

Kirkwood v. Domnau, 80 Tex. 645 ; s.c. 16 S. W. Rep. 428 ; 26 Am. St. Rep. 770.

Under *Tex. Rev. Stat.*, art. 2867, a conveyance of land by the husband during the pendency of a suit for a divorce is null and void.

Berg v. Ingalls, 79 Tex. 522 ; s.c. 123

15 S. W. Rep. 579.

In *Washington*, by the provisions of § 2007 of the *Wash. Code* the court decreeing a divorce has power to make division of all the property of the parties, whether community or separate property.

Fields v. Fields, 2 Wash. St. 441 ; s.c. 27 Pac. Rep. 267.

In the case of *Thornley v. Thornley*, 68 L. T. Rep. N. S. 199 ; s.c. 47 Alb. L. J. 334, the court say: "In the eye of the law, they were during coverture one person, and they held this estate in entirety, the husband being entitled to receive the rents during coverture. But neither could deal with the estate apart from the other so as to affect the rights of the survivor. What happened then on the divorce taking place between the two? They ceased to be husband and wife. They ceased to be one person, and, in my judgment, they held the estate as ordinary joint tenants, and the husband's right to receive the rents which existed during coverture came to an end."

¹ *Bertles v. Nunan*, 92 N. Y. 152 ; s.c. 44 Am. Rep. 361.

² 85 Mich. 340 ; s.c. 48 N. W. Rep. 580 ; 2 Ball. Ann. L. R. Prop. 327 ; overruling *Dowling v. Salliotte*, 83 Mich. 131 ; s.c. 47 N. W. Rep. 225.

³ In this case the court say that by "the express terms of the deed the estate is declared not to be in joint tenancy, but in entirety. It is contended by the learned counsel for the ap-

this opinion was reported the Supreme Court of New York has held the contrary doctrine above set forth as the preferable doctrine in the case of *Stelz v. Shreck*,¹ already cited, in which PECKHAM, J., says: "Being founded upon the marital relation and upon the legal theory of the absolute oneness of husband and wife, when that unity is broken, not by death, but by divorce *a vinculo*, it stands to reason that such termination of the marriage tie must have some effect upon an estate which requires the marriage relation to support its creation. The claim on the part of the counsel for the first wife is that it is only necessary the parties should stand in the relation of husband and wife at the time of the conveyance, and at the time the estate vests, and no subsequent divorce can affect an estate which is already vested. But the very question is, what is the character of the estate which became vested by the conveyance? If it were of such kind that nothing but the termination of the marriage by the death of one of the parties can affect it, then of course the claim of the counsel is made out, but it is an assumption of the whole case to say that the estate was of the character he claims. When the idea upon which the creation of an estate by the entirety depends is considered, it seems to me the more logical as well as plausible view to say that as the estate is founded upon the unity of husband and wife, and it never would exist in the first place but for such unity, anything that terminates the legal fiction of the unity of two separate persons ought to have an effect upon the estate whose

pellee that the entirety of seisin of husband and wife in real estate, with the incident right of survivorship, cannot exist independent of the legal condition of unity of persons on which it rests, and that a decree of divorce, which destroys the unity of person, destroys also the entirety of seisin; that the right of survivorship is destroyed by the decree; and that the parties then become tenants in common seized in severalty of their respective moieties. We are cited, to support

this doctrine, the following authorities:

Harrer v. Wallner, 80 Ill. 197;
Lash v. Lash, 58 Ind. 526;
Baker v. Stewart, 40 Kans. 442;
 s.c. 19 Pac. Rep. 904; 10 Am. St. Rep. 213;
Ames v. Norman, 4 Sneed (Tenn.) 696; s.c. 70 Am. Dec. 269;
 2 Bish. Mar. & Div. (5th ed.), § 716;
Freem. Co-Ten. & Part. (2d ed.), § 76.

¹ 128 N. Y. 263; s.c. 28 N. E. Rep. 510; 26 Am. St. Rep. 475; 13 L. R. A. 325; 34 Cent. L. J. 10.

creation depended upon such unity. It would seem as if the continued existence of the estate would naturally depend upon the continued legal unity of the two persons to whom the conveyance was actually made. The survivor takes the whole in case of death, because that event has terminated the marriage and the consequent unity of person. An absolute divorce terminates the marriage and unity of person just as completely as death itself, only instead of one, as in the case of death, there are in the case of divorce two survivors of the marriage, and there are from the time of such divorce two living persons in whom the title still remains. It seems to me the logical and natural outcome from such a state of facts is that the tenancy by the entirety is served, and a severance having taken place each takes his or her proportionate share of the property as a tenant in common without survivorship."

SEC. 1991. **Effect of partition.**—The general effect of a partition of an estate held in entirety is to adjust the different rights of the parties in possession, but does not create title;¹ consequently where the tenants in common by agreement partition the land among themselves and execute deeds to each other, and in the making of one of the deeds the co-tenant requests it to be deeded to himself and wife, it does not create an estate by entirety, for the reason that a partition deed passes no new title.²

It has been said a husband can convey his title as tenant in entirety through a third person to his wife;³ and in Indiana it is held that a husband's deed to his wife, she not joining, of land held by entireties, is valid.⁴

SECTION VI.—ESTATES IN COPARTNERSHIP.

SEC. 1992. Definition.

SEC. 1993. Nature of the estate.

SEC. 1994. When treated as personal property.

¹ See: *Freem. Co-Ten. & Part.* (2d ed.) 396.

² *Harrison v. Ray*, 108 N. C. 215; s.c. 12 S. E. Rep. 993; 2 Ball. Ann. 324.

³ *Donahue v. Hubbard*, 154 Mass.

537; s.c. 28 N. E. Rep. 909; 26 Am. St. Rep. 271; 14 L. R. A. 123.

⁴ *Enyeart v. Kepler*, 118 Ind. 34; s.c. 20 N. E. Rep. 539; 10 Am. St. Rep. 94.

SEC. 1995. Interest of partners in.

SEC. 1996. Incidents of the estate—Alienation.

SEC. 1997. Same—Liability for debts.

SEC. 1998. Same—Liability to curtesy and partition.

SEC. 1999. Same—Descent of.

SECTION 1992. **Definition.**—Where real property is purchased and held by two or more persons as partners, for partnership purposes, and paid for out of the partnership funds, it becomes partnership property, and the estate therein is an estate in copartnership.¹ Where the property is so purchased and the title thereto taken in the name of one partner, he will hold it in trust for the partnership, and the property will, in equity, have all the characteristics of an estate in copartnership, so far as is necessary to pay the debts and adjust the equities of the partnership;² but if the person holding the legal title disposes of the estate to purchasers for value who have no notice of the trust, such purchasers will take to the exclusion of partnership claims.³ Aside from the rights of creditors and the equities of the partnership, the question whether or not real estate is to be deemed partnership assets will depend upon the agreement of the partners, which may be either express or implied.⁴ Where the real estate is treated as a part of the stock of the firm it is partnership property and is not held by the members of such firm as tenants in common.⁵ But the mere purchase by two persons of a single tract of land, to be held by them until sold for profit, does not make it partnership property, and it is not held as tenants in copartnership, but either as joint-tenants or tenants in common.⁶ And the mere use by a firm of real estate belonging to the individual members of such firm does

¹ See: *Owens v. Collins*, 23 Ala. 837;

Brownlee v. Allen, 21 Mo. 123;

Coder v. Huling, 27 Pa. St. 84;

Cox v. McBurney, 2 Sand. (N. Y.) 561;

Smith v. Smith, 5 Ves. 189; s.c. 5 Rev. Rep. 22.

² *Walling v. Burgess*, 122 Ind. 299; s.c. 22 N. E. Rep. 419; 23 N. E. Rep. 1076; 7 L. R. A. 481.

³ *Smith v. Allen*, 87 Mass. (5 Allen)

454, 456; s.c. 81 Am. Dec. 758;

Moreau v. Saffara, 3 Sneed (Tenn.) 595; s.c. 67 Am. Dec. 582.

⁴ *Brown v. Morrill*, 45 Minn. 483; s.c. 48 N. W. Rep. 328.

⁵ *Murrell v. Mandelbaum* (Tex.), 19 S. W. Rep. 880.

⁶ *Demarest v. Koch*, 129 N. Y. 218; s.c. 29 N. E. Rep. 296;

Clark v. Sidway, 142 U. S. 682; bk. 35 L. ed. 1157.

not constitute it partnership property and impose upon it the equities arising out of the partnership business.¹

SEC. 1993. Nature of the estate.—Where real estate is purchased with partnership funds for the use of the partnership, independently of the rights of creditors, the title to the same will be in the several partners as tenants in common, and the estate will have all the incidents of an estate in common ;² and will be charged with a trust in favor of one partner until the debts obligatory on both are paid, and an accounting has been had between the partners.³

SEC. 1994. When treated as personal property.—In equity real estate purchased and paid for with partnership funds, and held for the purposes of the partnership, is regarded as personal property, held in trust for the partnership, which trust can be enforced either by the partners or the creditors of the firm.⁴ It is a settled principle of the law of partnership, that the partnership effects are to be applied in the first place to the payment of the debts of the firm, and to equalize the claims of the different copartners in relation to the fund. In other words, the separate estate or interest of a copartner in any of the copartnership property is only his share of that part of the co-

¹ *Wilhite's Admr. v. Boulware*, 88 Ky. 169 ; s.c. 10 S. W. Rep. 629.

² *Dyer v. Clark*, 46 Mass. (5 Met.) 562, 585 ; s.c. 39 Am. Dec. 697. See : *Gray v. Palmer*, 9 Cal. 616, 639 ;

Blake v. Nutter, 19 Me. 16 ;

Goodburn v. Stevens, 5 Gill (Md.) 1 ;

Howard v. Priest, 46 Mass. (5 Met.) 582, 585 ;

Collins v. Warren, 29 Mo. 236 ;

Baird v. Baird's Heirs, 1 Dev. & B. (N. C.) Eq. 524 ; s.c. 31 Am. Dec. 399 ;

Price v. Hunt, 11 Ired. (N. C.) L. 42 ;

Ludlow v. Cooper, 4 Ohio St. 1 ;

Tillinghast v. Champlin, 4 R. I. 173 ; s.c. 67 Am. Dec. 510.

³ *Dyer v. Clark*, 46 Mass. (5 Met.) 562 ; s.c. 39 Am. Dec. 697.

See : *Richards v. Manson*, 101 Mass. 482, 484 ;

Wilcox v. Wilcox, 95 Mass. (13 Allen) 250, 254 ;

Falls River Whaling Co. v. Borden, 64 Mass. (10 Cush.) 461 ;

Converse v. Citizens' Ins. Co., 64 Mass. (10 Cush.) 37, 38 ;

Peck v. Fisher, 61 Mass. (7 Cush.) 386, 390.

⁴ *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165 ; s.c. 47 Am. Dec. 305.

See : *Lang's Heirs v. Waring*, 25 Ala. 625 ; s.c. 60 Am. Dec. 533 ;

Cilley v. Huse, 40 N. H. 358 ;

Davis v. Christian, 15 Gratt. (Va.) 11 ;

Fowler v. Bailey, 14 Wis. 125 ;

Broom v. Broom, 3 Myl. & K. 443 ;

Houghton v. Houghton, 11 Sim. 491

partnership effects, or of the proceeds thereof, which remains after the debts of the firm, and the demands of his copartners, as such, are satisfied. And if one of the copartners has paid more than his share of the partnership debts, he has a claim upon the partnership property, which claim in equity is paramount to the claims of the separate creditors of his copartner.¹ Where a partnership is formed for the purpose of dealing in real estate, so far as creditors of the firm are concerned, the real estate standing in the firm name is to be treated as personal property for the payment of the firm's debts.²

¹ *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165; s.c. 47 Am. Dec. 305.

See: *Nicholl v. Mumford*, 4 John. Ch. (N. Y.) 522;
Christian v. Ellis, 1 Gratt. (Va.) 396;

Ex parte King, 17 Ves. 115; s.c. 11 Rev. Rep. 34;

Taylor v. Fields, 4 Ves. 396.

In *Buchan v. Sumner*, *supra*, the court say: "In the case of *Smith v. Haviland & Field* and *Deveau v. Fowler*, 2 Paige Ch. (N. Y.) 400, this court held, that an assignment, by one of the partners, or by his personal representatives, of his or their interest in the surplus, was not a relinquishment of the equitable claim to have the debts of the firm paid out of the copartnership funds, where the rights of *bona fide* purchasers were not involved."

² *Rovelsky v. Brown*, 92 Ala. 522; s.c. 9 So. Rep. 182; 25 Am. St. Rep. 83.

See: *Hamilton v. Halpin*, 68 Miss. 99; s.c. 8 So. Rep. 739;

Van Aken v. Clark, 82 Iowa 256; s.c. 48 N.W. Rep. 73.

In *Rovelsky v. Brown*, *supra*, the courts say: "A general partnership is a scheme of co-ordinate contribution, effort, and action by each for all. The property and resources contributed by the several members constitute a fund specially appropriated for use in carrying on the partnership obligations, and for a ratable division of what may be left among the partners. None of these special

purposes could be effectually carried out as to real estate, if the incidents of the legal ownership of that kind of property are recognized in the partnership dealings. The powers of the several general partners, in the acquisition, management, control, and disposition of the partnership property, in the course of business, would be impossible of adequate exercise if hampered by the restrictions which at law embarrass the ownership and alienation of the real estate. The incidents of dower, heirship, etc., practically preclude, so far as real estate is concerned, a recognition at law of that species of title which the partnership and the several members thereof have in the firm property; for each has the power of absolute disposition within the scope of the business, and, in the case of the death of a member, the survivor or survivors are vested with an exclusive title and right of disposition for partnership purposes. It is plain, without further illustration, that in dealing with partnership real estate for partnership purposes, it is impracticable to recognize the incidents of its legal ownership. And it is equally plain, without any illustration at all, that it would be grossly unjust, both in respect to the relations of the partners with each other, and as regards the partnership dealings with others, to allow the investment of partnership

SEC. 1995. Interest of partners in.—Where real property has been purchased by a partnership and paid for out of

funds in real estate to limit or to enlarge the rights and powers of the several partners as to the firm property or to cut off or restrict the appropriation of the partnership property to the purpose above mentioned, to which it has been specially set aside and devoted. Such inequitable results are obvious by treating, so far as necessary to accomplish the purposes of the partnership, such real estate as personal property. And why should not such real estate be treated as personal property when it is the subject-matter of the ordinary business of the partnership, as well as when it is sought to be reached to enforce the payment of debts, or to effect a settlement of the partnership affairs? It is a fact that the buying and selling of real estate is a regular business, engaged in throughout the country. Many partnerships are in existence devoted exclusively to the transaction of this kind of business. Real estate is the subject-matter of their trading operations. They deal in it as a commodity. It is their stock in trade. The obligations they assume directly affect and involve the title to that character of property. If a debt contracted in a transaction having no connection with real estate by a member of an ordinary commercial firm, acting within the scope of the business, may be enforced against land, merely because partnership funds have been used in its acquisition, *a fortiori* the obligation one member of a real estate partnership undertakes in the regular course of trade, in reference to the kind of property which is the subject-matter of their business, should be effectually enforceable against all the partners, and should reach and bind the property dealt in. If the several partners in a firm engage in the business of

buying and selling real estate, cannot bind the firm by purchases or sales of such property, made in the regular course of business, then they are incapable of exercising the essential rights and powers of general partners, and their association is not really a partnership at all, but a several agency, the acts of each member being subject to ratification or repudiation by the other members, or by their wives, or, if they should die, by their widows, heirs, or devisees. In short, we are unable to discover any satisfactory reason for denying to a court of equity the power to treat real estate as personalty, in order to make binding partnership obligations in reference to the particular subject-matter of the regular dealings with the firm, when that rule sought to be invoked to this end is readily applied to enforce the payment of ordinary debts, or to secure a partnership division, which, as compared with the immediate and primary aim of carrying on the regular business of the concern, are the secondary and ultimate purposes to which the partnership property has been pledged or devoted. And the authorities are not wanting to support the conclusion that the rule is not confined in its application by any such unreasonable distinctions. In *Lang's Heirs v. Waring*, 17 Ala. 145, it was said: 'So far as the partners and their creditors are concerned, real estate belonging to the partnership is in equity treated as mere personalty; and so it will be deemed as to all other intents, if the partners have by agreement or otherwise impressed upon it that character.' In a suit to recover commissions for finding a purchaser of real estate, brought by a man who has been employed by one member of a firm to sell the

the partnership funds, after the partnership debts have all been paid, the individual members of the partnership will be tenants in common of such real estate,¹ and on the death of either partner his widow and heirs are entitled to his share thereof.² Where there are partnership debts

partnership land, it was said: 'There is no doubt that a co-partnership may exist in the purchase and sale of real property, equally as in any other lawful business. Nor is there any doubt that each member of such copartnership possesses full authority to contract for the sale or other disposition of its entire property, though, for technical reasons, the legal title vested in all the copartners can only be transferred by their joint act.'

Thompson v. Bowman, 73 U.S. (6 Wall.) 316; bk. 18 L. ed. 736.

"One member of a partnership engaged in the business of buying and selling real estate, fraudulently, and without the knowledge of his copartner, represented to a purchaser that the partnership land which was the subject of the sale was oil-producing. In an action for damages for the fraud and deceit, it was held that both partners were liable. In the course of the opinion, the court say: 'When the partnership business is to deal in real estate, one partner has ample power, as general agent of the firm, to enter into an executory contract for the sale of real estate.'"

Chester v. Dickerson, 54 N. Y. 1; s.c. 13 Am. Rep. 550.

"When real estate is brought into the partnership business, it is treated, in equity, as personal estate, and a lease of it by one partner is as much a partnership transaction as a sale of the partnership goods by him would be."

Moderwell v. Mullison, 21 Pa. St. 257.

"When land is purchased to be dealt in as a commodity, this would seem to be, for the purposes of such dealing, an out-and-out conversion of it into personalty, and each partner can

bind the firm by contracts for its disposition."

Pugh v. Currie, 5 Ala. 446;

Ludlow v. Cooper, 4 Ohio St. 1; *Frost v. Wolf*, 77 Tex. 455; s.c.

14 S. W. Rep. 440; 19 Am. St. Rep. 761;

Olcott v. Wing, 4 McLean C. C. 15; s.c. Fed. Cas. No. 10481;

1 Bates, Partn., §§ 298, 299.

"Our conclusion is that partnership real estate is, in equity and for partnership purposes, to be treated as personalty; and that one member of a partnership, engaged in the business of buying and selling real estate, can bind the firm by contract in the firm name for the sale of partnership land, and that such contract should be specially enforced against all partners. This conclusion does not involve a disregard of the rule laid down in *Lang's Heirs v. Waring*, 25 Ala. 625, 640; s.c. 60 Am. Dec. 533; for the conversion into personalty is only so far as may be called for to effectuate the purposes of the partnership and when the partnership has come to an end, and its purposes have been fully accomplished, the real estate resumes its legal characteristics."

See 2 Ball. Ann. L. Real Prop. (1893), § 504.

¹ See: *Ante*, § 1993.

² *Loubat v. Nourse*, 5 Fla. 350, 363; *Patterson v. Blake*, 12 Ind. 436;

Lane v. Tyler, 49 Me. 252; *Fall River Whaling Co., v. Borden*, 64 Mass. (10 Cush.) 458;

Howard v. Priest, 46 Mass. (5 Met.) 582;

Goodwin v. Richardson, 11 Mass. 469;

Dilworth v. Mayfield, 36 Miss. 40; *Buckley v. Buckley*, 11 Barb.

(N. Y.) 43;

Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 163, 165; s.c. 47 Am.

Dec. 305; *Ludlow v. Cooper*, 4 Ohio St. 1;

the real property belonging to the firm will be treated as personal property so far as to entitle the surviving partner to dispose of it for the satisfaction of such partnership debts, and the widow and heirs of the deceased partner will be compelled by a court of equity to join in the conveyance of the estate for that purpose.¹ Where partnership real estate is sold for the payment of partnership debts, any surplus that may be left undisposed of will be regarded and treated as real property; and where one of the partners has died his share thereof will go to his widow and heirs.² In England the rule is otherwise, the partnership real property being looked upon as personalty. Under the English rule the surplus left after the satisfaction of the partnership debts goes to the representatives of the deceased partner, and not to his widow and heirs.³

SEC. 1996. *Incidents of the estate—Alienation.*—Where real estate is held by a partnership, all the powers, duties, and rights which usually appertain to partnerships must appertain to partnerships in real estate, except as they are modified by the character of the property; and the only difference grows out of the rules of law in reference to the conveyance and transmission of real estate. One partner cannot convey the whole title to real estate unless the whole title is vested in him.⁴ But he can enter into an

Tillinghast v. Champlin, 4 R. I. 173; s.c. 67 Am. Dec. 510;

Piper v. Smith, 1 Head (Tenn.) 93;

Deloney v. Hutcheson, 2 Rand. (Va.) 183;

Olcott v. Wing, 4 McL. C. C. 15; s.c. 1 Fed. Cas. No. 10481.

¹ Matlock v. Matlock, 5 Ind. 403; Winslow v. Chiffelle, 1 Harp. (S. C.) Eq. 25;

Arnold v. Wainwright, 6 Minn. 358; s.c. 80 Am. Dec. 448;

Boyce v. Coster, 4 Strobb. (N. C.) Eq. 25;

Delmonico v. Guillaume, 2 Sandf. Ch. (N. Y.) 366;

Boyers v. Elliott, 7 Humph. (Tenn.) 204.

² Offut v. Scott, 47 Ala. 105;

Bepp v. Fox, 53 Ill. 540;

Shearer v. Shearer, 98 Mass. 107; Foster's Appeal, 74 Pa. St. 391.

398; s.c. 32 Am. Law Reg. 300; 15 Am. Rep. 553;

³ Lang v. Waring, 17 Ala. 145; Rice v. Barnard, 20 Vt. 479; s.c. 50 Am. Dec. 54;

Darby v. Darby, 3 Drew. 495.

⁴ Dyer v. Clark, 46 Mass. (5 Met.) 562; s.c. 39 Am. Dec. 697;

Chester v. Dickerson, 54 N.Y. 1; s.c. 13 Am. Rep. 550;

Van Brunt v. Applegate, 44 N.Y. 544;

Coles v. Coles, 15 John. (N.Y.) 159; s.c. 8 Am. Dec. 231;

Davis v. Christian, 15 Gratt. (Va.) 11.

One partner can convey no more than his interest in houses or other real estate, even where they

executory contract to convey, which a court of equity will enforce.¹ Where one partner holds the legal title of partnership real estate and disposes of it to a purchaser for value without notice of a partnership trust, the purchaser will take to the exclusion of the partnership claims ;² if the purchaser takes the property with notice, he will hold it subject to the equitable rights of the partners and the creditors of the partnership ; and the same is true where he has a reasonable knowledge of the trust.³ But any partner may freely sell his undivided share of the partnership real estate, subject to the equitable rights of the creditors ;⁴ yet a partner so selling his right⁵ in real estate bought in partnership funds is liable to account to his copartners for the price received.⁶ But one tenant in common may grant a license to a third person to cut timber on the common land and it will be good, giving such person title to the trees cut by him ; and especially

are held for the purpose of the partnership.

Coles *v.* Coles, 15 John. (N. Y.) 159 ; s.c. 8 Am. Dec. 231.

¹ Chester *v.* Dickerson, 54 N. Y. 1 ; s.c. 13 Am. Rep. 550.

² Smith *v.* Allen, 87 Mass. (5 Allen) 454, 456 ; s.c. 81 Am. Dec. 758 ;

Moreau *v.* Saffarans, 3 Sneed (Tenn.) 595 ; s.c. 67 Am. Dec. 582 ; 1 Pars. on Con. 153.

Smith *v.* Allen, *supra*, the court held that a promise by a woman to marry a grantor is good consideration of the deed, and she will be entitled to hold the man against his creditors, although the marriage is prevented by the death. The court say : " It is immaterial at what time the consideration was paid or passes, if it passes before she had any notice of the fraud, and before any claim of title was set up or asserted against her by the surviving partners, or by the creditors of the company. For it is a well-settled principle that a deed which is voluntary or fraudulent in its creation, and voidable by creditors or subsequent purchasers, may become good and inde-

feasible by matter *ex post facto*."

Citing : Sterry *v.* Arden, 1 John. Ch. (N. Y.) 62, 261 ;

4 Kent Com. (13th ed.) 463.

³ Tarbell *v.* West, 86 N. Y. 280, 287 ; s.c. 13 Week. Dig. 314 ;

Hiscock *v.* Phelps, 49 N. Y. 47 ; Siemon *v.* Schurck, 29 N. Y. 598, 613 ;

Buchan *v.* Sumner, 2 Barb. Ch. (N. Y.) 165 ; s.c. 47 Am. Dec. 305 ;

Ridgway's Appeal, 15 Pa. St. 177 ; s.c. 53 Am. Dec. 586 ;

Forde *v.* Herron, 4 Munf. (Va.) 316 ;

Covender *v.* Bulteel, L. R. 9 Ch. App. Cas. 79 ; s.c. 8 Moak Eng. Rep. 743.

⁴ Treadwell *v.* Williams, 9 Bosw. (N. Y.) 649 ;

Donaldson *v.* Bank of Cape Fear, 1 Dev. (N. C.) Eq. 103 ; s.c. 18 Am. Dec. 577.

⁵ Coles *v.* Coles, 15 John. (N. Y.) 159 ; s.c. 8 Am. Dec. 231 ;

Baker *v.* Wheeler, 8 Wend. (N. Y.) 505 ; s.c. 24 Am. Dec. 66 ;

Baca *v.* Ramos, 10 La. Ann. 417 ; s.c. 29 Am. Dec. 463 ;

Ross *v.* Henderson, 77 N. C. 170.

⁶ Baca *v.* Ramos, 10 La. Ann. 417, 29 Am. Dec. 463.

is this the case where the license is given in satisfactory demands against the co-tenants.¹

SEC. 1997. **Same—Liabilities for debts.**—Real estate held by a partnership as partnership property, is liable to the satisfaction of partnership debts in preference to the claims of the private creditors of the individual partners ;² and until they are satisfied no claims can be made against the share belonging to a member of the firm.³ Where one partner has paid more of the debts of the firm than the value to his share, he is entitled to a lien upon the real estate held by the firm, and equity will protect his rights by enforcing a contribution of the amount of the overpayment, and on failure to pay said amount will decree a sale of a partnership property therefor.⁴

SEC. 1998. **Same—Liability to curtesy and partition.**—On the death of one of the partners, in the absence of any partnership debts, his share of the partnership realty will be liable to dower in favor of his widow ;⁵ and in the

- ¹ *Baker v. Wheeler*, 8 Wend. (N. Y.) 505 ; s.c. 24 Am. Dec. 66.
- ² *Lang's Heirs v. Waring*, 25 Ala. 625 ; s.c. 60 Am. Dec. 533 ;
Roberts v. McCarthy, 9 Ind. 16 ;
s.c. 68 Am. Dec. 604 ;
Divine v. Mitchum, 4 B. Mon. (Ky.) 488 ; s.c. 41 Am. Dec. 241 ;
Richards v. Manson, 101 Mass. 482, 484 ;
Wilcox v. Wilcox, 95 Mass. (13 Allen) 252, 254 ;
Peck v. Fisher, 61 Mass. (7 Cush.) 386, 390 ;
Dyer v. Clark, 46 Mass. (5 Met.) 562 ; s.c. 39 Am. Dec. 697 ;
Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165 ; s.c. 47 Am. Dec. 305.
- ³ *Lang's Heirs v. Waring*, 25 Ala. 625 ; s.c. 60 Am. Dec. 533 ;
Black v. Black, 15 Ga. 455 ;
Galbraith v. Gedge, 16 B. Mon. (Ky.) 631 ;
Lane v. Tyler, 49 Me. 252 ;
Howard v. Priest, 46 Mass. (5 Met.) 582 ;
Goodwin v. Richardson, 11 Mass. 469 ;
Arnold v. Wainwright, 6 Minn. 358, 370 ; s.c. 80 Am. Dec. 448 ;
- Deming v. Colt*, 3 Sandf. (N. Y.) 284 ;
Cox v. McBurney, 2 Sandf. (N. Y.) 561 ;
Delmonico v. Guillaume, 2 Sandf. (N. Y.) Ch. 366 ;
Marvin v. Trumbull, Wright (Ohio) 386 ;
Coder v. Huling, 27 Pa. St. 84 ;
Lancaster Bank v. Myley, 13 Pa. St. 544 ;
Hunter v. Martin, 2 Rich. (S. C.) L. 541 ;
Piatt v. Oliver, 3 McL. C. C. 27 ;
s.c. Fed. Cas. No. 11116 ;
1 Pars. on Con. 149.
- ⁴ *Loubat v. Nourse*, 5 Fla. 350 ;
Buffum v. Buffum, 49 Me. 108 ;
s.c. 77 Am. Dec. 249 ;
Howard v. Priest, 46 Mass. (5 Met.) 582, 585 ;
Burnside v. Merrick, 45 Mass. (4 Met.) 537 ;
Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28.
See : *Ante*, § 1994.
- ⁵ *Huston v. Neil*, 41 Ind. 504, 549 ;
Roberts v. McCarty, 9 Ind. 16 ;
s.c. 68 Am. Dec. 604.

absence of partnership debts, partition therein may be decreed by the courts.¹

SEC. 1999. **Same—Descent of.**—By the English law all real estate purchased with partnership funds for partnership purposes is treated as personal property, and the surplus remains after the settlement of partnership affairs goes to the personal representatives of the deceased partner and not to his heirs.² The same doctrine prevails in some states of the Union,³ but in a majority of the states, real property held by a partnership is regarded as personalty as for the purposes of the partnership;⁴ for every other purpose it remains real estate subject to a release of loss in relation thereto,⁵ and when the land is released from the partnership trust, the surplus of such real property descends as other real estate;⁶ consequently upon

¹ *Patterson v. Blake*, 12 Ind. 436, 438;

Roberts v. McCarty, 9 Ind. 16; s.c. 68 Am. Dec. 604;

Burnside v. Merrick, 45 Mass. (4 Met.) 537;

Buckley v. Buckley, 11 Barb. (N. Y.) 43;

Piper v. Smith, 1 Head (Tenn.) 93.

² *Essex v. Essex*, 20 Beav. 442;

Bell v. Phyn, 7 Ves. 453, 460; s.c. 6 Rev. Rep. 148.

See: *Rice v. Barnard*, 20 Vt. 479; s.c. 50 Am. Dec. 54.

³ *Thorn v. Thorn*, 11 Iowa 146;

Bank of Louisville v. Hall, 8 Bush (Ky.) 672, 678;

Solomon v. Fitzgerald, 7 Heisk. (Tenn.) 552;

Dewey v. Dewey, 35 Vt. 555;

Pierce v. Trigg, 10 Leigh (Va.) 406;

White v. Fitzgerald, 19 Wis. 480.

See: *Chester v. Dickerson*, 54 N. Y. 1; s.c. 13 Am. Rep. 550;

Shanks v. Klein, 104 U. S. 18; bk. 26 L. ed. 635.

⁴ *Shearer v. Shearer*, 98 Mass. 107;

Meily v. Wood, 71 Pa. St. 488; s.c. 10 Am. Rep. 719.

⁵ *Meily v. Wood*, 71 Pa. St. 488; s.c. 10 Am. Rep. 719.

See: *Shearer v. Shearer*, 98 Mass. 107;

Wilcox v. Wilcox, 95 Mass. (13 Allen) 252;

Buckley v. Buckley, 11 Barb. (N. Y.) 43;

Black's Appeal, 44 Pa. St. 503;

Smith v. Emerson, 43 Pa. St. 456, 461;

Lothrop v. Wightman, 41 Pa. St. 297, 304;

Erwin's Appeal, 39 Pa. St. 535; s.c. 1 Am. Lead. Cas. 497, 498;

80 Am. Dec. 542;

1 Lead. Cas. in Eq. (3d Am. ed.) 240;

Coover's Appeal, 29 Pa. St. 1, 14; s.c. 70 Am. Dec. 149;

Lancaster Bank v. Myley, 13 Pa. St. 544;

Overholt's Appeal, 12 Pa. St. 222; s.c. 51 Am. Dec. 598;

King's Appeal, 9 Pa. St. 124;

Roop v. Rogers, 3 Watts (Pa.) 193;

Cookson v. Cookson, 8 Sim. 529.

⁶ *Little v. Snedecor*, 52 Ala. 167;

Drewry v. Montgomery, 28 Ark. 256;

Gray v. Palmer, 9 Cal. 639;

Holland v. Fuller, 13 Ind. 195;

Shearer v. Shearer, 98 Mass. 107;

Scruggs v. Blair, 44 Miss. 406;

Collins v. Warren, 29 Mo. 236;

Fairchild v. Fairchild, 64 N. Y. 471;

Rice v. Barnard, 20 Vt. 479; s.c. 50 Am. Dec. 54.

the death of one of the partners, on adjustment of the partnership affairs the heirs of such deceased partner will succeed thereto,¹ subject to the right of dower on the part of the surviving widow of such deceased partner.²

SECTION VII.—INCIDENTS COMMON TO JOINT ESTATES.

SEC. 2000. Incidents of the estate—The four unities.

SEC. 2001. Same—Action by and against tenants.

SEC. 2002. Same—Alienation by tenants.

SEC. 2003. Same—Lease by tenants.

SEC. 2004. Same—Livery of seisin.

SEC. 2005. Same—Right of survivorship.

SEC. 2006. Same—Same—How destroyed.

SEC. 2007. Same—Waste.

SECTION 2000. Incidents of the estate—The four unities.—We have already seen that what is known as “the four unit” are necessary concurrent circumstances for the creation of a joint estate. These are unity of interest,³ unity

¹ *Yeatman v. Woods*, 6 Yerg. (Tenn.) 20; s.c. 27 Am. Dec. 452.

See: *Shearer v. Shearer*, 98 Mass. 107;

Williamson v. Fontain, 7 Baxt. (Tenn.) 212;

Barcroft v. Snodgrass, 1 Cold. (Tenn.) 445;

Piper v. Smith, 1 Head (Tenn.) 93;

Solomon v. Fitzgerald, 7 Heisk. (Tenn.) 552, 555.

In *Piper v. Smith*, *supra*, the court say: “This question was not free from difficulty in England, but the doctrine was ultimately settled there to be that all real property owned by the partners, and used in carrying on their business, and all such as may have been purchased with the means, and in the name of the firm, should be deemed partnership stock, and treated as personalty. According with this are the American cases in 4 Munf. (Va.) 316; 7 Conn. 11, and other cases; and the opinion of Chancellor KENT, in his 3 Com. 14, and

subsequent pages, where the subject is fully treated. But on the other side there are high and numerous authorities in that country, and in this: 3 Brown. 199; 7 Ves. 453; 9 Ves. 500; 15 John. (N. Y.) 159; 11 Mass. 469. It may be said that the weight of authority is that it is to be regarded as stock, and should be so held if the question was an open one in this state. But as early as the year 1816, in the case of *McAlister v. Montgomery*, 3 Hayw. 94, the act of 1784, c. 22, sec. 6, Car. and Nich. 417, was held to have settled this question in favor of the heirs of deceased partners.”

² *Dyer v. Clark*, 46 Mass. (5 Met.) 562; s.c. 39 Am. Dec. 697;

Dilworth v. Mayfield, 36 Miss. 40;

Collins v. Warren, 29 Mo. 236;

Davis v. Christian, 15 Gratt. (Va.) 11.

See: *Murphy v. Abrams*, 50 Ala. 293;

McCauley v. Fulton, 44 Cal. 355.

³ See: *Ante*, § 1913.

of title,¹ unity of time,² and unity of possession.³ At common law whenever these four unities are present in a joint estate, it is construed to be a joint tenancy, in the absence of any express words in the instrument creating the estate indicating that the estate is held by a term of a different character.⁴ In these estates all the tenants must have the same interest in the land in respect to the duration of the estate. One cannot be a tenant for life and another a tenant in fee; one cannot hold by one deed and another by a second deed, for the reason that the estate must vest at the same time in order that there may be a unity of time; one cannot have an estate in possession and the other an estate in remainder. In short, all joint tenants must have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same possession.⁵

SEC. 2001. **Same—Action by and against tenants.**—We have already seen⁶ that joint tenants may maintain actions for the possession of the lands held jointly by them, and also for injury thereof; but that in such actions they must all join.⁷ Joint tenants can neither sue nor be sued alone in respect to the joint estate, and if they attempt to sue or are sued alone the defect may be taken advantage of by proper plea.⁸ At common law joint tenants could not, as a general rule, maintain actions against each other in relation to the matters pertaining to the common property, but under a statute of Anne⁹ one joint tenant was authorized to maintain an action for account against another tenant who had received all the rents and profits of the joint estate.¹⁰ This statute has been re-enacted in some of the states of the Union and adopted and acted upon in the courts in others, probably in all those states

¹ See: *Ante*, § 1914.

² See: *Ante*, § 1915.

³ See: *Ante*, § 1916.

⁴ *Rigden v. Vallier*, 3 Atk. 734;
2 Bl. Com. 180;

Williams Real Prop. (6th ed.) 132.

⁵ 2 Bl. Com. 180, 181, 182.

⁶ See: *Ante*, § 1941, *et seq.*

⁷ *Dewey v. Lambies*, 7 Cal. 347.

See: *Ante*, §§ 1941, 1942.

⁸ *Webster v. Vandeverter*, 72 Mass. (6 Gray) 428.

Compare: *Mitchell v. Tarbutt*, 5 Durnf. & E. (5 T. R.) 649;

2 Bl. Com. 182;

1 Wms. Saund. 291f.

⁹ 3 and 4 Anne, c. 16, § 27.

¹⁰ See: *Ante*, § 1493.

in which the action of account has been in use ; but this remedy has fallen into disuse, and assumpsit is now resorted to.¹

SEC. 2002. **Same—Alienation by tenants.**—Another of the incidents of a joint tenancy is the right of either tenant to convey his share of the estate, either to a co-tenant or to a stranger ;² but one tenant in common cannot convey a specific portion of the common estate so as to prejudice his co-tenants.³ Neither can one joint tenant bind his co-tenants by an agreement to sell the entire estate, unless he has authority from his co-tenant to make and enter into such a contract, or unless the contract thus made is subsequently ratified by him.⁴

SEC. 2003. **Same—Lease by tenants.**—We have already seen that one joint tenant in common may lease the common property for the benefit of all.⁵ Where joint tenants make a lease on the common property, and the lessee surrenders to one of them, such surrender will inure to the benefit of all.⁶

SEC. 2004. **Same—Livery of seisin.**—Another incident of joint tenancy is seisin ; the entry and seisin of one are re-

¹ *Munroe v. Luke*, 42 Mass. (1 Met.) 459, 464 ;

Miller v. Miller, 24 Mass. (7 Pick.) 133 ; s.c. 19 Am. Dec. 264 ;

Sargent v. Parsons, 12 Mass. 149, 152 ;

Jones v. Harraden, 9 Mass. 540 ;

Brigham v. Eveleth, 62 Mass. 538 ;

Wilkin v. Wilkin, 1 Salk. 9 ; s.c. Carth. 89 ;

1 Com. Dig. 115 ;

4 Kent Com. (13th ed.) 369.

² *Gates v. Salmon*, 35 Cal. 576, 588 ; s.c. 95 Am. Dec. 139 ;

Rector v. Waugh, 17 Mo. 13 ; s.c. 57 Am. Dec. 251.

See : *Shaw v. Hearsey*, 5 Mass. 521, 522 ;

Denne v. Judge, 11 East 288, 289 ; s.c. 10 Rev. Rep. 511.

³ *Gates v. Salmon*, 35 Cal. 576 ; s.c. 95 Am. Dec. 139 ;

Stark v. Barnett, 15 Cal. 368.

See : *Griswold v. Johnson*, 5 Conn. 363 ;

Duncan v. Sylvester, 24 Me. 483 ; s.c. 41 Am. Dec. 400 ;

Peabody v. Minot, 41 Mass. (24 Pick.) 329 ;

Nichols v. Smith, 39 Mass. (22 Pick.) 316, 318 ;

Rising v. Stannard, 17 Mass. 282 ; *Baldwin v. Whiting*, 13 Mass. 57 ;

Varmun v. Abbott, 12 Mass. 474 ; s.c. 7 Am. Dec. 87 ;

Bartlet v. Harlow, 12 Mass. 347, 348 ; s.c. 7 Am. Dec. 76 ;

Porter v. Hill, 9 Mass. 34 ; s.c. 6 Am. Dec. 22 ;

Robinett v. Preston, 2 Rob. (Va.) 278.

⁴ *Manks v. Enloe*, 33 Tex. 624. See : *Ante*, § 1958, *et seq.*

⁵ See : *Ante*, § 1962.

⁶ 2 Bl. Com. 182 ;

2 Cruise Dig. (4th ed.) 376.

garded as the entry and seisin of all. Livery of seisin made by one joint tenant will inure to the benefit of all.¹ An entry and occupation by one is an entry and occupation by all;² consequently a re-entry made by one tenant in common is as effectual as if it were made by the act of all.³

SEC. 2005. **Same—Right of survivorship.**—Out of the intimate union of interest and possession existing between joint tenants arises the most important incident characteristic of an estate in joint tenancy,—the right of survivorship.⁴ We have already seen⁵ that by survivorship it is understood that upon the death of one joint tenant the entire estate remains to the survivor or survivors, and at length to the last survivor, and does not pass to the heirs or representatives of the deceased co-tenant.⁶ According to this doctrine the survivor alone is entitled to the whole estate created by the original grant, whatever it may be.⁷ This right of the survivor was not favored in equity in England,⁸ and in this country is considered as repugnant to the modern sense of justice to the heirs,⁹ and has been specially abolished by statute in many of the states, except so far as it relates to trustees and other persons holding a joint estate in a fiduciary capacity.¹⁰ In other of the states the common-law rule obtains, unless the instrument creating the estate expressly declares otherwise.¹¹

¹ 1 Co. Litt. (19th ed.) 49b.

² *Small v. Clifford*, 38 Me. 213;
Ford v. Grey, 6 Mod. 44.

See: *Drane v. Gregory*, 3 B.
Mon. (Ky.) 619.

³ 2 Bl. Com. 182;

2 Cruise Dig. (4th ed.) 376.

⁴ 2 Co. Litt. (19th ed.) 181b;
2 Cruise Dig. (4th ed.) 369.

⁵ See: *Ante*, §§ 1917, 1975.

⁶ *De Witt v. San Francisco*, 2 Cal.
289;

Cray v. Willis, 2 Pr. Wms. 530;
Brompton v. Alkis, 2 Vern. 556;
2 Bl. Com. 183.

⁷ *Overton v. Lacy*, 6 T. B. Mon.
(Ky.) 13; s.c. 17 Am. Dec. 111;
2 Bl. Com. 184.

⁸ *Rigden v. Vallier*, 3 Atk. 731;
Gould v. Kemp, 2 Myl. & K. 309.

⁹ *Randall v. Phillips*, 3 Mas. C. C.
378, 386; s.c. Fed. Cas. No.
11555.

See: *Barclay v. Hendrick*, 3 Dana
(Ky.) 378, 380.

¹⁰ See: *Parson v. Boyd*, 20 Ala. 112;
Phelps v. Jepson, 1 Root (Conn.)
48; s.c. 1 Am. Dec. 33;

Nichols v. Denny, 37 Miss. 59;

Miles v. Fisher, 10 Ohio 1; s.c.
36 Am. Dec. 61;

Jenks v. Backhouse, 1 Binn. (Pa.)
91;

Baird's Appeal, 3 Watts & S. (Pa.)
459;

Ball v. Deas, 1 Strob. (S. C.) Eq.
24; s.c. 49 Am. Dec. 651.

See: *Ante*, § 1972.

¹¹ *Hoffman v. Stigers*, 28 Iowa 302;
Purdy v. Purdy, 3 Md. Ch. 547;

SEC. 2006. **Same—Same—How destroyed.**—We have already seen that one of the incidents of joint estates is the right and power to convey the common property.¹ Such conveyance to a third person on the part of one of the joint tenants will destroy the right of survivorship;² and should one joint tenant mortgage his interest in the common estate it will, to that extent, destroy or suspend the *jus accrescendi*, or right of survivorship.³ Such right, however, cannot be taken away or suspended by the devise of the share of a deceased co-tenant.⁴

SEC. 2007. **Same—Waste.**—Under the statute of Westminster,⁵ where one co-tenant in a joint tenancy misuses or abuses the property while in his possession, whereby injury results to the other co-tenants, they will be entitled to an action of waste against him.⁶ Such co-tenant will be held liable for negligence in keeping up the necessary repairs, as well as for doing any affirmative act which injures the estate.⁷ And in those cases where willful and malicious destruction of the property is threatened, such waste may be restrained by injunction.⁸

- Jones v. Crane, 82 Mass. (16 Gray) 308 ;
 Webster v. Vandeventer, 72 Mass. (6 Gray) 428 ;
 Stimpson v. Batterman, 59 Mass. (5 Cush.) 153 ;
 Shaw v. Hearsey, 5 Mass. 521, 522 ;
 Sergeant v. Steinberger, 2 Ohio 305 ; s.c. 15 Am. Dec. 553 ;
 4 Kent Com. (13th ed.) 361.
¹ See : *Ante*, §§ 1958–1962.
² 2 Co. Litt. (19th ed.) 273b.
³ Simpson v. Ammons, 1 Binn. (Pa.) 175 ; s.c. 2 Am. Dec. 425 ;
 York v. Stone, 1 Salk. 158 ;
 1 Eq. Cas. Abr. 293.
⁴ Duncan v. Forrer, 6 Binn. (Pa.) 193 ;
 2 Co. Litt. (19th ed.) 185b.
⁵ Westm. II., c. 22.
⁶ Sheils v. Stark, 14 Ga. 429 ;
 2 Bl. Com. 183.
⁷ Shiels v. Stark, 14 Ga. 429 ;
 Fightmaster v. Beasley, 7 J. J. Marsh. (Ky.) 410 ;
 Hines v. Robinson, 57 Me. 324, 328 ; s.c. 99 Am. Dec. 772 ;
 Hutchinson v. Chase, 39 Me. 508 ;
 s.c. 63 Am. Dec. 645 ;
 Hastings v. Hastings, 110 Mass. 280, 285 ;
 Chesley v. Thompson, 3 N. H. 9 ;
 s.c. 14 Am. Dec. 324 ;
 Odiorne v. Lyford, 9 N. H. 502 ;
 s.c. 32 Am. Dec. 387 ;
 Elwell v. Burnside, 44 Barb. (N. Y.) 447, 454 ;
 Hyde v. Stone, 9 Cow. (N. Y.) 230 ; s.c. 18 Am. Dec. 501 ;
 Farr v. Smith, 9 Wend. (N. Y.) 338 ; s.c. 24 Am. Dec. 162 ;
 nders v. Meredith, 3 Dev. & B. (N. C.) L. 199 ;
 Harman v. Gartman, 1 Harp. (S. C.) L. 430 ;
 Hayden v. Merrill, 44 Vt. 336 ;
 s.c. 8 Am. Rep. 372 ;
 McLellan v. Jenness, 43 Vt. 183 ;
 s.c. 5 Am. Rep. 270.
 Martin v. Knowlys, 8 Durnf. & E. (8 T. R.) 146 ;
 Wilbraham v. Snow, 2 Saund. 47 ;
 Twort v. Twort, 16 Ves. 128 ; s.c. 10 Rev. Rep. 141.

SECTION VIII.—PARTITION OF JOINT ESTATES.

- SEC. 2008. Introductory.
- SEC. 2009. Definition of partition.
- SEC. 2010. Partition at common law.
- SEC. 2011. Partition under statute.
- SEC. 2012. Kinds of partition.
- SEC. 2013. Same—Voluntary partition.
- SEC. 2014. Same—Same—By arbitrators.
- SEC. 2015. Same—Involuntary partition.
- SEC. 2016. Same—Parol partition.
- SEC. 2017. Same—Partial partition.
- SEC. 2018. Who may have partition.
- SEC. 2019. Same—Seisin requisite.
- SEC. 2020. What may be partitioned.
- SEC. 2021. Parties in action for partition.
- SEC. 2022. Pleadings and practice in actions for partition.
- SEC. 2023. Trial of title in partition.
- SEC. 2024. Judgment or decree in action for partition.
- SEC. 2025. Manner of allotment.
- SEC. 2026. Same—Owelty.
- SEC. 2027. Same—Sale of land for division.
- SEC. 2028. Warranty in partition deeds.
- SEC. 2029. Effect of partition.

SECTION 2008. *Introductory.*—We have already seen that joint estates are founded upon what are known as “the four unities.”¹ A destruction of any of these unities will sever and destroy the estate,² except the unity of time, which, as it respects only the original commencement of the estate, cannot be affected by any subsequent transaction.³ Thus the destruction of the unity of interest will be a destruction of the joint estate; and this destruction of interest may be brought about either by the act of the parties themselves, or by the operation of law. Where a lease is executed for the common property,⁴ the jointure will be severed;⁵ and where a common estate descends to one of the tenants or his heirs this will constitute a sever-

¹ See: *Ante*, § 2000.

² *Denne d. Bowyer v. Judge*, 11 East 288; s.c. 10 Rev. Rep. 511; *Chester v. Willan*, 2 Saund. 96; *Brown v. Raindle*, 3 Ves. 257.

³ 2 Cruise Dig. (4th ed.) 378.

⁴ Thus it is said by Lord COKE, that if a man makes a lease to two for their lives, and after grants

the reversion to one of them in fee, the jointure will thereby sever, and the reversion will be executed for the one moiety; and for the other moiety there will be a tenant for life with reversion to the grantee.

1 Inst. 182b.

⁵ 1 Inst. 182b.

ance and destruction of the jointure by operation of law.¹ A joint tenancy may also be destroyed by the destruction of unity of title ; as where one joint tenant conveys his share to a stranger. The reason for this is because the grantee and a remaining joint tenant hold by several titles, the alienee coming into one moiety by the conveyance of one of the joint tenants, and the other joint tenant holding the other moiety by feoffment.² On this principle the execution of a mortgage by two or more joint tenants is a severance of the joint estate.³ Another method of destroying the joint tenancy is by disuniting the possession. The reason for this is that joint tenants being seized *per my et per tout*, everything that tends to narrow that interest is a severance and a destruction of the estate. Thus it has been said that an alienation by one joint tenant to a stranger severs the joint tenancy by destroying the unity of title ; it also severs the estate by destroying the unity of possession, the alienee and the remaining tenant having several freeholds.⁴ Littleton says, if there be two joint tenants in fee, and one of them makes a lease for life to a stranger, the joint tenancy is severed. Lord Coke observes that, in this case, there is also a severance of the reversion. And it has been stated that a lease for years made by one joint tenant will bind his companion, so that it operates as a severance *pro tanto*.⁵

SEC. 2009. **Definition of partition.**—By partition is understood the act of dividing up joint estates in severalty among the co-tenants, allotting to two or more of such tenants his share in severalty, each taking a distributive part.⁶ This distribution can be made of all joint estates in possession, except such as are held by entirety.⁷ And to this general rule there is a further exception in case of an ex-

¹ 2 Cruise Dig. (4th ed.) 379.

² Denne d. Bowyer v. Judge, 11 East 288; s.c. 10 Rev. Rep. 511 ; 2 Co. Litt. (19th ed.) 188b.

³ Simpson v. Ammons, 1 Binn. (Pa.) 175 ; s.c. 2 Am. Dec. 425.

⁴ 2 Cruise Dig. (4th ed.) 380.

⁵ 2 Co. Litt. (19th ed.) 191a.

⁶ Anderson L. Dict. 749 ;

2 Bl. Com. 323 ;

2 Bouv. Inst. 410, 411 ;

2 Cruise Dig. (4th ed.) 394.

See: Weiser v. Weiser, 5 Watts (Pa.) 279 ; s.c. 30 Am. Dec. 313.

⁷ Bennett v. Child, 19 Wis. 362, 364 ; s.c. 88 Am. Dec. 692.

press condition against partition in the instrument creating the estate ; in which case an attempt to secure a partition of the estate would result in its forfeiture.¹ But such conditions must be clearly expressed in the deed and manifest an unmistakable intention to prevent partition ;²

¹ *Hunt v. Wright*, 47 N. H. 396, 399 ; s.c. 93 Am. Dec. 451.

See : *Collins Mfg. Co. v. Marcy*, 25 Conn. 242 ;

Hooper v. Cummings, 45 Me. 359 ;

Richardson v. Merrill, 21 Me. 47 ;

Savage v. Mason, 57 Mass. (3 Cush.) 500 ;

Fisher v. Dewerson, 44 Mass. (3 Met.) 544, 546 ;

Gray v. Blanchard, 25 Mass. (8 Pick.) 284 ;

Emerson v. Simpson, 43 N. H. 475 ; s.c. 82 Am. Dec. 168 ;

Chapin v. School District, 35 N. H. 445, 451 ;

Wood v. Cheshire, 32 N. H. 421, 423 ;

Gillis v. Bailey, 21 N. H. 149, 150 ; s.c. 17 N. H. 18 ;

Cornelius v. Ivins, 26 N. J. L. (2 Dutch.) 376 ;

Southard v. Central R. Co., 26 N. J. L. (2 Dutch.) 13 ;

Stuyvesant v. Mayor, 11 Paige Ch. (N. Y.) 414 ;

Parsons v. Miller, 15 Wend. (N. Y.) 561, 564 ;

Pennsylvania R. Co. v. Parke, 42 Pa. St. 31.

In *Hunt v. Wright*, *supra*, the condition in a conveyance of land in undivided shares to the individual members of an association for the purpose of erecting and managing a hotel, that the land was to be held in common, without partition or division, subject to the articles of the association, was held not invalid as repugnant to the estate granted, or upon grounds of public policy ; and that each of the grantees, and those claiming under them, were estopped to claim partition as against the others. In this case the court say : "The proviso in the deed is not repugnant to the estate granted, for originally at common law a tenant in common could not be compelled to make partition

(Litt., § 318 ; 2 Co. Litt. (19th ed.) 187a ; 2 Bl. Com. 194) ; and the right given by statute, being for the benefit of the party, may be waived by him. *Coleman v. Coleman*, 19 Pa. St. 100 ; s.c. 57 Am. Dec. 641 ; *Broom's Leg. Max.* 547. It is not in restraint of alienation, for each tenant may convey his share at his pleasure, nor does it prevent a beneficial enjoyment of the profits, for by the articles of association the rents, after deducting the incidental expenses, are to be divided among the tenants in proportion to their shares ; it is merely a partial and temporary restriction as to the mode of occupation. *Gray v. Blanchard*, 25 Mass. (8 Pick.) 284, 289. Similar provisions have frequently been treated as valid : 1 *Shep. Touch.* 129, 130 ; *Gray v. Blanchard*, 25 Mass. (8 Pick.) 284, 289 ; *Gillis v. Bailey*, 17 N. H. 18 ; s.c. 21 N. H. 149, 150 ; *Emerson v. Simpson*, 43 N. H. 475 ; s.c. 82 Am. Dec. 184 ; *Chapin v. School District*, 35 N. H. 451 ; *Woods v. Cheshire*, 32 N. H. 423 ; *Savage v. Mason*, 57 Mass. (3 Cush.) 500 ; *Richardson v. Merrill*, 21 Me. 47, 49 ; *Fisher v. Dewerson*, 44 Mass. (3 Met.) 546 ; *Parsons v. Miller*, 15 Wend. (N. Y.) 564 ; *Stuyvesant v. Mayor*, 11 Paige Ch. (N. Y.) 414 ; *Cornelius v. Ivins*, 26 N. J. L. (2 Dutch.) 376 ; *Southard v. Central R. Co.*, 26 N. J. L. (2 Dutch.) 13 ; *Collins Mfg. Co. v. Marcy*, 25 Conn. 242 ; *Hooper v. Cummings*, 45 Me. 359 ; *Pennsylvania R. Co. v. Parke*, 42 Pa. St. 31 ; and although the provision in some of these cases was by covenant, yet alienation can no more be restrained by covenant than by condition."

² *Spaulding v. Woodward*, 53 N. H. 573 ; s.c. 16 Am. Rep. 392.

for if the language used in the deed is of doubtful meaning, the courts will always interpret it with reference to the probable intention of the parties, which must always be made apparent in order to operate as a restraint or incumbrance upon the full and free enjoyment, title, and control of the property conveyed by deed. Thus, restrictive conditions are never favored in law; and if it be doubtful whether a clause in a deed imports a condition or a covenant, the latter will be held to have been intended by the parties.¹ With the exceptions above noted partition is said to be a matter of right,² and partition may be had of all joint estates and joint tenancies, as well as tenancies in common.³

SEC. 2010. Partition at common law.—At common law the owner of a joint estate could not compel his companion to make partition, except in those cases where the property was held as coparceners;⁴ but the writ of parti-

The right of partition may be waived by the parties in interest, who, by express condition or proviso, may restrain and inhibit the exclusive beneficial use and enjoyment of estates holden in common or joint tenancy, to any extent short of an absolute alienation.

Coleman v. Coleman, 19 Pa. St. 100; s.c. 57 Am. Dec. 641;

Avery v. Payne, 12 Mich. 540;

Hunt v. Wright, 47 N. H. 396; s.c. 93 Am. Dec. 451;

Hoyt v. Kimball, 49 N. H. 322;

Doe d. Mitchinson v. Carter, 8 Durnf. & E. (8 T. R.) 57, 60; s.c. 4 Rev. Rep. 586;

Platt on Cov. 404;

Broom's Leg. Max. 539.

¹ *Spaulding v. Woodward*, 53 N. H. 573; s.c. 16 Am. Rep. 392;

Hoyt v. Kimball, 49 N. H. 322;

² *Spaulding v. Woodward*, 53 N. H. 573; s.c. 16 Am. Rep. 392;

Morrill v. Morrill, 5 N. H. 134, 136.

³ *Lovelle v. Menard*, 6 Ill. (1 Gilm.) 39; s.c. 41 Am. Dec. 161;

Batterton v. Chiles, 12 B. Mon. (Ky.) 348; s.c. 54 Am. Dec. 539;

Hanson v. Willard, 12 Me. 142; s.c. 28 Am. Dec. 162;

Potter v. Wheeler, 13 Mass. 504;

Mitchell v. Starbuck, 10 Mass. 5; *Higginbottom v. Short*, 25 Miss. 160; s.c. 57 Am. Dec. 198;

Holmes v. Holmes, 2 Jones (N. C.) Eq. 334;

Harman v. Kelly, 14 Ohio 502; s.c. 45 Am. Dec. 552;

Coleman v. Coleman, 19 Pa. St. 100; s.c. 57 Am. Dec. 641;

Witherspoon v. Dunlap, 1 Harp. (S. C.) L. 390;

Wiseley v. Findlay, 3 Rand. (Va.) 361, s.c. 15 Am. Dec. 712;

Parker v. Girard, Amb. 236;

Cartwright v. Pultney, 2 Atk. 380;

Turner v. Morgan, 8 Ves. 143; *Baring v. Nash*, 1 Ves. & B. 551.

Impartable estates.—For instances in which partition will not be made,

See *Funk v. Haldeman*, 53 Pa. St. 229, 246;

Brown v. Lutheran Church, 23 Pa. St. 495, 500;

Coleman v. Grubb, 23 Pa. St. 393, 407;

Brown v. Turner, 1 Aik. (Vt.) 350; s.c. 15 Am. Dec. 696.

⁴ *Venable v. Beauchamp*, 3 Dana (Ky.) 321; s.c. 28 Am. Dec. 74;

Coles v. Wooding, 2 Pat. & H. (Va.) 189, 197;

1 Co. Litt. (19th ed.) 117b.

tion was given to joint tenants and tenants in common by statute of Henry VIII.,¹ which expressly provides that after partition they shall have aid of each other during the warranty; in the same manner as was used between the coparceners;² and this mode of partition continued in England until the writ of partition was abolished by a statute of William IV.,³ by the provisions of which the process of partition was greatly simplified.⁴

SEC. 2011. *Partition under statute.*—In this country the right of partition is secured in joint tenancy by statute;

¹ 31 Hen. VIII., c. 1; 31 Hen. VIII., c. 32.

² *Venable v. Beauchamp*, 3 Dana (Ky.) 321; s.c. 28 Am. Dec. 74, 78;

2 Bl. Com. 323.

³ 3 & 4 Wm. IV.

See: *Cook v. Allen*, 2 Mass. 462, 469;

McKee v. Straub, 2 Binn. (Pa.) 1.

⁴ *Cook v. Allen*, 2 Mass. 462, 469; *Baxter v. Knowles*, 1 Ves. Sr. 494.

See: *Gilbert v. Smith*, L. R. 11 Ch. Div. 78; s.c. 27 Moak Eng. Rep. 349;

Crookes v. Whitworth, L. R. 10 Ch. Div. 289; s.c. 26 Moak Eng. Rep. 700;

Gilbert v. Smith, L. R. 8 Ch. Div. 548; s.c. 25 Moak Eng. Rep. 465;

Porter v. Lopes, L. R. 7 Ch. Div. 358; s.c. 23 Moak Eng. Rep. 631;

In re Frith L. R. 3 Ch. Div. 618; s.c. 18 Moak Eng. Rep. 724;

Rawlinson v. Miller, L. R. 1 Ch. Div. 52; s.c. 15 Moak Eng. Rep. 644.

Partition—Common-law doctrine—
Cook v. Allen.—In *Cook v. Allen*, 2 Mass. 462, 469, the court say: "Partition, so necessary for the settlement and cultivation of the lands, is therefore impracticable by writ at common law. Inconveniences of this kind heretofore prevailed in England, and they were remedied by an act of Parliament passed 8 & 9 Will. III., c. 31. This act, after providing that to a writ of partition no plea in abatement should be received,

and that it shall not abate by the death of any of the tenants, enacts that, if any tenant to the writ shall not enter an appearance within fifteen days after the return of the attachment, notice having been given of such writ by leaving a copy thereof, forty days before the return, with the occupier or tenant in possession, or, if he cannot be found, with his wife, son, or daughter,—the court may proceed to examine the demandant's title, and give judgment, on default, for his purparty; and his purparty being regularly assigned by an execution of that judgment, the partition shall be good, and conclude all persons whatever, whatever right or title they had to the premises, although all persons concerned were not named in any of the proceedings, nor the title of the tenants truly set forth; and a power is given to the court, within a limited time, to permit a tenant against whom judgment has been rendered by default to plead in bar, or to show an inequality in the partition.

"The inconveniences of partition by writ, according to the course of the common law, were, in this state, remedied by a temporary provincial act, passed 22 Geo. II., c. 3. This act, after several continuances, expired, but its provisions were re-enacted, with some regulations, by the statute first mentioned, and which is the foundation of the partition in the case."

but aside from statute partition in equity is a matter of right,¹ and courts of equity have assumed jurisdiction of cases in partition from a very early period.² Yet to entitle a complainant to partition in equity he must show a clear legal title.³ This matter is regulated by statute in this country, and in the several states the various statutes regulating and enforcing the right of partition will be found to be substantially the same in relation to joint tenants and tenants in common.⁴

SEC. 2012. Kinds of partition.—The partition of an estate held in joint tenancy is affected by several different processes. Thus, it may be voluntary, by the act of the parties, or involuntary, by act of law; that is, may be had amicably or compulsorily—either by a suit in equity, or by special statutory proceedings, or an award of commissioners. Where by act of the parties it may be by either parol or in writing; complete or partial. Each of these methods of partition is worthy of especial consideration.

¹ *Donnor v. Quartermas*, 90 Ala. 164; s.c. 8 So. Rep. 715;

Allard v. Carleton, 64 N. H. 24; s.c. 3 Atl. Rep. 313;

Wiseley v. Findlay, 3 Rand. (Va.) 361; s.c. 15 Am. Dec. 712.

² *Adams v. Ames Iron Co.*, 24 Conn. 230;

Greenup v. Sewell, 18 Ill. 53;

Spitts v. Wells, 18 Mo. 468;

Whitten v. Whitten, 36 N. H. 332;

Hartshorne v. Hartshorne, 2 N. J. Eq. (1 H. W. Gr.) 349;

Moore v. Moore, 47 N. Y. 467, 469; s.c. 7 Am. Rep. 466;

Smith v. Smith, 10 Paige Ch. (N. Y.) 470;

Kennedy v. Kennedy, 43 Pa. St. 413; s.c. 82 Am. Dec. 574;

Bailey v. Sisson, 1 R. I. 233;

Baxter v. Knowles, 1 Ves. Sr. 494;

1 Story's Eq. Jur. (13th ed.), § 647.

See: *Post*, § 2018.

³ *Shearer v. Winston*, 33 Miss. 149;

Obert v. Obert, 10 N. J. Eq. (2 Stock.) 98;

Maxwell v. Maxwell, 8 Ired. (N. C.) Eq. 25;

Tabler v. Wiseman, 2 Ohio St.

207;

Albergott v. Chaplin, 10 Rich. (S. C.) Eq. 428;

Whitlock v. Hale, 10 Humph. (Tenn.) 64;

Wiseley v. Findlay, 3 Rand. (Va.) 361; s.c. 15 Am. Dec. 712;

McCall's Lessee v. Carpenter, 59 U. S. (18 How.) 297; bk. 15 L. ed. 389;

4 Kent's Com. (13th ed.) 365.

See: *Miller v. Chittenden*, 2 Iowa 315;

Haggin v. Haggin, 2 B. Mon. (Ky.) 317;

Hay v. Estell, 18 N. J. Eq. (3 C. E. Gr.) 251;

Hosford v. Merwin, 5 Barb. (N. Y.) 51.

⁴ *Bollo v. Navarro*, 33 Cal. 459;

Adam v. Ames Iron Co., 24 Conn. 230;

Griffin v. Griffin, 33 Ga. 107;

Potter v. Wheeler, 13 Mass. 504;

Platt v. Stewart, 10 Mich. 260;

Ledbetter v. Gash, 8 Ired. (N. C.) L. 462;

Whitten v. Whitten, 36 N. H. 326;

Brownell v. Brownell, 19 Wend. (N. Y.) 367.

SEC. 2013. **Same—Voluntary partition.**—Where co-tenants hold the joint estate with an unrestricted power of alienation, as is usually the case, they may make a partition thereof by mutual agreement and mutual conveyances to each other of their respective share in the different parts of the joint estate; but in order that such partition may be effectual, it must either be in writing or by a definite oral agreement,¹ and must be accompanied by possession in severalty of the respective parcels.²

SEC. 2014. **Same—Same—By arbitrators.**—In those cases where co-tenants seek to make partition by their own acts, they may select persons to act as arbitrators or commissioners to make the partition for them, but it is not usually understood that the award or report of such arbitrators or commissioners will operate upon the legal title. It has been said that partition cannot be made by award for the reason that a freehold cannot pass without livery; but this is understood as referring to the actual operation of the award itself, and not to the agreement of the co-tenants and possession thereunder.³ In those

¹ **Parol partition** is held by many courts to be void under the statute of frauds.

See: *Manly v. Pettee*, 38 Ill. 128; *Gardiner Mfg. Co. v. Heald*, 5 Me. 381, 384;

Porter v. Hill, 9 Mass. 34; s.c. 6 Am. Dec. 22;

Willey v. Barney's Lessee, 31 Miss. 644;

Dow v. Jewell, 18 N. H. 340, 354; s.c. 45 Am. Dec. 371;

Wood v. Fleet, 36 N. Y. 499, 501; s.c. 93 Am. Dec. 528;

Piatt v. Hubbell, 5 Ohio 244;

Gratz v. Gratz 4 Rawle (Pa.) 411;

Slice v. Derrick, 2 Rich. (S. C.) L. 627;

Coles v. Wooding, 2 Pat. & H. (Va.) 189.

Parol partition, followed by actual possession, gives to the parties all the rights and incidents of exclusive possession, which, if continued a sufficient length of time, ripens into a valid title under the statute of limitations. See: *Drane v. Gregory*, 3 B. Mon.

(Ky.) 619;

Lloyd v. Gordon, 2 Har. & McH. (Md.) 254;

Keay v. Goodwin, 16 Mass. 1;

Jackson v. Harder, 4 John. (N. Y.) 202; s.c. 4 Am. Dec. 262;

Corbin v. Jackson, 14 Wend. (N. Y.) 619; s.c. 28 Am. Dec. 550;

Piatt v. Hubbell, 5 Ohio 243;

Gregg v. Blackmore, 10 Watts (Pa.) 192;

Slice v. Derrick, 2 Rich. (S. C.) L. 627.

² *Patterson v. Martin*, 33 W. Va. 494; s.c. 10 S. E. Rep. 817.

See: *Manly v. Pettee*, 38 Ill. 128;

Rountree v. Lane, 32 S. C. 160;

s.c. 10 S. E. Rep. 941;

Warren v. Frederichs, 76 Tex.

647; s.c. 13 S. W. Rep. 643.

Voluntary partition must be clearly proven.

Patterson v. Martin, 33 W. Va. 494; s.c. 10 S. E. Rep. 817.

³ See *Allnott Part.*, § 1718;

Freeman Co-Ten. & Part. (2d ed.), § 395.

cases where arbitrators or commissioners thus selected partition the lands and award the same in severalty to the co-tenants, such award will be incomplete until confirmed by mutual conveyances executed in accordance therewith by the several co-tenants.¹

SEC. 2015. **Same—Involuntary partition.**—A partition of land held in joint tenancy may be made either by a suit in equity or by special statutory proceedings on the award of commissioners.² At common law, we have already seen,³ an action for the partition of a joint estate could not be maintained in England except in the case of an estate in coparcenary, until after the passage of the statute of Henry VIII. Statutes similar to that of Henry VIII. have been passed in a majority, if not all, of the states of the Union;⁴ so that in this country a decree in equity has the same effect as a judgment at common law.⁵

SEC. 2016. **Same—Parol partition.**—We have already seen⁶ that a parol partition of land owned by tenants in common is binding in those cases where possession is taken in pursuance thereof, and where the title rests in severalty.⁷ Some courts hold that a parol partition of lands between joint tenants and tenants in common is invalid under the statute of frauds; but the better opinion is thought to be that such a partition is not a sale or transfer of lands within the meaning of the statute of frauds.⁸ Particularly is the partition valid in all those cases where it is carried into effect by possession and

¹ *Johnson v. Wilson*, Willes 248.

² See: *Dana v. Jackson*, 6 Pa. St. 234, 237.

³ See: *Ante*, § 2011.

⁴ 4 Kent Com. (13th ed.) 364.

See: *Champion v. Spencer*, 1 Root (Conn.) 147;
Cook v. Allen, 2 Mass. 462;
McKee v. Straub, 2 Binn. (Pa.) 1;
Witherspoon v. Dunlap, 1 McC. (S.C.) L. 546.

⁵ *Hassett v. Ridgely*, 49 Ill. 197, 201;
Hoffman v. Stigers, 28 Iowa 302.

⁶ See: *Ante*, § 2012.

⁷ *McKnight v. Bell*, 135 Pa. St. 359;

s.c. 19 Atl. Rep. 1036;

1 Ball. Ann. L. Real Prop., § 444.

⁸ *McKnight v. Bell*, 135 Pa. St. 358; s.c. 19 Atl. Rep. 1036;

1 Ball. Ann. L. Real Prop., § 444;
Rider v. Maul, 46 Pa. St. 376.

See: *McMahn v. McMahn*, 13 Pa. St. 376; s.c. 53 Am. Dec. 481;

Ebert v. Wood, 1 Binn. (Pa.) 216; s.c. 2 Am. Dec. 436.

Calhoun v. Hays, 8 Watts & S. (Pa.) 127; s.c. 42 Am. Dec. 275;

Pugh v. Good, 3 Watts & S. Pa. 56; s.c. 37 Am. Dec. 534.

occupation in conformity thereto, where the tenants have distinct titles and the only object of the division is to ascertain the separate possessions.¹ And this is true even though some of the co-tenants are minors or *femes covert*, provided the partition is made with the acquiescence of the guardians or husbands respectively.² Where the partition merely severs the relation existing between tenants in common in the undivided whole, and vests title in a corresponding severalty, it is in no sense such a sale or transfer of title as to bring the transaction within the statute of frauds.³ The reason for this rule is the fact that the partition is not an acquisition or purchase of land, nor is it in any proper sense a transfer of the title to land ; it is a mere setting apart in severalty of the same interest held in common, not in other, but in the same lands. A parol partition, when fair and equal, and followed by due execution, we have already seen, binds even infants and *femes covert* ; and a judgment or a mortgage or the lien of a legacy against one of the tenants in common will, after the partition, *ipso facto*, cease to bind the whole as an entirety, and attach to his purport.⁴

SEC. 2017. **Same—Partial partition.**—The general rule is that the whole tract of real estate held in common must be partitioned at one time, where partition of the same is sought to be enforced by legal process.⁵ Yet any two or more co-tenants may unite in a petition for the partition of the common estate, and have their respective por-

¹ *Shepard v. Rinks*, 78 Ill. 188 ;
Mount v. Morton, 20 Barb. (N.
Y.) 123, 128 ;

Rider v. Maul, 46 Pa. St. 376 ;
Buzzell v. Gallagher, 28 Wis. 678.

² *McConnell v. Carey*, 48 Pa. St.
345.

See : *Dement v. Williams*, 44
Tex. 158.

³ *Mellon v. Reed*, 114 Pa. St. 649 ;
s.c. 8 Atk. Rep. 227 ;

Rider v. Maul, 46 Pa. St. 376.

⁴ *McKnight v. Bell*, 135 Pa. St.
358 ; s.c. 19 Atl. Rep. 1036.

Citing : *Long's Appeal*, 77 Pa. St.
151 ;

Darlington's Appropriation, 13
Pa. St. 430 ;

Bavington v. Clark, 2 Pen. & W.
(Pa.) 115 ; s.c. 21 Am. Dec.
432 ;

McLanahan v. Wyant, 1 Pen. &
W. (Pa.) 96 ; s.c. 21 Am. Dec.
363.

⁵ *Bigelow v. Littlefield*, 52 Me. 24 ;
s.c. 83 Am. Dec. 484.

See : *Sutter v. San Francisco*, 36
Cal. 112, 116 ;

Miller v. Miller, 30 Mass. (13
Pick.) 237 ;

Sweeny v. Meany, 1 Miles (Pa.)
167.

tions set off to them in severalty,¹ in all those cases where the premises are capable of being subdivided. Where the property held in common consists of several tracts of land, but only one co-tenant has an interest in all, partition of all cannot be had in one suit, because all the parties are not interested in all the tracts of land.²

SEC. 2018. **Who may have partition.**—An action for partition can be maintained only by some one having an interest or estate in the land to be divided.³ All co-tenants in joint tenancy and tenancy in common are entitled to partition of the common estate,⁴ as a matter of right, in all cases where he can show a clear legal title,⁵ without regard to what inconvenience or injury it may be to the common estate.⁶ But to entitle him to maintain an action in partition the co-tenant must be in possession, or entitled to the immediate possession of the land to be divided.⁷ Hence tenants in common of a reversion or remainder cannot maintain an action of partition against the owners of the principal estate without

- ¹ *Shull v. Kennon*, 12 Ind. 34, 35;
Bigelow v. Littlefield, 52 Me. 24;
 s.c. 83 Am. Dec. 484;
Upham v. Bradley, 17 Me. 423,
 427;
Duncan v. Sylvester, 16 Me. 388;
Clark v. Parker, 106 Mass. 554;
Allen v. Hoyt, 46 Mass. (5 Met.)
 324, 326;
Colton v. Smith, 28 Mass. (11
 Pick.) 311; s.c. 22 Am. Dec.
 375;
Arms v. Lyman, 22 Mass. (5 Pick.)
 210;
Page v. Webster, 8 Mich. 265;
Ladd v. Perley, 18 N. H. 396;
Northrop v. Anderson, 8 How.
 (N. Y.) Pr. 351.
- ² *Matter of Prentiss*, 7 Ohio (pt. II.)
 129; s.c. 30 Am. Dec. 203.
 See: *Harman v. Kelly*, 14 Ohio
 502; s.c. 45 Am. Dec. 552.
- ³ *Harris v. Larkins*, 22 Hun (N. Y.)
 488;
Stryker v. Lynch, 11 N. Y. Leg.
 Obs. 116.
- ⁴ *Scovill v. Kennedy*, 14 Conn. 339,
 349;
Campbell v. Lowe, 9 Md. 500;
 s.c. 66 Am. Dec. 339;
- Higginbottom v. Short*, 25 Miss.
 160; s.c. 57 Am. Dec. 198;
Holmes v. Holmes, 2 Jones (N.
 C.) Eq. 334;
Danvers v. Dorrity, 14 Abb. (N.
 Y.) Pr. 200, 206;
Smith v. Smith, 10 Paige Ch. (N.
 Y.) 470;
Harburg v. Hussy, 15 Jur. 596;
 s.c. 5 Eng. L. & Eq. 81.
- ⁵ *Wiseley v. Findlay*, 3 Rand. (Va.)
 331; s.c. 15 Am. Dec. 712.
- ⁶ *Hanson v. Willard*, 12 Me. 142,
 s.c. 28 Am. Dec. 162;
Ledbetter v. Cash, 8 Ired. (N. C.)
 L. 462;
Witherspoon v. Dunlap, 1 Harp.
 (S. C.) L. 390.
- ⁷ *Manolt v. Brush*, 19 N. Y. Daily
 Reg. No. 137; s.c. 3 Law Bull.
 66.
 See: *McConnel v. Kibbe*, 43 Ill.
 12; s.c. 92 Am. Dec. 93;
Clapp v. Bromagham, 9 Cow. (N.
 Y.) 530, rev'g 5 Cow. (N. Y.)
 295;
Thomas v. Garvan, 4 Dev. (N. C.)
 L. 223; s.c. 25 Am. Dec. 708;
Matter of Prentiss, 7 Ohio (pt. II.)
 129; s.c. 30 Am. Dec. 203.

their concurrence.¹ While an action for partition can be maintained only by some one having an estate or interest in the land, thus excluding a *cestui que trust*,² yet it has been held that such action may be maintained by the committee of a lunatic or an habitual drunkard.³ An action for partition may also be maintained by the grantee of a widow's right of dower in the land,⁴ or of the interest of a devisee;⁵ by the guardian of a minor who is the tenant in common with adults;⁶ by the heirs of a deceased person or their grantee;⁷ by mortgagees holding the title;⁸ by a partner;⁹ by tenants in common, either

¹ *Brown v. Brown*, 8 N. H. 93;
Hughes v. Hughes, 63 How. (N. Y.) Pr. 408; s.c. 11 Abb. (N. Y.) N. C. 37;

Striker v. Mott, 2 Paige Ch. (N. Y.) 387; s.c. 22 Am. Dec. 646;

Tabler v. Wiseman, 2 Ohio St. 207;

Nichols v. Nichols, 28 Vt. 228; s.c. 67 Am. Dec. 699.

See: *Morse v. Morse*, 85 N. Y. 57;

Brevoort v. Brevoort, 70 N. Y. 136;

Blakely v. Calder, 15 N. Y. 617, aff'g 13 How. (N. Y.) Pr. 476.

² *Stryker v. Lynch*, 11 N. Y. Leg. Obs. 116.

³ *Gorham v. Gorham*, 3 Barb. Ch. (N. Y.) 24.

See: *Snowden v. Dunlavey*, 11 Pa. St. 522;

Matter of Latham, 6 Ired. (N. C.) Eq. 231, 406.

⁴ *Morgan v. Staley*, 11 Ohio 389.

A tenant in dower may not demand partition.

Coles v. Coles, 15 John. (N. Y.) 319, 320.

⁵ *De Castro v. Barry*, 18 Cal. 96;

Stewart's Appeal, 56 Pa. St. 241.

See: *King v. Howard*, 27 Mo. 21;

Collamer v. Hutchins, 27 Vt. 733, 734.

⁶ *Shull v. Kennon*, 12 Ind. 35;

Mitchell v. Jones, 50 Mo. 438;

Thornton v. Thornton, 27 Mo. 302; s.c. 72 Am. Dec. 266.

Compare: *Galleo v. Eagle*, 65 Barb. (N. Y.) 583; s.c. 1 Thomp. & C. (N. Y.) 124;

Zirkle v. McCue, 26 Gratt. (Va.) 517.

⁷ *Van Der Werker v. Van Der*

Werker, 7 Barb. (N. Y.) 221.

Between the living heirs and the one in *in ventre sa mere* cannot be had.

Gillespie v. Nabors, 59 Ala. 441; s.c. 31 Am. Rep. 20.

See: *Hone v. Van Schaick*, 3 Barb. Ch. (N. Y.) 488, 508;

Mason v. Jones, 2 Barb. (N. Y.) 229, 252, aff'g 2 Sandf. Ch. (N. Y.) 432;

Bowman v. Tallman, 27 How. (N. Y.) Pr. 212, 272, aff'd 3 Abb. App. Dec. 182n; 40 How. (N. Y.) Pr. 1;

Jenkins v. Freyer, 4 Paige Ch. (N. Y.) 47, 53;

Marsellis v. Thalhimier, 2 Paige Ch. (N. Y.) 35; s.c. 21 Am. Dec. 66;

Harper v. Archer, 12 Miss. (4 Smed. & M.) 99, 109; s.c. 43 Am. Dec. 472.

Partition among the heirs cannot be had while there remains the lien of the administrator for the payment of the intestate's debts.

Hubbard v. Ricart, 3 Vt. 207; s.c. 23 Am. Dec. 198.

⁸ *Welch v. Agar*, 84 Ga. 583; s.c. 11 S. E. Rep. 149; 20 Am. St. Rep. 380.

⁹ *Hughes v. Devlin*, 23 Cal. 501;

Jackson v. Deese, 35 Ga. 84, 88;

Danvers v. Dorrity, 14 Abb. (N. Y.) Pr. 200, 208;

Canfield v. Ford, 28 Barb. (N. Y.) 336, aff'g 16 How. (N. Y.) Pr. 473;

Collins v. Dickinson, 1 Hayw. (N. C.) L. 240.

See: *Wild v. Milne*, 26 Beav. 504;

Darby v. Darby, 3 Drew. 501.

of an estate for life or in fee ;¹ by a tenant by the curtesy initiate ;² by tenants for life in possession ;³ by a person owning the equitable title,⁴ and by the owners of an equity of redemption before the mortgagee has entered and taken possession under his mortgage.⁵ But partition cannot be had by an assignee in bankruptcy ;⁶ by a *cestui que trust* ;⁷ by tenants in dower ;⁸ by a tenant by curtesy who has the right to the exclusive possession for life, as against the remainderman ;⁹ by a tenant in fee on a contingency, where the contingency has not transpired ;¹⁰ by a tenant who is in possession with power to sell and divide the proceeds,¹¹ or by tenants in remainder or reversion,¹² during the continuance of the particular estate.¹³

SEC. 2019. **Same—Seisin requisite.**—We have already seen,¹⁴ that to entitle a co-tenant to maintain an action for partition he must have the actual possession, or the right to the immediate possession of the

- ¹ *Hawkins v. McDougall*, 125 Ind. 397 ; s.c. 25 N. E. Rep. 807.
- ² *Riker v. Darke*, 4 Edw. Ch. (N. Y.) 668 ;
Otley v. McAlpine Heirs, 2 Gratt. (Va.) 340, 343.
- ³ Tenants for life in possession may have partition as between themselves.
Jenkins v. Fahey, 73 N. Y. 355.
- ⁴ *Welch v. Anderson*, 28 Mo. 293 ;
Willing v. Brown, 7 Serg. & R. (Pa.) 467.
 See : *Coale v. Barney*, 1 Gill & J. (Md.) 324, 341 ;
Hopkins v. Toel, 4 Humph (Tenn.) 46.
- ⁵ *Upham v. Bradley*, 17 Me. 423 ;
Call v. Barker, 12 Me. 320 ;
Colton v. Smith, 28 Mass. (11 Pick.) 311 ; s.c. 22 Am. Dec. 375.
 See : *Bradley v. Fuller*, 40 Mass. (23 Pick.) 1.
- ⁶ Unless he makes it appear that it will be to the interest of his trust to have the land partitioned, and that he is acting under the direction of the court.
Jewett Trustees v. Perrette, 127 Ind. 97 ; s.c. 26 N. E. Rep. 685.
- ⁷ *Stryker v. Lynch*, 11 N. Y. Leg. Obs. 116.
- ⁸ *Coles v. Coles*, 15 John. (N. Y.) 319, 320 ;
 Partition by the grantee of a tenant in dower may be had.
Morgan v. Staley, 11 Ohio 389.
- ⁹ *Seiders v. Giles*, 141 Pa. St. 93 ; s.c. 21 Atl. Rep. 514.
- ¹⁰ *Hays v. Davis*, 105 N. C. 482 ; s.c. 10 S. E. Rep. 912.
- ¹¹ *Carr, Petitioner*, 16 R. I. 645 ; s.c. 19 Atl. Rep. 145.
- ¹² *Adams v. Ames Iron Co.*, 24 Conn. 230 ;
Hunnewell v. Taylor, 60 Mass. (6 Cush.) 472 ;
Hodgkinson, Petitioner, 29 Mass. (12 Pick.) 374 ;
Brown v. Brown, 8 N. H. 93 ;
Tabler v. Wiseman, 2 Ohio St. 207 ;
Savage v. Savage, 19 Oreg. 113 ; s.c. 23 Pac. Rep. 890 ;
Ziegler v. Grim, 6 Watts (Pa.) 106 ;
Nichols v. Nichols, 28 Vt. 228 ; s.c. 67 Am. Dec. 699 ;
Merritt v. Hughes, 36 W. Va. 356 ; s.c. 15 S. E. Rep. 56.
- ¹³ *Merritt v. Hughes*, 36 W. Va. 356 ; s.c. 15 S. E. Rep. 56.
- ¹⁴ See : *Ante*, § 2018.

property;¹ consequently, where a co-tenant has been disseized he cannot maintain an action for partition of the estate;² but a mere constructive seisin will be sufficient to sustain an action for partition in the absence of proof of an actual ouster.³

SEC. 2020. *What may be partitioned.*—Any estate held in joint tenancy, whether it be in freehold or for life, may be partitioned,⁴ and in some states there may be a partition of a vested remainder.⁵ It has been held that there may be a partition of standing timber,⁶ and also of a mill and mill privileges;⁷ but an early Vermont case holds that a saw-mill, mill-yard and mill-pond are not partable, and for that reason are not proper subjects of partition.⁸ This decision is founded upon the theory that where partition cannot be made without operating, prac-

¹ *Call v. Barker*, 12 Me. 320;
Mussey v. Sanborn, 15 Mass. 152;
Lambert v. Blumenthal, 26 Mo.

471;
Riker v. Darke, 4 Edw. Ch. (N. Y.) 668;

Brownell v. Brownell, 19 Wend. (N. Y.) 367;

Tabler v. Wiseman, 2 Ohio St. 207;

Windsor v. Simpkins, 19 Oreg. 117; s.c. 23 Pac. Rep. 669;

Savage v. Savage, 19 Oreg. 112; s.c. 23 Pac. Rep. 890;

Austin v. Rutland R. Co., 45 Vt. 215;

2 Co. Litt. (13th ed.) 167.

² *Adam v. Ames Iron Co.*, 24 Conn. 230;

Call v. Barker, 12 Me. 320;
Hunnewell v. Taylor, 60 Mass. (6

Cush.) 472;
Marshal v. Crehore, 54 Mass. (13

Met.) 462;
Bonner v. Kennebeck Purchase, 7 Mass. 475;

Lambert v. Blumenthal, 26 Mo. 471;

Whitten v. Whitten, 36 N. H. 326;

Miller v. Dennett, 6 N. H. 109;
Stevens v. Enders, 13 N. J. L. (1

J. S. Gr.) 271;
Florence v. Hopkins, 46 N. Y. 182, 184;

Burhans v. Burhans, 2 Barb. Ch. (N. Y.) 398;

Clapp v. Bromaghan, 9 Cow. (N. Y.) 304; s.c. 8 Cow. (N. Y.) 746;

Bradshaw v. Callaghan, 8 John. (N. Y.) 558;

Brownell v. Brownell, 19 Wend. (N. Y.) 367;

Tabler v. Wiseman, 2 Ohio St. 207;

Brock v. Eastman, 28 Vt. 658; s.c. 67 Am. Dec. 733.

³ *Barnard v. Pope*, 14 Mass. 434; s.c. 7 Am. Dec. 325;

Rozier v. Johnson, 35 Mo. 326.

See: *Wommack v. Whitmore*, 58 Mo. 448;

Van Schuyver v. Mufford, 59 N. Y. 430.

⁴ *McQueen v. Turner*, 91 Ala. 273; s.c. 8 So. Rep. 863.

⁵ *Hilliard v. Scoville*, 52 Ill. 449;
Blakely v. Calder, 15 N. Y. 617,

aff'g 13 How. (N. Y.) Pr. 476.

⁶ *Steedman v. Weeks*, 2 Strob. (S. C.) Eq. 145; s.c. 49 Am. Dec. 660.

⁷ *Munroe v. Gates*, 42 Me. 178;

Bailey v. Rust, 15 Me. 440;

Hanson v. Willard, 12 Me. 142; s.c. 28 Am. Dec. 162;

Morrill v. Morrill, 5 N. H. 329;
Hills v. Dey, 14 Wend. (N. Y.) 204.

⁸ *Brown v. Turner*, 1 Aik. (Vt.) 350; s.c. 15 Am. Dec. 696.

tically, as a destruction of the property, it should not be ordered.¹ On the same principle it has been held that where the common property is chiefly valuable as an ore-bed, partition should be refused ; because the court cannot ascertain the value of the different parts.² It has been said that where a building is constructed upon a lot under an agreement to the effect that the first story and the ground hall shall be owned by one party, and the second story by another, with a right of ingress, egress, and regress over such ground for the owner of the upper story, that as between the parties there can be no partition.³

SEC. 2021. **Parties in action for partition.**—In an action for the partition of an estate held in joint tenancy, all persons interested in the property sought to be divided must be made parties to the proceedings, either as plaintiffs or as defendants ;⁴ otherwise they will not be bound by any judgment or decree that may be rendered.⁵ Thus in order that the decree in partition shall bind the holders of claims or incumbrances against the estate existing at the same time that the suit for partition is instituted, they must be made parties, in the absence of statutory provisions to the contrary.⁶ The committees of lunatics

¹ Freeman Co-Ten. & Part. (2d ed.), § 433.

² Conant v. Smith, 1 Aik. (Vt.) 67 ; s.c. 15 Am. Dec. 669 ;

Boston Franklinite Co. v. Condit, 19 N. J. Eq. (4 C. E. Gr.) 394.

See : Cooper v. Cedar Rapids, 42 Iowa 398 ;

Eberts v. Fisher, 54 Mich. 249 ; s.c. 20 N. W. Rep. 80 ;

Miller v. Miller, 30 Mass. (13 Pick.) 237.

³ Anderson School Township v. Milroy Lodge F. & A. M., No. 139, 130 Ind. 108 ; s.c. 29 N. E. Rep. 411.

⁴ Candy v. Stradley, 1 Del. Ch. 113 ; Kester v. Stark, 19 Ill. 328 ;

Harlan v. Stout, 22 Ind. 488 ; Newby v. Perkins, 1 Dana (Ky.)

440 ; s.c. 25 Am. Dec. 160 ; Sullivan v. Sullivan, 66 N. Y. 37,

rev'g 4 Hun (N. Y.) 198 ; Bogardus v. Parker, 7 How. (N.

Y.) Pr. 305 ;

Knapp v. Hungerford, 7 Hun (N. Y.) 588 ;

Braker v. Devereaux, 8 Paige Ch. (N. Y.) 513 ;

Harman v. Kelly, 14 Ohio 502 ; s.c. 45 Am. Dec. 552 ;

Lancaster v. Seay, 6 Rich. (S. C.) Eq. 111 ;

Barney v. Baltimore, 73 U. S. (6 Wall.) 280 ; bk. 18 L. ed. 825.

⁵ Harlan v. Stout, 22 Ind. 488 ;

Munroe v. Luke, 36 Mass. (19 Pick.) 39 ;

Cook v. Allen, 2 Mass. 462.

See : Foxcroft v. Barnes, 29 Me. 128 ;

Purvis v. Wilson, 5 Jones (N. C.) L. 22 ; s.c. 69 Am. Dec. 773.

⁶ De Uprey v. De Uprey, 27 Cal. 329, 332 ; s.c. 87 Am. Dec. 81 ;

Kilgour v. Crawford, 51 Ill. 249 ; Harlan v. Stout, 22 Ind. 488 ;

Call v. Barker, 12 Me. 320.

or habitual drunkards should be joined as a party plaintiff in all actions for the partition of real estate in which their wards or charges are interested;¹ also the guardian of an infant ward's estate;² the heirs of a deceased person or several grantees;³ the husband is a necessary party defendant where the wife seeks a partition of her separate estate;⁴ the wife of a tenant in common is a necessary party defendant,⁵ and a person in possession under a parol contract of purchase is a necessary party defendant to partition proceedings by one of several tenants in common holding legal title;⁶ a reversioner is also a necessary party to a suit in partition when the complainant is the owner of an undivided interest in the present estate, and also in the reversion, or where some of the other reversioners have also an undivided present estate in fee;⁷ but a person who merely holds an incumbrance upon the separate undivided share of one or more of the co-tenants is not a necessary party to an action for partition;⁸ and it has been said that before the assignment of her dower, a widow is not a necessary

Taylor v. Blake, 109 Mass. 513;
Colton v. Smith, 28 Mass. (11 Pick.) 311; s.c. 22 Am. Dec. 375;

Motley v. Blake, 12 Mass. 280;
Butler v. Roys, 25 Mich. 53; s.c. 12 Am. Rep. 218;

Burhaus v. Burhaus, 2 Barb. Ch. (N. Y.) 398;

Bradshaw v. Callaghan, 8 John. (N. Y.) 558;

Purvis v. Wilson, 5 Jones (N. C.) L. 22; s.c. 69 Am. Dec. 773.

Gorham v. Gorham, 3 Barb. Ch. (N. Y.) 24.

See: *Matter of Latham*, 6 Ired. (N. C.) Eq. 406;

Snowden v. Dunlavey, 11 Pa. St. 522.

² *Roodhouse v. Roodhouse*, 132 Ill. 360; s.c. 24 N. E. Rep. 55; 1 Ball. Ann. L. Real Prop. 281. In this case the court say: "It is error to render a decree for partition of property of a minor unless he is actually represented in the court either by a guardian, or a guardian *ad litem*, or a next friend."

Citing: *Hall v. Davis*, 44 Ill. 494;

Rhoads v. Rhoads, 43 Ill. 239;

McDaniel v. Correll, 19 Ill. 226; s.c. 68 Am. Dec. 587;

Cost v. Rose, 17 Ill. 276.

³ *Van Derwerker v. Van Derwerker*, 7 Barb. (N. Y.) 221.

⁴ *Brownson v. Gifford*, 8 How. (N. Y.) Pr. 389.

See: *Doe d. Short v. Prettyman*, 1 Houst. (Del.) 334;

Disbrow v. Folger, 5 Abb. (N. Y.) Pr. 53, 54.

⁵ *Rosekraus v. White*, 7 Lans. (N. Y.) 486.

⁶ *Sock v. Suba*, 31 Neb. 228; s.c. 47 N. W. Rep. 859.

⁷ *Striker v. Mott*, 2 Paige Ch. (N. Y.) 387; s.c. 22 Am. Dec. 646.

⁸ *Thurston v. Minke*, 32 Md. 574;

Low v. Holmes, 17 N. J. Eq. (2 C. E. Gr.) 148;

Townshend v. Townshend, 1 Abb. (N. Y.) N. C. 81;

Sebring v. Mersereau, 9 Cow. (N. Y.) 344, aff'g 1 Hopk. Ch. (N. Y.) 501;

Long's Appeal, 77 Pa. St. 151;

Baring v. Nash, 1 Ves. & B. 551.

See: *Lewis v. Atkinson*, 15 Iowa 361; s.c. 83 Am. Dec. 417.

party to an action for partition of an estate in which she claims dower rights.¹

SEC. 2022. Pleadings and practice in actions for partition.—We have already seen that in actions for partition of joint estates all persons interested should be made either parties plaintiff or defendant; but the non-joinder of a defendant in an action for partition at common law is merely matter of abatement,² and will not be made unless it show that some persons interested in the title are not parties to the proceedings.³ All proceedings in partition are *in rem*,⁴ and like real actions must be brought in the county and state in which the land lies.⁵ In the case of a partition among coparceners,⁶ or among heirs and devisees, notice must be given to all who do not join in the petition, or they will not be bound by the acts of the court.⁷ Where the statute requires notice to be given, and the service to be proved in a particular mode, the statute should be strictly pursued.⁸

SEC. 2023. Trial of title in action of partition.—In actions for partition, where the only issue presented by the pleadings is the partition of the land and the allotting of it to the alleged owners only in severalty, according to their respective interest, the title of the land is not put in issue; and a decree taken upon the issue thus raised may be conclusive as an estoppel only so far as to settle and bind the present interest of all those who are parties to the transaction from setting up after-acquired titles.⁹

¹ *Tanner v. Niles*, 1 Barb. (N. Y.) 560;
Gordon v. Sterling, 13 How. (N. Y.) Pr. 405;
Power v. Power, 7 Watts (Pa.) 205.
 See: *Green v. Putnam*, 1 Barb. (N. Y.) 500.
² *Hoxsie v. Ellis*, 4 R. I. 123.
³ *Noble v. Meyers*, 76 Tex. 280; s.c. 13 S. W. Rep. 299.
⁴ *Corwithe v. Griffing*, 21 Barb. (N. Y.) 9.
⁵ *Peabody v. Minot*, 41 Mass. (24 Pick.) 329, 333;
Bonner, Petitioner, 4 Mass. 122;
Platt v. Stewart, 10 Mich. 260;
Corwithe v. Griffing, 21 Barb. (N. Y.) 9;
Pillsbury's Lessee v. Dugan's Administrator, 9 Ohio 117; s.c. 34 Am. Dec. 427;
Brown v. McMullen, 1 Nott. & McC. (S. C.) L. 252.
⁶ *Newby v. Perkins*, 1 Dana (Ky.) 440; s.c. 25 Am. Dec. 160.
⁷ *Vick v. Vicksburg*, 2 Miss. (1 How.) 379; s.c. 31 Am. Dec. 167.
⁸ *Newby v. Perkins*, 1 Dana (Ky.) 440; s.c. 25 Am. Dec. 160.
⁹ *Habig v. Dodge*, 127 Ind. 31; s.c. 25 N. E. Rep. 182.
 See: *Hughes v. Carne*, 135 Ill. 519; s.c. 26 N. E. Rep. 517;

If the title be put in issue in partition proceedings, and is actually determined by the court, the decree will be conclusive. Where the title is put in issue proceedings for partition, the rule for trying title in actions brought for that purpose must prevail.¹

SEC. 2024. **Judgment or decree in action for partition.**--At common law the judgment upon a writ is *quod partitio feat*, that partition be made.² All judgments or decrees awarding partition are a bar to a subsequent petition for partition, where the parties to the questions put in issue are necessarily the same;³ because such a judgment establishes the title and concludes the parties,⁴ and is regarded as equivalent to an ordinary conveyance.⁵ Such judgments or decrees must set forth the estate and interest of each tenant in the property,⁶ and direct the manner in which the partition shall be made,⁷ a simple order directing that "partition be awarded" being held void.⁸ In directing a partition of improved lands the improvements, together with the lands on which they are erected, should be assigned to the co-tenant making such improvements in those cases where it can readily be done,⁹ and without making allowance against him for the increase in value occasioned by his improvements.¹⁰ In a case where the land cannot properly be divided the court will direct that it be sold, and may protect and secure

Davis v. Lennen, 125 Ind. 185; s.c. 24 N. E. Rep. 885.

The title not being in issue, the decree does nothing more than divide the land.

Davis v. Lennen, 125 Ind. 185; s.c. 24 N. E. Rep. 885.

Cloud upon title may be removed in partition proceedings.

Hughes v. Carne, 135 Ill. 519; s.c. 26 N. E. Rep. 517.

¹ Hawkins v. Taylor, 128 Ind. 431; s.c. 27 N. E. Rep. 1117.

² Dana v. Jackson, 6 Pa. St. 234, 237.

³ Colton v. Smith, 28 Mass. (11 Pick.) 311; s.c. 22 Am. Dec. 375.

⁴ Colton v. Smith, 28 Mass. (11 Pick.) 311; s.c. 22 Am. Dec. 375;

Jenkins v. Fahey, 73 N. Y. 355;

Mills v. Witherington, 2 Dev. & B. (N. C.) L. 433, 434.

⁵ Anderson v. Hughes, 5 Stro. (S. C.) L. 74.

⁶ Kilgour v. Crawford, 51 Ill. 249; Ledbetter v. Gash, 8 Ired. (N. C.) L. 462.

⁷ Harrell v. Harrell, 12 La. An. 549; Young v. Frost, 1 Md. 377.

⁸ Greenup v. Sewell, 18 Ill. 53.

See: Tibbs v. Allen, 27 Ill. 119.

⁹ Seale v. Soto, 35 Cal. 102;

Nelson v. Clay, 7 J. J. Marsh (Ky.) 138; s.c. 23 Am. Dec. 387.

See: Patrick v. Marshall, 2 Bibb (Ky.) 40; s.c. 4 Am. Dec. 670.

¹⁰ Nelson v. Clay, 7 J. J. Marsh. (Ky.) 138; s.c. 23 Am. Dec. 387.

See: Post, § 2025.

the respective rights of the parties in the proceeds of such sale, whether such rights be legal or equitable.¹ Where the estate to be partitioned consists of distinct kinds of property, and partition cannot be done without impairing the value of the estate, the part awarded to each tenant should be assigned in severalty.² Where the common estate to be divided consists of several distinct parcels of land, the entire share of the tenant in common applying for partition may be set off from one parcel where this is practicable, leaving the residue undivided.³

SEC. 2025. **Manner of allotment.**—Where the partition of a joint estate is awarded the court usually appoints commissioners to view the premises and ascertain the best method to divide the estate among the several co-tenants. In performing their duty this commission is to be guided by the circumstances in each particular case. Where the estate to be divided consists of but a single tract of land, it should be divided up, if possible, into equal parcels of land ; where the estate consists of several distinct tracts of land, one parcel may be given to each co-tenant. If the commissioner finds that an equal division is not practicable, for the purpose of equalizing the partition they may direct the payment by one or more of the tenants of a specified sum of money, called owelty of partition.⁴ Where the joint estate is of such a character that it cannot be partitioned without destroying the value of the property, the commissioners may either recommend that the entire estate be sold and the money divided among the tenants according to their equities, or that the entire property be vested in one of the tenants, and he be required to pay to the others their share of the ap-

¹ *Milligan v. Poole*, 35 Ind. 64 ;
Gregory v. Gregory, 69 N. C.
522.

See: *Prentice v. Jaassen*, 79 N.
Y. 478.

² *Hay v. Estell*, 19 N. J. Eq. (4 C.
E. Gr.) 133.

³ *Shull v. Kennon*, 12 Ind. 34 ;
Hagar v. Wiswall, 27 Mass. (10

Pick.) 152 ;

Gordon v. Pearson, 1 Mass. 323 ;

Abbott v. Berry, 46 N. H. 369.

⁴ *Hagar v. Wiswall*, 27 Mass. (10
Pick.) 152 ;

Green v. Arnold, 11 R. I. 364 ;
s.c. 23 Am. Rep. 466 ;

1 Story's Eq. Jur. (13th ed.) 654.

See: *Post*, § 2026.

prised value thereof in money. In all cases where partition is practicable it is favored in law.¹ Where a partition of the estate is made among the tenants, and improvements have been made upon part of the land, where it is practicable the commissioner should allot to the tenant making such improvements the portion on which the improvements are made, without allowing to the other tenants anything for the enhanced value because of such improvements.²

SEC. 2026. **Same—Owelty.**—Owelty is the money paid, or secured to be paid, by one co-tenant or coparcener to another for the purpose of equalizing a partition of their realty.³ Under those statutes authorizing the giving of owelty, the charge upon the more valuable portion of the lands is not a personal charge, but is upon the land itself, and may be enforced by a *venditioni exponas* at the instance of the party entitled thereto.⁴ The lien is somewhat in the nature of purchase-money for land,⁵ and is not discharged by the execution of a note therefor.⁶ Under statutes authorizing the giving of owelty, the statutory "presumption of payment" applies to a judgment for owelty.⁷

¹ McGillivray v. Evans, 27 Cal. 96 ;
 Royston v. Royston, 13 Ga. 425 ;
 Wood v. Little, 35 Me. 107 ;
 King v. Reed, 77 Mass. (11 Gray)
 490 ;
 Adams v. Briggs Iron Co., 61
 Mass. (7 Cush.) 361 ;
 Miller v. Miller, 30 Mass. (13 Pick.)
 237 ;
 Higginbottom v. Short, 25 Miss.
 160 ; s.c. 57 Am. Dec. 198 ;
 Crowell v. Woodbury, 52 N. H.
 613 ;
 Morrill v. Morrill, 5 N. H. 134 ;
 Belknap v. Trimble, 3 Paige Ch.
 (N. Y.) 577 ;
 Hills v. Dey, 14 Wend. (N. Y.)
 204 ;
 Conant v. Smith, 1 Aik. (Vt.) 67.
² Dean v. O'Meara, 47 Ill. 120, 122 ;
 Thorn v. Thorn, 14 Iowa 49, 55 ;
 s.c. 81 Am. Dec. 451 ;
 Borah v. Archers, 7 Dana (Ky.)
 176, 177 ;
 Nelson v. Clay, 7 J. J. Marsh.

(Ky.) 138 ; s.c. 23 Am. Dec. 387 ;
 Crafts v. Crafts, 79 Mass. (13
 Gray) 360 ;
 Wood v. Fleet, 36 N. Y. 499, 501 ;
 s.c. 93 Am. Dec. 528 ;
 Green v. Putman, 1 Barb. (N. Y.)
 500 ;
 Robinson v. McDonald, 11 Tex.
 385 ; s.c. 62 Am. Dec. 480.
Compare : Gourley v. Woodbury,
 43 Vt. 89.
³ 1 Co. Litt. (19th ed.) 146b ; 2 Id.
 169a ;
 16 Vin. Abr. 223. pl. 3.
⁴ Myers v. Rice, 107 N. C. 24 ; s.c.
 12 S. E. Rep. 66.
⁵ Reed v. Fidelity Insurance, Trust,
 and Safe Deposit Co., 113 Pa.
 St. 574 ; s.c. 6 Atl. Rep. 163 ;
 McCandless' Appeal, 98 Pa. St.
 489.
⁶ Dobbin v. Rex, 106 N. C. 444 ; s.c.
 11 S. E. Rep. 260.
⁷ Herman v. Watts, 107 N. C. 646 ;
 s.c. 12 S. E. Rep. 437.

SEC. 2027. **Same—Sale of land for division.**—We have already seen¹ that where the joint estate cannot be readily divided, the co-tenants are entitled to a sale of the premises and a division of the proceeds.² In proceedings for partition a decree for the sale of the land and a distribution of the proceeds cannot be made without there has been an averment and proof of facts showing that the lands cannot be fairly divided or equitably partitioned ;³ and in some of the states, under statutes regulating the proceedings for partition, it is an essential prerequisite to a decree of sale that commissioners shall be appointed to make the partition and allotment, and shall have reported that the land is not susceptible of partition, a decree for a sale without being based upon such report being erroneous.⁴

SEC. 2028. **Warranty in partition deeds.**—There is no implied warranty in a partition deed between tenants in common, although there is, it seems, an implied special warranty annexed to every partition between coparceners.⁵ It has been said, however, that there is an implied warranty of title in a partition of land between tenants who derive their estate by descent ;⁶ and where the partition is made by law, each co-tenant becomes a warrantor to the other to the extent of the portion allotted to him, whether there has been any express warranty in

¹ See : *Ante*, §§ 2024, 2025.

² *Royston v. Royston*, 13 Ga. 425 ;
Lucas v. Peters, 45 Ind. 313 ;
Potter v. Wheeler, 13 Mass. 504 ;
Bradshaw v. Callaghan, 8 John.
 (N. Y.) 558 ;
Gregory v. Gregory, 69 N. C.
 522.

³ *Keaton v. Terry*, 93 Ala. 85 ; s.c.
 9 So. Rep. 524 ;
Benedict v. Torrent, 83 Mich. 181
 s.c. 47 N. W. Rep. 129 ; 21 Am.
 St. Rep. 589.

⁴ *Coffin v. Argo*, 134 Ill. 276 ; s.c.
 24 N. E. Rep. 1068.

⁵ *Weiser v. Weiser*, 5 Watts (Pa.)
 279 ; s.c. 30 Am. Dec. 313.
 See : *Sumner v. Williams*, 8 Mass.
 162 ; s.c. 5 Am. Dec. 813 ;
Gates v. Caldwell, 7 Mass. 68 ;
Frost v. Raymond, 2 Cai. (N. Y.)
 188, 192 ; s.c. 2 Am. Dec. 228 ;

Vanderkarr v. Vanderkarr, 11
 John. (N. Y.) 122 ;
Kent v. Welch, 7 John. (N. Y.)
 258 ;
Christine v. Witherill, 16 Serg. &
 R. (Pa.) 98, 114 ;
Nookes' Case, 4 Co. 80 ;
Frontin v. Small, 2 Ld. Raym.
 1419 ;
Brown v. Brown, 1 Lev. 57 ;
Dering v. Farrington, 1 Mod.
 113 ;
Merrill v. Frame, 4 Taunt. 329 ;
 s.c. 13 Rev. Rep. 612 ;
Hayes v. Bickerstall, 1 Vaughn
 126 ;
Clarke v. Samson, 1 Ves. 101.
⁶ *Paterson v. Lanning*, 10 Watts
 (Pa.) 135 ;
Feather v. Strohoecker, 3 Pen. &
 W. (Pa.) 505 ; s.c. 24 Am. Dec.
 342.

the deed of partition or not,¹ and cannot be permitted to assert an adverse title, for the purpose of ousting another co-tenant from his portion allotted to him in such partition proceedings.² Thus one co-tenant in common cannot purchase a superior outstanding title and afterwards use it for the purpose of expelling another co-tenant from the land received by him as his portion.³ Such purchase will inure to the joint benefit of all of the co-tenants; but the one making the purchase will be entitled to be re-imbursed by each of his co-tenants their respective proportionate parts of the amount necessarily expended in such purchase.⁴

SEC. 2029. **Effect of partition.**—We have seen in a preceding section that in compulsory partition each tenant becomes a warrantor of the title of the others to the extent of his share.⁵ This is a condition entire, the breach of which gives an entry into the whole; with this difference, however, that a voucher to warranty of the part evicted affirms the partition by the acceptance of a compensation, while an entry for the condition broken defeats it.⁶ But in those cases where the partition is

¹ *Venable v. Beauchamp*, 3 Dana (Ky.) 321; s.c. 28 Am. Dec. 74; *Walker v. Hall*, 15 Ohio St. 355; s.c. 86 Am. Dec. 482.

² *Venable v. Beauchamp*, 3 Dana (Ky.) 321; s.c. 28 Am. Dec. 74.

³ *Venable v. Beauchamp*, 3 Dana (Ky.) 321; s.c. 28 Am. Dec. 74; 4 Kent's Com. (13th ed.) 371; 2 Story's Eq. (13th ed.), § 1211. See: *Brittin v. Handy*, 20 Ark. 381.

⁴ *Mandeville v. Solomon*, 39 Cal. 125;

Titsworth v. Stout, 49 Ill. 78; *Sullivan v. McLenans*, 2 Iowa (2 Clarke) 437;

Sneed v. Atherton, 6 Dana (Ky.) 276; s.c. 32 Am. Dec. 70;

Lee v. Fox, 6 Dana (Ky.) 171; *Thurston v. Masterson*, 9 Dana (Ky.) 228;

Gossom v. Donaldson, 18 B. Mon (Ky.) 230;

Funk v. Newcomer, 10 Md. 301; *Picot v. Page*, 26 Me. 398;

Jones v. Stanton, 11 Mo. 433;

Brown v. Homan, 1 Neb. 488; *Van Horne v. Fonda*, 5 John. Ch. (N. Y.) 388;

Davis v. King, 87 Pa. St. 261; *Duff v. Wilson*, 72 Pa. St. 442;

Keller v. Auble, 58 Pa. St. 410; *Lloyd v. Lynch*, 28 Pa. St. 419;

Weaver v. Wible, 25 Pa. St. 270; *Rothwell v. Dewees*, 67 U. S. (3

Black) 613; bk. 17 L. ed. 309; *Flagg v. Mann*, 2 Sumn. C. C.

486; s.c. Fed. Cas. No. 4847. See: *Bracken v. Cooper*, 80 Ill. 221;

Flinn v. McKinley, 44 Iowa 68; *Dubois v. Campau*, 24 Mich. 360;

Buchanan v. King, 22 Gratt. (Va.) 414.

⁵ 2 Co. Litt. (19th ed.) 173b. See: *Campau v. Barnard*, 25 Mich. 381, 382;

Feather v. Strohoecker, 3 Pen. & W. (Pa.) 205; s.c. 24 Am. Dec. 342.

⁶ *Feather v. Strohoecker*, 3 Pen. & W. (Pa.) 205; s.c. 24 Am. Dec. 342.

voluntary, by mutual deeds of release, there can be no claim for compensation, unless the partition was tainted with fraud.¹ For this and other reasons one co-tenant cannot, after partition, as we have seen above, acquire a superior title to the whole or any portion of the individual estate which he can enforce against his former co-tenants ; and this is true whether the partition be voluntary or involuntary.²

In this case the court say :

“ After eviction of an estate of freehold from a parcener who has a bad title as to a whole or part, she may enter and avoid the partition as to the whole or a part: 2 Co. Litt. (19th ed.) 208 ; and the same law was held in *Bustard's Case*, 4 Co. 121b, on the authority of 15 E. 4, 3, and 42 Ass. 22 ; and the principle of the *Earl of Pembroke's Case* was affirmed, while the opinion of *Cavendish*, that partition shall remain, though an estate for life or in tail were evicted, was denied.

Such, then, being the rule, and the party entitled to enter being already in possession, an entry to give her the benefit of the condition was unnecessary ; as was held in *Hamilton v. Elliott*, 5 Serg. & R. (Pa.) 375, where the doctrine on the subject was particularly examined.”

¹ *Weiser v. Weiser*, 5 Watts (Pa.) 279 ; s.c. 30 Am. Dec. 313 ; *Beardsley v. Knight*, 10 Vt. 185 ; s.c. 33 Am. Dec. 193.

² *Venable v. Beauchamp*, 3 Dana (Ky.) 321 ; s.c. 28 Am. Dec. 74 : 2 Co. Litt. (19th ed.) 174a.

CHAPTER XXX.

MORTGAGES.

- SECTION I. Origin and history.
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SECTION III. Rights and liabilities under.
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- SEC. 2030. Definition.
SEC. 2031. Origin of mortgages—Civil-law doctrine.
SEC. 2032. Same—Common-law doctrine.
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SEC. 2034. Same—Same—Equity of redemption.
SEC. 2035. Modern English mortgages.
SEC. 2036. Doctrine of mortgages in the United States.
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SEC. 2040. Same—Same—Deposit of title-deeds.
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SEC. 2042. Same—Vendor's lien.
SEC. 2043. Same—Same—Who may claim.
SEC. 2044. Same—Same—Discharge of.
SEC. 2045. Same—Vendee's lien.
SEC. 2046. Welsh mortgages.

SECTION 2030. **Definition.**—The conveyance of an estate or property in land by way of pledge to secure the payment of a debt, and to become void on such payment, constitutes a mortgage of such property.¹ At common law a

¹ *Mitchell v. Burnham*, 44 Me. 286 299;
Lund v. Lund, 1 N. H. 39, 41 s.c. 8 Am. Dec. 29;
Montgomery v. Bruere, 4 N. J. L. (1 South.) 260;
Bennett v. Union Bank, 5 Humph. (Tenn.) 612, 615;
Wing v. Cooper, 37 Vt. 169;
New Orleans Nat. Banking Assoc. v. Adams, 109 U. S. 211; bk. 27 L. ed. 910;

Conard v. Atlantic Insurance Co., 26 U. S. (1 Pet.) 386, 441; bk. 7 L. ed. 189, 213;
Thelusson v. Smith, 15 U. S. (2 Wheat.) 396; bk. 4 L. ed. 271;
2 Bouv. L. Dict. (15th ed.) 257;
4 Kent Com. (13th ed.) 136.
Mortgagor and mortgagee—Relation of—Lord Denman says, in *Doe d. Higginbotham v. Barton*, 11 Ad. & E. 307; s.c. 39 Eng. C. L. 181: "It is very dangerous
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mortgage was an estate in land created by a conveyance, absolute in form, but designed as a pledge for the payment of money or the performance of some act or condition, and to become void upon such payment being made or such act being performed agreeably to the terms prescribed in the instrument.¹ Under such mortgages, although the money was not paid or the act performed at the time appointed, by which the conveyance of the lands became absolute at law, yet the mortgagor still had an equity of redemption; that is, on payment of the principal and interest together with costs, within a reasonable time, to have a reconveyance of the lands.² Such conveyance is in substance but a security for the obligation, to which it is collateral,³ and the mortgage being but an incident of the debt,⁴ even though the conveyance be absolute in form, it is in equity but a mortgage, and will cease on the performance of the obligation.⁵ This is on the general doctrine that the debt or obligation is the principal thing and the mortgage is merely an incident,⁶ and is both in law and equity merely a lien upon the property.⁷

to attempt to define the precise relation in which mortgagor and mortgagee stand to each other in any other terms than those very words; but thus much is established by the case of *Patridge v. Bere*, 5 Barn. & Ald. 604; s.c. 7 Eng. C. L. 330, and *Hutchman v. Waltam*, 4 Mees. & W. 407, that the mortgagee may treat the mortgagor as being rightfully in possession and himself as reversioner."

¹ *Welsh v. Phillips*, 54 Ala. 309; s.c. 25 Am. Rep. 679;
Cross v. Robinson, 21 Conn. 379, 387;
Mitchell v. Burnham, 44 Me. 286;
Moore v. Esty, 5 N. H. 469;
Trimm v. Marsh, 54 N. Y. 599; s.c. 13 Am. Rep. 623;
Baker v. Thrasher, 4 Den. (N. Y.) 493, 495;
Carter v. Taylor, 3 Head (Tenn.) 30;
Dexter v. Harris, 2 Mas. C. C. 531; s.c. 7 Fed. Cas. 612.

² *Cruise Dig.* (4th ed.) 67.

³ *Heburn v. Warner*, 112 Mass. 271, 273; s.c. 17 Am. Rep. 86;

Brobst v. Brock, 77 U. S. (10 Wall.) 519, 529; bk. 19 L. ed. 1002.

⁴ *Blackwell v. Barnett*, 52 Tex. 326.

⁵ *Flagg v. Mann*, 31 Mass. (14 Pick.) 467, 478;

Parks v. Hall, 19 Mass. (2 Pick.) 206, 211;

Wilcox v. Morris, 1 Murph. (N. C.) L. 116, 117;

Briggs v. Fish, 2 D. Chip. (Vt.) 100;

Conrad v. Atlantic Insurance Co., 26 U. S. (1 Pet.) 386; bk. 7 L. ed. 189.

⁶ *McMillan v. Richards*, 9 Cal. 365; s.c. 70 Am. Dec. 655;

Timms v. Shannon, 19 Md. 296; s.c. 81 Am. Dec. 632;

Glass v. Ellison, 9 N. H. 69.

See: *Hubbell v. Moulson*, 53 N. Y. 225; s.c. 13 Am. Rep. 519;

Blackwell v. Barnett, 52 Tex. 326.

⁷ See: *Kidd v. Teeple*, 22 Cal. 255; *Vason v. Ball*, 56 Ga. 268;

Elfe v. Cole, 26 Ga. 197;

Woolley v. Holt, 14 Bush (Ky.) 788;

Berthold v. Fox, 13 Minn. 501; s.c. 97 Am. Dec. 243.

SEC. 2031. **Origin of mortgages—Civil-law doctrine.**—According to the civil law there were two methods for the transfer of property for the security of the payment of a debt. *Pignus* was the technical term for a pledge which passed into the possession of the creditor, while *hypothica* was applied to a pledge which continued to be held by the debtor, and was applied to immovables or landed property. By this method of pledge no title to the property passed, and a failure of payment at the time stipulated did not work a forfeiture of the land. These two methods of pledge are the root of the law of mortgages among all the Latin races of the present time.¹

SEC. 2032. **Same—Common-law doctrine.**—With the coming of the Norman Conquest there was brought into England from Normandy two modes of pledging lands, which have been fully described by Glanville. The first of these was called *vivium vadium*, and was a conveyance of lands by a debtor to his creditor to hold them until the rents and profits should amount to the sum borrowed, in which case the pledge was said to be living, because on the rents and profits discharging the debts, the land returned to the borrower.² The second method of pledging land was called *mortuum vadium*, and consisted in the conveyance of the land to the mortgagee on condition that the mortgagor should pay the sum by a stipulated time. This method of conveyance was called a mortgage for the reason that it was doubtful whether the mortgagor would pay at the day limited the amount stipulated; and if he did not pay it, the land which was put in pledge upon condition for such payment was taken away from him forever, and so was dead to him upon a condition,³ and in this was distinguishable from *vivium vadium*.⁴ This form of security was extremely severe, and often grossly unjust to the debtor, because the common law was inexorable and allowed the debtor no redress if he

Hurley v. Estes, 6 Neb. 386;

Trimm v. Marsh, 54 N. Y. 599;

s.c. 13 Am. Rep. 623;

Roberts v. Sutherlin, 4 Oreg. 219.

¹ Wilsey Mortg. Forc. (2d ed.), § 2.

² 2 Cruise Dig. (4th ed.) 65.

³ 2 Co. Litt. (19th ed.) 205a.

⁴ See: Livingston v. Story, 36 U. S. (11 Pet.) 357, 388; bk. 9 L. ed. 746;

Howell v. Price, 1 Pr. Wms. 231; 2 Bl. Com. 158.

failed to meet his obligation promptly. There was at common law no remedy to restore the debtor to his estate, or to have the estate sold at public sale to the highest bidder.¹

SEC. 2033. **Same—Equity doctrine.**—While the *mortuum vadium* is to be regarded as the root of our modern mortgages, yet its severity and unjustness rendered it odious and unpopular until the appearance of that new jurisdiction which was exercised by the chancellors.² We have already seen that these chancellors sought to engraft upon the rules of the common law the equitable principles of the civil law.³ The result was that mortgages assumed under the chancellors a different character from what they had under the Norman customs;⁴ the equity courts seized hold of the real intentions of the parties and construed the mortgage as vesting a defeasible estate only in the mortgagee, and converted the instrument into a lien upon the estate, and not an estate in the land itself.⁵ The growth of this doctrine was very slow, and finally developed what is known at the present time as the equity of redemption.

SEC. 2034. **Same—Same—Equity of redemption.**—A mortgage in its origin was in reality what it still, by the terms thereof, purports to be—an absolute sale of the estate

¹ Coote on Mortg. 422.

² For a short account of origin of the court of chancery and equitable doctrines so far as they affect real property, see: *Ante*, §§ 1614–1622.

³ See: *Ante*, § 1618.

⁴ Wilsey Mort. Forec. (2d ed.) 4.

⁵ *Hannah v. Carrington*, 18 Ark. 85;

McMillan v. Richards, 9 Cal. 365; s.c. 70 Am. Dec. 655;

Dudley v. Cadwell, 19 Conn. 218;

Ragland v. Justices, 10 Ga. 65;

Timms v. Shannon, 19 Md. 296; s.c. 81 Am. Dec. 632;

Eaton v. Whiting, 20 Mass. (3 Pick.) 484;

Anderson v. Baumgartner, 27 Mo. 80;

Ellison v. Daniels, 11 N. H. 274, 280;

Kinna v. Smith, 3 N. J. Eq. (3 H. W. Gr.) 14;

Headley v. Goundry, 41 Barb. (N. Y.) 279, 282;

Runyan v. Mersereau, 11 John. (N. Y.) 534;

Jackson v. Willard, 4 John. (N. Y.) 41;

Green v. Hart, 1 John. (N. Y.) 580;

Myers v. White, 1 Rawle (Pa.) 353;

Whitney v. French, 25 Vt. 663;

Hughes v. Edwards, 22 U. S. (9 Wheat.) 489, 500; bk. 6 L. ed. 142;

Matthews v. Wallwyn, 4 Ves. 118;

4 Kent Com. (13th ed.) 138.

by the mortgagor to the mortgagee, subject to be determined by the payment of a given sum of money, or the performance of some condition, within a given period of time, as by the terms of the contract, if the money is not paid, or the condition performed, by the day limited for payment or performance, the estate becomes absolute in the grantee.¹ At common law there was no means whereby the mortgagor could compel the mortgagee to accept the money secured by the mortgage, and discharge the same, where the money was not paid on the day named in the instrument, even in those cases where the failure to do so was owing to accident or unavoidable delay. This rigorous rule worked many hardships and was deemed contrary to the principles of equity ingrafted onto the common law, and courts of chancery determined that this was in the nature of a penalty, which should be relieved against, and accordingly established a rule allowing the mortgagor to reclaim his land upon the payment of his debt, with interest, within a reasonable time after the breach of the condition.² This right of the mortgagor to redeem his property, by paying the money secured within a reasonable time, is known as his equity of redemption and is incident to every mortgage, being regulated by statutes in the various states.³

¹ *Lansing v. Goelet*, 9 Cow. (N. Y.) 346, 349.

See: *Brigham v. Winchester*, 42 Mass. 390, 392;

Fay v. Cheney, 31 Mass. (14 Pick.) 399, 340;

Dewey v. Van Dusen, 21 Mass. (4 Pick.) 19, 20;

Parsons v. Welles, 17 Mass. 419, 421;

Smith v. Dyer, 16 Mass. 18;

Wood v. Trask, 7 Wis. 566;

Wade's Case, 5 Co. 115;

Goodall's Case, 5 Co. 95;

2 Cruise Dig. (4th ed.) 65;

4 Kent Com. (13th ed.) 140;

1 Spence Eq. Jur. 601.

² *Shields v. Lozeau*, 34 N. J. L. (5 Vr.) 496; s.c. 3 Am. Rep. 256;

Casborne v. Scarfe, 1 Atk. 603;

Roscarick v. Benton, 1 Cas. in Ch. 217;

Price v. Perrie, 2 Freem. 258;

Bowen v. Edwards, 1 Rep. in Ch. 222;

How v. Viguers, 1 Rep. in Ch. 32;

Emanuel College v. Evans, 1 Rep. in Ch. 18;

Willett v. Winnelly, 1 Vern. 488;

2 Cruise Dig. (4th ed.) 66;

4 Kent Com. (13th ed.) 158;

1 Spence Eq. Jur. 603.

³ See: *Lee v. Evans*, 8 Cal. 424;

Pritchard v. Elton, 38 Conn. 434;

Norwich v. Hubbard, 22 Conn. 587;

Holridge v. Gillespie, 2 John. Ch. (N. Y.) 30, 34;

Parsons v. Welles, 17 Mass. 419, 421;

Batty v. Snook, 5 Mich. 231;

Willmerding v. Mitchell, 42 N. J. L. (13 Vr.) 476;

SEC. 2035. **Modern English mortgages.**—Modern mortgages are of a twofold nature ; the first created by the common law, and the second given in equity. Courts of common law regard a mortgage as an estate ; courts of equity regard it as a mere security for the debt, a chattel interest, or chose in action, the debt being considered as the principal, and the mortgage as the accessory, or appurtenant thereto.¹ By a recent statute in England,² the common-law doctrine of mortgages and the rights thereunder have been greatly modified, the rules of equity being substituted therefor. It has been said that this legislation was necessary in order to relieve the legal tribunals from the logical necessity of enforcing strictly legal rights by strictly equitable remedies. Yet in England the mortgagee is still regarded as invested with the legal estate, and to have the right of possession for the purpose of applying the rents and profits toward the satisfaction of the mortgage debt, and may proceed in courts of law to obtain possession where it is held from him.³

SEC. 2036. **Doctrine of mortgages in United States.**—There is a want of uniformity in respect to the doctrine of mortgages in this country ; some of the states following the English doctrine above outlined, and others having abolished or modified it by statutes. The English doctrine of mortgages, with its double aspect as to nature and the distinct and independent rights enforceable in law and equity, has been in the main adopted in

Johnston v. Gray, 16 Serg. & R. (Pa.) 351, 361 ; s.c. 16 Am. Dec. 577 ;

Plato v. Roe, 14 Wis. 453.

¹ *Timms v. Shannon*, 19 Md. 296 ; s.c. 81 Am. Dec. 632.

See : *White v. Rittenmeyer*, 30 Iowa 268 ;

George's Coal & Iron Co. v. Detmold, 1 Md. 237 ;

Ohio Life Ins. & Trust Co. v. Ross, 2 Md. Ch. 25 ;

Clark v. Levering, 1 Md. Ch. 178 ;

Chase v. Lockerman, 11 Gill & J. (Md.) 210 ; s.c. 35 Am. Dec. 277 ;

Pratt v. Van Wyck, 6 Gill & J. (Md.) 498 ;

Jamieson v. Bruce, 6 Gill & J. (Md.) 74 ; s.c. 26 Am. Dec. 557 ;

Glass v. Ellison, 9 N. H. 69 ;

Jackson v. Willard, 4 John. (N. Y.) 41 ;

Ledyard v. Butler, 9 Paige Ch. (N. Y.) 132 ; s.c. 37 Am. Dec. 379 ;

Brobst v. Brock, 77 U. S. (10 Wall.) 519 ; bk. 19 L. ed. 1002.

² See : *Judicature Act*, 36 & 37 Vict., c. 66, §§ 24, 25.

³ See : *Coote on Mortg.* 17.

Alabama,¹ Arkansas,² Connecticut,³ Illinois,⁴ Kentucky,⁵ Maine,⁶ Maryland,⁷ Massachusetts,⁸ New Hampshire,⁹ New Jersey,¹⁰ North Carolina,¹¹ Ohio,¹² Pennsylvania,¹³ Rhode Island,¹⁴ Tennessee,¹⁵ Vermont,¹⁶ and Virginia.¹⁷ In the states of Delaware,¹⁸ Mississippi,¹⁹ and Missouri,²⁰

- Paulling v. Barron, 32 Ala. 9 ;
 Barker v. Bell, 37 Ala. 354 ;
 Knox v. Easton, 38 Ala. 345.
² Terry v. Rosell, 32 Ark. 478 ;
 Turner v. Watkins, 31 Ark. 429.
³ New Haven Savings Bank v. McParttan, 40 Conn. 90 ;
 Clinton v. Westbrook, 30 Conn. 9 ;
 Dotan v. Russell, 17 Conn. 146 ;
 Lacon v. Davenport, 16 Conn. 331 ;
 Middletown Savings Bank v. Bates, 11 Conn. 519 ;
 Chamberlain v. Thompson, 10 Conn. 243, 251 ; s.c. 26 Am. Dec. 390.
⁴ Erickson v. Rafferty, 79 Ill. 209 ;
 Harper v. Ely, 70 Ill. 581 ;
 Vallette v. Bennett, 69 Ill. 632 ;
 Karnes v. Lloyd, 52 Ill. 113 ;
 Carroll v. Ballance, 26 Ill. 2-9 ;
 s.c. 79 Am. Dec. 354,
⁵ Redman v. Sanders, 2 Dana (Ky.) 70 ;
 Stewart v. Barrow, 7 Bush (Ky.) 368.
⁶ Blaney v. Bearce, 2 Me. (2 Greenl.) 132 ;
 Wilkins v. French, 20 Me. 111.
⁷ Annapolis R. Co. v. Gantt, 39 Md. 115 ;
 Sumwalt v. Tucker, 34 Md. 89 ;
 McKinn v. Mason, 3 Md. Ch. 186 ;
 Wilhelm v. Lee, 2 Md. Ch. 322 ;
 Brown v. Stewart, 1 Md. Ch. 87 ;
 Jamison v. Bruce, 6 Gill & J. (Md.) 72 ; s.c. 25 Am. Dec. 557
⁸ Norcross v. Norcross, 105 Mass. 265
 Sillonay v. Brown, 94 Mass. (12 Allen) 30 ;
 Steel v. Steel, 86 Mass. (4 Allen) 417, 419 ;
 Sparhawk v. Bagg, 82 Mass. (16 Gray) 583 ;
 Hapgood v. Blood, 77 Mass. (11 Gray) 400 ;
 Howard v. Robinson, 59 Mass. (5 Cush.) 119.
⁹ Brown v. Cram, 1 N. H. 169 ;
 McMurphy v. Minot, 4 N. H. 251 ;
 Southerin v. Mendum, 5 N. H. 420 ;
 Parish v. Gilman, 11 N. H. 923 ;
 Ellison v. Daniels, 11 N. H. 274 ;
 Hobart v. Sanborn, 13 N. H. 226 ;
 s.c. 38 Am. Dec. 483 ;
 Great Falls Co. v. Worster, 15 N. H. 412, 444 ;
 Whittimore v. Gibbs, 24 N. H. (4 Fost.) 484.
¹⁰ Shields v. Lozeur, 34 N. J. L. (5 Vr.) 496 ;
 Sanderson v. Price, 21 N. J. L. (1 Zab.) 637.
In New Jersey, however, the mortgage is regarded simply as a security for the debt, and the legal estate is in the mortgagee even after default, solely for the purpose of enforcing payment. Shields v. Lozeur, 34 N. J. L. (5 Vr.) 495 ;
 Osborne v. Tunis, 25 N. J. L. (1 Dutch.) 633.
¹¹ Ellis v. Hussey, 66 N. C. 501 ;
 Hemphill v. Ross, 66 N. C. 477.
¹² **In Ohio** the legal title is in the mortgagee solely for the purpose of enforcing collection ; as to all others the legal title is in the mortgagor. Allen v. Everly, 24 Ohio St. 97 ;
 Rands v. Kendall, 15 Ohio 671 ;
 Harkrader v. Leiby, 4 Ohio St. 602.
¹³ Youngman v. Elmira, etc., R. Co. 65 Pa. St. 278 ;
 Brobst v. Brock, 77 U. S. (10 Wall.) 519 ; bk. 19 L. ed. 1002.
¹⁴ Carpenter v. Carpenter, 6 R. I. 542 ;
 Waterman v. Matteson, 4 R. I. 539.
¹⁵ Vance v. Johnson, 10 Humph. (Tenn.) 214 ;
 Henshaw v. Wells, 9 Humph. (Tenn.) 568.
¹⁶ **In Vermont** the matter is regulated by statutes substantially re-enacting the English common law. Vt. Gen. St. 1870, c. 40, § 12. Default of the mortgagor vests the absolute title in the mortgagee. Hagar v. Brainerd, 44 Vt. 294.
¹⁷ Faulkner v. Brockenborough, 4 Rand. (Va.) 245.
¹⁸ See v. Hall v. Tunnell, 1 Houst. (Del.) 320 ;
 Cooch v. Gerry, 3 Harr. (Del.) 280.
¹⁹ Buck v. Payne, 52 Miss. 271 ;
 Buckley v. Daley, 45 Miss. 388 ;
 Carpenter v. Bowen, 42 Miss. 28.
²⁰ Reddick v. Grossman, 49 Mo. 389 ;

the mortgagor is regarded as the owner of the mortgaged estate, against the mortgagee as well as third persons; but the mortgagee may take possession after default, and, upon taking possession, is invested with the legal title for the purpose of subjecting the rents and profits to the satisfaction of his claim. In California,¹ Florida,² Georgia,³ Indiana,⁴ Iowa,⁵ Kansas,⁶ Louisiana,⁷ Michigan,⁸ Minnesota,⁹ Nebraska,¹⁰ Nevada,¹¹

- Pease v. Pilot Knob Iron Co., 49 Mo. 124, 134;
 Johnson v. Houston, 47 Mo. 227;
 Woods v. Hilderbrand, 46 Mo. 284; s.c. 2 Am. Rep. 513;
 Sutton v. Mason, 38 Mo. 120;
 Kennett v. Plummer, 28 Mo. 142;
 Walcop v. McKinney, 10 Mo. 229.
¹ Cas. Civ. Code, § 2927.
 See: Skinner v. Buck, 29 Cal. 253;
 Kidd v. Teeple, 22 Cal. 255;
 Dutton v. Warschauer, 21 Cal. 609; s.c. 82 Am. Dec. 765;
 Goodenow v. Ewer, 16 Cal. 461; s.c. 76 Am. Dec. 540;
 McMillan v. Richards, 9 Cal. 365; s.c. 70 Am. Dec. 655.
² Bush Dig. Stats. 611, 612.
 See: Soutter v. McRea, 15 Fla. 625.
³ Ga. Code, § 1954.
 See: Vason v. Ball, 56 Ga. 268;
 Burnside v. Terry, 45 Ga. 621;
 United States v. Athens Armory, 35 Ga. 344;
 Jackson v. Carswell, 34 Ga. 279;
 Elfe v. Cole, 26 Ga. 197;
 Ragland v. Justices, etc., 10 Ga. 65;
 Davis v. Anderson, 1 Ga. 176;
 Seals v. Cashien, 2 Ga. Dec. 76.
⁴ Fletcher v. Holmes, 32 Ind. 497;
 Grable v. McCulloh, 27 Ind. 472;
 Morton v. Noble, 22 Ind. 160;
 Francis v. Porter, 7 Ind. 213;
 Reasoner v. Edmundson, 5 Ind. 393.
⁵ White v. Rittenmyer, 30 Iowa 268;
 Courtney v. Carr, 6 Iowa 238, 239;
 Hall v. Savill, 3 Iowa (3 Clarke) 329.
⁶ Waterson v. Devoe, 18 Kan. 223;
 Chick v. Willetts, 2 Kan. 384.
 A deed of trust does not pass the legal title in Kansas.
 Lennox v. Reed, 12 Kan. 223.
⁷ La. Civ. Code, arts. 3278, 3279, 3290.
⁸ Wagar v. Stone, 36 Mich. 364;
 Humphrey v. Hurd, 29 Mich. 44;
 Gorham v. Arnold, 22 Mich. 274;
 Carruthers v. Humphrey, 12 Mich. 270.
 In Michigan prior to the passage of the laws of 1871 a mortgage executed in common-law form gave the mortgagee the right to the possession of the premises on default and to hold them until redeemed.
 Hoffman v. Harrington, 33 Mich. 392;
 Mundy v. Monroe, 1 Mich. 68;
 Schwarz v. Sears, Walk. (Mich.) Ch. 170;
 Stevens v. Brown, Walk. (Mich.) Ch. 41.
⁹ Berthold v. Fox, 13 Minn. 501;
 Berthold v. Holman, 12 Minn. 335;
 Adams v. Corriston, 7 Minn. 456;
 Donnelly v. Simonton, 7 Minn. 167.
¹⁰ Cobbey Consol. Stats. 1893, § 4379.
 See: Higginbottom v. Benson, 24 Neb. 463; s.c. 39 N. W. Rep. 418;
 Davidson v. Coxe, 11 Neb. 252; s.c. 9 N. W. Rep. 95;
 Union Mut. Life Ins. Co. v. Lovitt, 10 Neb. 302; s.c. 4 N. W. Rep. 986;
 Webb v. Hoselton, 4 Neb. 308; s.c. 19 Am. Rep. 638;
 Kyger v. Ryley, 2 Neb. 20.
¹¹ 1 Nev. Comp. L. 1, § 1323;
 Whitmore v. Shiverick, 3 Nev. 288;
 Hyman v. Kelly, 1 Nev. 179.

New York,¹ North Dakota,² Oregon,³ South Carolina,⁴ South Dakota,⁵ Texas,⁶ and Wisconsin,⁷ the common-law doctrine of mortgages has been abrogated by statute, and no estate of any kind vests in the mortgagee; he simply has a lien on the property for the security of his debt.

SEC. 2037. **Kinds of mortgages.**—Mortgages are of two kinds, the common or legal mortgage, and equitable mortgages. The common mortgage is the ordinary instrument executed for securing the payment of money or the performance of a condition. The equitable mortgage is (1) the mortgage of an equitable interest, (2) the lien of the vendor of realty for unpaid purchase-money, (3) the lien of the vendee for money paid under contract for possession not given, (4) the lien upon realty recognized in a court of equity as security for money loaned or due, and (5) in the case of a deposit of title-deeds with the creditor.⁸ There was formerly also a third kind known as Welsh mortgages.⁹

¹ 2 N. Y. Rev. Stats. Codes & L., §§ 1999–2004.

See : *Trimm v. Marsh*, 54 N. Y. 599 ;

Merritt v. Bartholick, 36 N. Y. 44 ;

Power v. Lester, 23 N. Y. 527 ;

Parker v. Rochester, etc., R. Co., 17 N. Y. 283 ;

Bolton v. Brewster, 32 Barb. (N. Y.) 389 ;

Bryan v. Butts, 27 Barb. (N. Y.) 503 ;

Calkins v. Calkins, 3 Barb. (N. Y.) 305 ;

Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119 ;

Waters v. Stewart, 1 Cai. Cas. (N. Y.) 47 ;

Jackson v. Bronson, 19 John. (N. Y.) 325 ;

Stanard v. Eldridge, 16 John. (N. Y.) 254 ;

Runyan v. Mersereau, 11 John. (N. Y.) 534 ;

Jackson v. Willard, 4 John. (N. Y.) 41, 42 ;

Bell v. Mayor of N. Y., 10 Paige Ch. (N. Y.) 49 ;

Astor v. Miller, 2 Paige Ch. (N. Y.) 68 ;

Phyfe v. Riley, 15 Wend. (N. Y.) 248 ;

Astor v. Hoyt, 5 Wend. (N. Y.) 603.

² *Compl. Laws* 1887, § 4346, *et seq.*

³ *Oreg. Civ. Code*, § 323.

See : *Roberts v. Sutherlin*, 4 Oreg. 219 ;

Besser v. Hawthorne, 3 Oreg. 129.

⁴ *Nixon v. Bynum*, 1 Bailey (S. C.) L. 148 ;

Thayer v. Cramer, 1 McC. (S. C.) Eq. 395 ;

Hughes v. Edwards, 22 U. S. (9 Wheat.) 489 ; bk. 6 L. ed. 142.

⁵ *Compl. Laws* 1887, § 4346, *et seq.*

⁶ *Walker v. Johnson*, 37 Tex. 127 ;

Mann v. Falcon, 25 Tex. 271 ;

Wright v. Henderson, 12 Tex. 43.

⁷ *Hennesy v. Farrell*, 20 Wis. 42 ;

Fladland v. Delaplaine, 19 Wis. 459 ;

Wood v. Trask, 7 Wis. 566 ; s.c. 76 Am. Dec. 230 ;

Tallman v. Ely, 6 Wis. 244 ;

Gillet v. Eaton, 6 Wis. 30.

⁸ *Anderson's L. Dict.* 689.

⁹ See : *Post*, § 2045.

SEC. 2038. **Same—Common law-mortgages.**—At common law, as we have already seen,¹ a mortgage was a conveyance of an estate in lands upon condition that it should be defeated by the payment of a stipulated sum of money, or the performance of a stipulated condition or obligation, within a certain time. That a legal mortgage, as it exists in this country, is merely a security for the debt and not an estate in the land, has already been more particularly pointed out.²

SEC. 2039. **Same—Equitable mortgages.**—An equitable mortgage arises whenever there is a conveyance or transfer of an estate in an irregular manner, which is intended merely as a security, whether such intention appears from the face of the instrument, or is otherwise shown.³ This is on the general principle that equity considers that which is agreed to be done as actually performed.⁴ Thus where there is an agreement to give a mortgage, based upon a valuable consideration, and the instrument executed is in form an absolute conveyance, it will be treated as a mortgage;⁵ and, on the other hand, where an instrument intended as a mortgage is imperfectly executed, it will be sustained in equity and enforced.⁶ Judge STORY says, in the case of *Flagg v. Mann*,⁷ that whenever a transaction resolves itself into a security it will be in equity a mortgage, no matter what form the instrument

¹ See: *Ante*, § 2032.

² See: *Ante*, § 2036.

³ See: *De Leon v. Higuera*, 15 Cal. 483;

Woodworth v. Guzman, 1 Cal. 203;

Wilson v. Drumrite, 21 Mo. 325;

Gale v. Morris, 29 N. J. Eq. (2 Stew.) 222;

Elliott v. Wood, 45 N. Y. 71, aff'g 53 Barb. (N. Y.) 285;

Wilcox v. Morris, 1 Murph. (N. C.) L. 116; s.c. 3 Am. Dec. 678;

Woods v. Wallace, 22 Pa. St. 171;

Bigelow v. Topliff, 25 Vt. 273; s.c. 60 Am. Dec. 264;

Breckinridge v. Auld, 1 Rob. (Va.) 148;

Klinck v. Price, 4jW. Va. 4; s.c. 6 Am. Rep. 268.

⁴ *Daggett v. Rankin*, 31 Cal. 321; *Chase v. Peck*, 21 N. Y. 581; *Bank v. Carpenter*, 7 Ohio (pt. I.) 21.

⁵ *Morrow v. Turney*, 35 Ala. 131; *Adams v. Johnson*, 41 Miss. 258; *Burdick v. Jackson*, 7 Hun (N. Y.) 488;

Miller v. Moore, 3 Jones (N. C.) Eq. 431.

⁶ *Love v. Mining Co.*, 32 Cal. 639; *Gill v. Clark*, 54 Mo. 415; *Lake v. Doud*, 10 Ohio 415; *Delaire v. Keenan*, 3 Desau. (S. C.) Eq. 74; s.c. 4 Am. Dec. 604.

⁷ 2 Sumn. C. C. 533; s.c. Fed. Cas. No. 4847.

may be given, or what name the parties may attach to it.¹

SEC. 2040. **Same—Same—Deposit of title-deeds.**—In England, where there does not exist a system of registration of instruments affecting the title to real estate, the same as there is in this country, it is the habit to deposit the title-deeds of a tract of land with the creditor, which secures to him in equity a lien upon the land for the amount of the debt;² and the same rule prevails in some of the states of the Union.³ This is upon the theory that such deposit is an agreement to execute a mortgage, which would be enforced against the depositor and all persons claiming under him, except such as purchase without notice.⁴ It has been held that such deposit is not within the operation of the statute of frauds.⁵ But in order to constitute a deposit a mortgage it must have been made with the express intention of creating a lien.⁶ In England it is not necessary that this intention be de-

¹ See : *Hill v. Eldred*, 49 Cal. 398 ;
Purdy v. Bullard, 41 Cal. 444 ;
Barroilhet v. Battelle, 7 Cal. 450 ;
Dwen v. Blake, 44 Ill. 135 ;
Jones v. Lapham, 15 Kan. 540 ;
Curtis v. Buckley, 14 Kans. 449 ;
Case v. McCabe, 35 Mich. 100 ;
Black v. Cregg, 58 Mo. 565 ;
Fessler's Appeal, 75 Pa. St. 483.

² *Baynard v. Woolley*, 20 Beav. 583 ;
Russell v. Russell, 1 Bro. C. C. 269 ;

Lacon v. Allen, 3 Drew. 582 ;
Shaw v. Foster, L. R. 5 H. L. Cas. 321 ; s.c. 2 Moak Eng. Rep. 1.

³ *Carey v. Rawson*, 8 Mass. 159 ;
Jarvis v. Dutcher, 16 Wis. 307 ;
Mandeville v. Welch, 18 U. S. (5 Wheat.) 277 ; bk. 5 L. ed. 87.
 See : *Sidney v. Stevenson*, 11 Phil. (Pa.) 178.

⁴ *Carey v. Rawson*, 8 Mass. 159 ;
Jarvis v. Dutcher, 16 Wis. 307 ;
Mandeville v. Welch, 18 U. S. (5 Wheat.) 277 ; bk. 5 L. ed. 87 ;
Roberts v. Craft, 24 Beav. 223 ;
Russell v. Russell, 1 Bro. C. C. 269 ;
Edge v. Worthington, 1 Cox 211 ;
 s.c. 1 Rev. Rep. 20 ;
Pain v. Smith, 2 Myl. & K. 417 ;

Ex parte Langston, 17 Ves. 227, 250 ; s.c. 11 Rev. Rep. 66 ;

Ex parte Coming, 9 Ves. 115 ;
 s.c. 7 Rev. Rep. 149 ;

4 Kent Com. (13th ed.) 150 ;

2 Story Eq. Jur. (13th ed.), § 1020.

⁵ *Russell v. Russell*, 1 Bro. C. C. 269 ;

Ex parte Hooper, 19 Ves. 477 ;

Ex parte Whitbread, 19 Ves. 209 ;

Norris v. Wilkinson, 19 Ves. 192 ;

Ex parte Haigh, 11 Ves. 403 ; s.c. 8 Rev. Rep. 189.

⁶ *Mandeville v. Welch*, 18 U. S. (5 Wheat.) 277 ; bk. 5 L. ed. 87 ;

Lucas v. Dorrien, 7 Taunt. 278 ;
 s.c. 1 Moore 29 ; 2 Eng. C. L. 362 ;

James v. Rice, 23 Eng. L. & Eq. 567 ;

Chapman v. Chapman, 13 Beav. 308 ; s.c. 3 Eng. L. & Eq. 70 ;

Ex parte Bruce, 1 Rose 374 ;

Ex parte Wright, 19 Ves. 258 ;

Ex parte Langston, 17 Ves. 277 ;

s.c. 11 Rev. Rep. 66 ;

Norris v. Wilkinson, 12 Ves. 162 ;

Bozon v. Williams, 3 Young & J. 150 ;

2 Story's Eq. Jur. (13th ed.), § 1020.

clared by a memorandum in writing, but if it is so declared it cannot be controlled by parol evidence.¹ In this country, however, some of the cases hold that a written agreement must accompany the deposit of the muniments of title, in order to take the transaction out of the operation of the statute of frauds.²

SEC. 2041. **Same—Same—Same—In this country.**—The creation of an equitable mortgage by the deposit of title-deeds is recognized in some of the states of this country, but is regarded as a very precarious kind of security, in view of the general prevalence of the laws requiring registration of all instruments affecting the title to land, and for that reason is very rarely met with in practice. Its defect as a mortgage is the fact that there is no means of giving constructive notice of its existence; and in those states where all deeds of conveyance are required to be recorded in order to give constructive notice to subsequent purchasers, actual notice of such deposit of title-deeds must be brought home to the purchaser before the lands will be bound in his hands, the purchaser of real estate not being required to look beyond the record for the condition of the title.³ This system of mortgage has been recognized in Georgia,⁴ Maine,⁵ Mississippi,⁶ Rhode Island,⁷ New York,⁸ New Jersey, South Carolina,⁹ Wisconsin,¹⁰ and in the United States courts;¹¹ but it has

¹ Baynard v. Woolley, 20 Beav. 583;

Ex parte Coombe, 17 Ves. 369.

² Edward v. Trumbull, 50 Pa. St. 509;

Luch's Appeal, 44 Pa. St. 519.

³ Hall v. McDuff, 24 Me. 311;

Berry v. Mutual Ins. Co., 2 John. Ch. (N. Y.) 603, 604;

Edwards v. Trumbull, 50 Pa. St. 612;

Luch's Appeal, 44 Pa. St. 522;

Probasco v. Johnson, 2 Disn. (Ohio) 96;

Whitworth v. Gangain, 3 Hare 416.

⁴ Mounce v. Byars, 16 Ga. 469;

2 Story Eq. Jur. (13th ed.), § 1020.

⁵ Hall v. McDuff, 24 Me. 311.

⁶ Gothard v. Flynn, 25 Miss. 58;

Williams v. Stratton, 18 Miss. (10 Smed. & M.) 418.

⁷ Hackett v. Reynolds, 4 R. I. 512.

⁸ Stoddard v. Hart, 23 N. Y. 556, 561;

Chase v. Peck, 21 N. Y. 581;

Rockwell v. Hobby, 2 Sandf. Ch. (N. Y.) 9.

⁹ Welsh v. Usher, 2 Hill (S. C.) Eq. 166, 170; s.c. 29 Am. Dec. 63.

¹⁰ Jarvis v. Dutcher, 16 Wis. 307.

¹¹ Mandeville v. Welch, 18 U. S. (5 Wheat.) 277; s.c. 5 L. ed. 87;

United States v. Cutts, 1 Sumn. C. C. 133, 141, 142; s.c. Fed. Cas. No. 14912.

been denied in Kentucky,¹ Ohio,² Pennsylvania,³ Tennessee,⁴ and Vermont.⁵

SEC. 2042. **Same—Vendor's lien.**—Every vendor has a lien on the land sold for the payment of the purchase-money, even where the title has been fully conveyed, if he has taken no security for the payment. This is on the theory that until the payment of the price agreed upon the lands are held in trust as security for the payment of such price, it being presumed in all cases where the contrary intention does not plainly appear.⁶ The doctrine of vendor's lien is recognized in Alabama,⁷ Arkansas,⁸ California,⁹ Colorado,¹⁰ Florida,¹¹ Illinois,¹² Indiana,¹³ Iowa,¹⁴ Kentucky,¹⁵ Maryland,¹⁶ Michigan,¹⁷ Min-

¹ *Van Meter v. McFadden*, 8 B. Mon. (Ky.) 435, 438.

² *Probasco v. Johnson*, 2 Disn. (Ohio) 96.

³ *Strauss' Appeal*, 49 Pa. St. 353, 358;

Shitz v. Dittenback, 3 Pa. St. 233;

Bowers v. Oyster, 3 Pa. St. 239;

Kauffelt v. Bower, 7 Serg. & R. (Pa.) 64; s.c. 10 Am. Dec. 428.

A written agreement accompanying a deposit of title-deeds, declaring the purpose of the deposit, constitutes an equitable mortgage in Pennsylvania.

Edwards v. Trumbull, 50 Pa. St. 612;

Luch's Appeal, 44 Pa. St. 522.

⁴ *Meador v. Meador*, 3 Heisk. (Tenn.) 562.

⁵ *Bicknell v. Bicknell*, 31 Vt. 498.

⁶ *Salmon v. Hoffman*, 2 Cal. 138; s.c. 56 Am. Dec. 327.

See: *Truebody v. Jacobson*, 2 Cal. 269;

Wilson v. Lyon, 51 Ill. 530;

Ahrend v. Odiorne, 118 Mass. 261, 266;

Payne v. Atterbury, Harr. (Mich.) 4:4;

Dodge v. Evans, 43 Miss. 570;

Warren v. Fenn, 28 Barb. (N. Y.) 333, 334;

Kauffelt v. Bower, 7 Serg. & R. (Pa.) 64; s.c. 10 Am. Dec. 428;

Blackburn v. Gregson, 1 Bro. C. C. 420;

Chapman v. Tanner, 1 Vern. 267;

Macreth v. Symmons, 15 Ves. 339; s.c. 10 Rev. Rep. 85.

⁷ *Barnett v. Riser*, 63 Ala. 347;

Bizzell v. Nix, 60 Ala. 281.

⁸ *Neal v. Speigle*, 33 Ark. 63;

Blevins v. Rogers, 32 Ark. 258.

⁹ *Wells v. Hart*, 56 Cal. 342;

Gallagher v. Mars, 50 Cal. 23;

Burt v. Wilson, 28 Cal. 632.

¹⁰ *Francis v. Wells*, 2 Colo. 660.

¹¹ *Woods v. Bailey*, 3 Fla. 41;

Bradford v. Marvin, 2 Fla. 463.

¹² *Moshier v. Meek*, 80 Ill. 79;

Kirkham v. Boston, 67 Ill. 599;

Keith v. Horner, 32 Ill. 524;

Dyer v. Martin, 5 Ill. 158.

¹³ *Richards v. McPherson*, 74 Ind. 178;

Higgins v. Kendall, 73 Ind. 522;

Fouch v. Wilson, 60 Ind. 64.

¹⁴ *Johnson v. McGrew*, 42 Iowa 555;

Grapegether v. Fejervary, 9 Iowa 163; s.c. 74 Am. Dec. 336.

¹⁵ *Tierman v. Thurman*, 14 B. Mon. (Ky.) 77;

Thornton v. Knox, 6 B. Mon. (Ky.) 74.

¹⁶ *Carr v. Hobbs*, 11 Md. 285;

Magruder v. Peter, 1 Gill & J. (Md.) 217.

¹⁷ *Payne v. Avery*, 21 Mich. 524;

Carroll v. Van Rensselaer, Harr. (Mich.) 225.

sota,¹ Mississippi,² Missouri,³ New Jersey,⁴ New York,⁵ Ohio,⁶ Oregon,⁷ Tennessee,⁸ Texas,⁹ Wisconsin,¹⁰ and by the United States court in the District of Columbia ;¹¹ but has been repudiated in Kansas,¹² Maine,¹³ Massachusetts,¹⁴ North Carolina,¹⁵ Pennsylvania,¹⁶ and South Carolina.¹⁷ The question is left in doubt in Connecticut,¹⁸ New Hampshire,¹⁹ and Rhode Island.²⁰ The doctrine has been abolished by statute in the states of Georgia,²¹ Vermont,²² Virginia,²³ and West Virginia, except in those cases where reserved on the face of the deed of conveyance.²⁴ Such lien is binding upon the vendee and all persons claiming under him with notice thereof.²⁵

¹ *Duke v. Balme*, 16 Minn. 306 ;

Selby v. Stanley, 4 Minn. 65.

² *Dodge v. Evans*, 43 Miss. 570 ;

Davidson v. Allen, 36 Miss. 419.

³ *Pratt v. Clark*, 57 Mo. 189 ;

Delassus v. Poston, 19 Mo. 425 ;

March v. Turner, 4 Mo. 253.

⁴ *Carlies v. Howland*, 26 N. J. Eq.

(11 C. E. Gr.) 311 ;

Van Doren v. Todd, 17 N. J. Eq.

(2 C. E. Gr.) 397.

⁵ *Chase v. Peck*, 21 N. Y. 581 ;

Smith v. Smith, 9 Abb. Pr. (N.

Y.) N. S. 420 ;

Stafford v. Van Rensselaer, 9

Cow. (N. Y.) 316 ;

Garson v. Green, 1 John. Ch. (N.

Y.) 308 ;

Warner v. Van Alstyne, 3 Paige

Ch. (N. Y.) 513.

⁶ *Anketel v. Converse*, 17 Ohio St.

11 ; s.c. 91 Am. Dec. 115 ;

William v. Roberts, 5 Ohio 35.

⁷ *Pease v. Kelly*, 3 Oreg. 417.

⁸ *Ross v. Whitson*, 6 Yerg. (Tenn.)

50 ;

Eskridge v. McClure, 2 Yerg.

(Tenn.) 84.

⁹ *Yarborough v. Wood*, 42 Tex.

91 ; s.c. 19 Am. Rep. 44 ;

Briscoe v. Bronaugh, 1 Tex. 326 ;

s.c. 46 Am. Dec. 108.

¹⁰ *Willard v. Reas*, 26 Wis. 540 ;

Tobey v. McAllister, 9 Wis. 463.

¹¹ *Ford v. Smith*, 1 McA. (D. C.) 592.

¹² *Smith v. Rowland*, 13 Kan. 245 ;

Simpson v. Mundee, 3 Kan. 172.

¹³ *Philbrook v. Delano*, 29 Me. 410 ;

Gilman v. Brown, 1 Mass. 192.

¹⁴ *Ahrend v. Odiorne*, 118 Mass.

261 ;

Wright v. Dane, 46 Mass. (5 Met.)

603.

¹⁵ *Cameron v. Mason*, 7 Ired. (N. C.)

Eq. 180 ;

Wamble v. Battle, 3 Ired. (N. C.)

Eq. 18.

¹⁶ *Stephen's Appeal*, 38 Pa. St. 9 ;

Zentmyer v. Mittower, 5 Pa. St.

403 ;

Kaufelt v. Bower, 7 Serg. & R.

(Pa.) 64 ; s.c. 10 Am. Dec. 428.

¹⁷ *Wragg v. Comptroller-General*, 2

Desau. (S. C.) 509.

¹⁸ *Chapman v. Beardsley*, 31 Conn.

115 ;

Atwood v. Vincent, 17 Conn.

575 ;

Watson v. Wells, 5 Conn. 468.

¹⁹ *Arlin v. Brown*, 44 N. H. 102.

²⁰ *Perry v. Grant*, 10 R. I. 334.

²¹ *Jones v. Jones*, 56 Ga. 325 ;

Mounce v. Byars, 16 Ga. 469.

²² *Manly v. Slason*, 21 Vt. 271 ; s.c.

52 Am. Dec. 60.

²³ *Wade v. Greenwood*, 2 Robt. (Va.)

475 ; s.c. 40 Am. Dec. 759.

²⁴ See : *Chilton v. Lyons*, 67 U. S.

(2 Black) 458 ; bk. 17 L. ed.

304 ;

McLearn v. McLellan, 35 U. S.

(10 Pet.) 625 ; bk. 9 L. ed. 559 ;

Bayley v. Greenleaf, 20 U. S. (7

Wheat.) 46 ; bk. 5 L. ed. 393 ;

Brown v. Gilman, 17 U. S. (4

Wheat.) 254 ; bk. 4 L. ed. 564.

²⁵ *McHendry v. Reilly*, 13 Cal. 75 ;

Webb v. Robinson, 14 Ga. 216 ;

Amory v. Reilly, 9 Ind. 490 ;

Fisher v. Johnson, 5 Ind. 492 ;

Crane v. Palmer, 8 Blackf. (Ind.)

120 ;

Nazareth Benevolent Institution

v. Lowe, 1 B. Mon. (Ky.) 257 ;

Ellicott v. Welch, 2 Bland Ch.

(Md.) 242 ;

It is an unsettled question as to how far the vendor's lien will be enforced against creditors of a purchaser not charged with notice.¹ Anything which is sufficient to put a reasonable man on inquiry will be sufficient to charge a purchaser of land with knowledge of the existence of a vendor's lien will be regarded by the courts as notice. Thus, a recital in the deed that the consideration has not been paid, or the possession of the land by the purchaser, will be sufficient to charge notice.²

SEC. 2043. Same—Same—Who may claim.—A lien for purchase-money may be claimed by the vendor and his heirs, but does not inure to the benefit of third persons;³ and it is thought that such lien cannot be assigned, unless such right is specially reserved by the parties at the

Bisland v. Hewett, 19 Miss. (11 Smed. & M.) 164;

Upshaw v. Hargrove, 14 Miss. (6 Smed. & M.) 286;

Newton v. McLean, 41 Barb. (N. Y.) 285;

Shirley v. Sugar Refining Co., 2 Edw. Ch. (N. Y.) 505;

Garson v. Green, 1 John. Ch. (N. Y.) 308;

Warner v. Van Alstyne, 3 Paige Ch. (N. Y.) 513;

Williams v. Wood, 1 Humph. (Tenn.) 408;

Duval v. Bibb, 4 Hen. & M. (Va.) 113;

Cole v. Scott, 2 Wash. (Va.) 141;

Bayley v. Greenleaf, 20 U. S. (7 Wheat.) 46; bk. 5 L. ed. 393;

Pintard v. Goodloe, 1 Hempst. C. C. 502, 527; s.c. Fed. Cas. No. 11171.

¹ *Pearce v. Foreman*, 29 Ark. 563;

Truebody v. Jacobson, 2 Cal. 269;

Repp v. Repp, 12 Gill & J. (Md.) 341;

Walton v. Hargroves, 42 Miss. 18;

Carlies v. Howland, 26 N. J. Eq. (11 C. E. Gr.) 311;

Warren v. Fenn, 28 Barb. (N. Y.) 333;

Shirley v. Sugar Refinery, 2 Edw. Ch. (N. Y.) 505;

Green v. Demoss, 10 Humph. (Tenn.) 371;

Brown v. Vanlier, 7 Humph. (Tenn.) 239;

Bowles v. Rogers, 6 Ves. 95.

² *Hamilton v. Fowlkes*, 16 Ark. 340;

Baum v. Grigsby, 21 Cal. 176;

Mounce v. Byars, 11 Ga. 180;

Wilson v. Lyon, 51 Ill. 530;

Melross v. Scott, 18 Ind. 250;

Tiernan v. Thurman, 14 B. Mon.

(Ky.) 277;

Hopkins v. Garrard, 7 B. Mon.

(Ky.) 312, 366;

Woodward v. Woodward, 7 B.

Mon. (Ky.) 116;

Thornton v. Knox, 6 B. Mon.

(Ky.) 74;

Honore v. Bakewell, 6 B. Mon.

(Ky.) 67;

Daughaday v. Paine, 6 Minn. 443,

452;

Parker v. Foy, 43 Miss. 260;

Kilpatrick v. Kilpatrick, 23 Miss.

124;

Thorpe v. Dunlap, 4 Heisk.

(Tenn.) 674;

McAlpine v. Burnett, 23 Tex.

649;

McRimmons v. Martin, 14 Tex.

318;

Briscoe v. Bronaugh, 1 Tex. 318;

Manly v. Slason, 21 Vt. 271;

De Cordova v. Hood, 84 U. S. (17

Wall.) 1; bk. 21 L. ed. 587;

Frail v. Ellis, 17 Eng. L. & Eq.

457.

³ *Crane v. Caldwell*, 14 Ill. 468;

Brown v. Budd, 2 Ind. 442;

Skaggs v. Nelson, 25 Miss. 88;

Nottes' Appeal, 45 Pa. St. 361.

time of the transaction. Where there is an express reservation of a right to alienate a vendor's lien, such reservation gives it all the characteristics of a special lien. Such lien is held to be non-assignable in Arkansas,¹ California,² Georgia,³ Illinois,⁴ Iowa,⁵ Maryland,⁶ Mississippi,⁷ Missouri,⁸ New York,⁹ North Carolina,¹⁰ Ohio,¹¹ and Tennessee;¹² while the contrary doctrine prevails in Alabama,¹³ Indiana,¹⁴ Kentucky,¹⁵ and Texas.¹⁶

SEC. 2044. **Same—Same—Discharge of.**—A lien for the purchase-money being raised by the law for the benefit of the vendor, in those cases where he shows by any act that he does not rely upon such lien for his protection, the land will pass discharged of such lien. The lien of the vendor for the purchase-money being raised by implication of the law, it will be presumed to be the intention of the parties to reserve such lien, in the absence of an express agreement to the contrary.¹⁷ The vendor

¹ *Carlton v. Buckner*, 28 Ark. 66 ;
Hutton v. Moore, 26 Ark. 382,
396 ;
Shall v. Biscoe, 18 Ark. 162.

² *Ross v. Heintzen*, 36 Cal. 313 ;
Baum v. Grigsby, 21 Cal. 172.

³ *Webb v. Robinson*, 14 Ga. 216 ;
Wellborn v. Williams, 9 Ga. 86.

⁴ *Moshier v. Meek*, 80 Ill. 79 ;
Keith v. Horner, 32 Ill. 524.

⁵ *Crow v. Vance*, 4 Iowa 434, 436 ;
Dickenson v. Chase, 1 Mor. (Iowa)
492.

⁶ *Dixon v. Dixon*, 1 Md. Ch. 220 ;
Inglehart v. Arminger, 1 Bland
Ch. (Md.) 519.

⁷ *Pitts v. Parker*, 44 Miss. 247 ;
Stratton v. Gold, 40 Miss. 778,
780 ;
Walker v. Williams, 36 Miss.
165 ;
Tanner v. Hicks, 12 Miss. (4 Smed.
& M.) 294.

⁸ *Adams v. Cowherd*, 30 Mo. 458.

⁹ *Smith v. Smith*, 9 Abb. Pr. (N. Y.)
N. S. 420 ;
Hallock v. Smith, 3 Barb. (N. Y.)
267 ;
White v. Williams, 1 Paige Ch.
(N. Y.) 502.

¹⁰ *Green v. Crockett*, 2 Dev. & B.
(N. C.) Eq. 390.

¹¹ *Brush v. Kinsley*, 14 Ohio 20 ;
Jackman v. Hallock, 1 Ohio 318.

¹² *Thorpe v. Dunlap*, 4 Heisk. (Tenn.)
674 ;

Green v. Demoss, 10 Humph.
(Tenn.) 371 ;

Nowell v. Johnson, 5 Humph.
489 ;

Graham v. McCampbell, Meigs
(Tenn.) 52 ;

Sheratz v. Nicodemus, 7 Yerg.
(Tenn.) 9 ;

Gann v. Chester, 5 Yerg. (Tenn.)
205 ;

Eskridge v. McClure, 2 Yerg.
(Tenn.) 84.

¹³ *Wells v. Morrow*, 38 Ala. 125 ;
Griggsby v. Hair, 25 Ala. 327.

¹⁴ *Nichols v. Glover*, 41 Ind. 24 ;
Fisher v. Johnson, 5 Ind. 492.

¹⁵ *Ripperdon v. Cozine*, 8 B. Mon.
(Ky.) 465 ;
Honore v. Bakewell, 6 B. Mon.
(Ky.) 67.

¹⁶ *White v. Downs*, 40 Tex. 225 ;
Moore v. Raymond, 15 Tex. 554.

¹⁷ *Foster v. Trustees of Athenæum*,
3 Ala. 302 ;
Baum v. Grigsby, 21 Cal. 175 ;
Mims v. Lockett, 23 Ga. 237 ;
Mims v. Macon & W. R. R. Co.,
3 Ga. 333 ;

Kirkham v. Boston, 67 Ill. 599 ;
Cowl v. Varnum, 37 Ill. 184 ;

Burger v. Potter, 32 Ill. 70 ;
Richards v. Leaming, 27 Ill. 431 ;

having a lien for purchase-money unpaid against the vendee unless clearly relinquished, the mere taking of another security and the relying upon such security may be evidence, according to circumstances, of an intention to abandon the lien; but the burden is always on the vendee¹ to show that the vendor agreed to rest on that security and to discharge the lands.²

SEC. 2045. **Same — Vendee's lien.** — A purchaser who has paid a part of the purchase-money under a contract for the sale of land before the actual conveyance is made to him, has a lien in equity upon the land for the amount so advanced. This lien has all the characteristics of a vendor's lien, and is enforceable in the same manner.³

- Phelps v. Conover, 25 Ill. 309, 314;
 Conover v. Warren, 6 Ill. (1 Gilm.) 498;
 Hadley v. Pickett, 25 Ind. 450, 452;
 Mattix v. Weand, 19 Ind. 151;
 Boon v. Murphy, 6 Blackf. (Ind.) 272;
 Lagow v. Badollett, 1 Blackf. (Ind.) 416; s.c. 12 Am. Dec. 258;
 Clark v. Hunt, 3 J. J. Marsh. (Ky.) 553;
 Young v. Wood, 11 B. Mon. (Ky.) 123;
 Honore v. Bakewell, 6 B. Mon. (Ky.) 67;
 Hummer v. Schott, 21 Md. 311;
 Richardson v. Ridgely, 8 Gill & J. (Md.) 87;
 Phillips v. Saunderson, 8 Miss. (1 Smed. & M.) 462;
 Linville v. Savage, 58 Mo. 248;
 Adams v. Buchanan, 49 Mo. 64;
 Burette v. Briggs, 47 Mo. 356;
 Morris v. Pate, 31 Mo. 315;
 Dudley v. Dickson, 14 N. J. Eq. (1 McC.) 252;
 Vail v. Foster, 4 N. Y. 312;
 Dubois v. Hull, 43 Barb. (N. Y.) 26;
 Hare v. Van Deusen, 32 Barb. (N. Y.) 92;
 Fish v. Howland, 1 Paige Ch. (N. Y.) 20;
 Mayham v. Coombs, 14 Ohio 428;
 Williams v. Roberts, 5 Ohio 35;
 Anthony v. Smith, 9 Humph. (Tenn.) 508;
 Marshall v. Christmas, 3 Humph. (Tenn.) 616;
 Campbell v. Baldwin, 2 Humph. (Tenn.) 248;
 White v. Dougherty, 1 Mart. & Y. (Tenn.) 309;
 Manly v. Slason, 21 Vt. 277;
 Redford v. Gibson, 12 Leigh (Va.) 332;
 Wilson v. Graham, 5 Munf. (Va.) 297;
 Tobey v. McAllister, 9 Wis. 463;
 De Cordova v. Hood, 84 U. S. (17 Wall.) 1; bk. 21 L. ed. 587;
 Gilman v. Brown, 1 Mas. C. C. 191; s.c. Fed. Cas. No. 5441; 4 U. S. (4 Wheat.) 255; bk. 4 L. ed. 564;
 Winter v. Anson, 3 Russ. 488;
 Hughes v. Kearney, 1 Sch. & L. 132, 136; s.c. 9 Rev. Rep. 30;
 Mackreth v. Symmons, 15 Ves. 342; s.c. 10 Rev. Rep. 85;
 Austen v. Halsey, 6 Ves. 483;
 Teed v. Caruthers, 2 Younge & C. 31.
¹ Ketlewell v. Watson, L. R. 26 Ch. Div. 501;
 Mackreth v. Symmons, 15 Ves. 329; s.c. 10 Rev. Rep. 85.
² Hughes v. Kearney, 1 Sch. & L. 132; s.c. 9 Rev. Rep. 30.
³ Cooper v. Merritt, 30 Ark. 686;
 Shirley v. Shirley, 7 Blackf. (Ind.) 452;
 Brown v. East, 57 B. Mon. (Ky.) 407;
 Lowell v. Middlesex Ins. Co., 62 Mass. (8 Cush.) 127;
 Payne v. Atterbury, Harr. (Mich.) Ch. 414;

The lien both of vendor and vendee are enforceable by a bill in equity, but cannot be enforced in a collateral suit. In order that the property may be subjected to the lien of either the vendor or the vendee, the action must be brought directly for that purpose.¹ In some of the states, however, the vendor or vendee is required to exhaust his remedy at law before bringing a suit in equity,² while in other states he may enforce his lien in equity, although he has a complete remedy at law.³

SEC. 2046. **Welsh mortgages.**—Another kind of pledge in early years of real property to secure payment of money, or the performance of an obligation, but which is now obsolete, was what is known as a Welsh mortgage, the distinguishing feature of which was that the mortgagee entered and received the rents and profits of the estate in satisfaction of the interest upon the sum loaned, the principal remaining undisturbed, the mortgagee neither being able to collect his principal nor foreclose the mortgage and acquire the title to the estate ; until payment of the principal, however, the mortgagee was entitled to exercise any and all rights of ownership.⁴ In such a mort-

Hope v. Stone, 10 Minn. 141, 151 ;
 Stewart v. Wood, 63 Mo. 252 ;
 Chase v. Peck, 21 N. Y. 581, 585 ;
 Lane v. Ludlow, 6 Paige Ch. (N. Y.) 316, note ;
 Taft v. Kessel, 16 Wis. 273 ;
 Wickman v. Robinson, 14 Wis. 493 ;
 Mackreth v. Symmons, 15 Ves. 352 ; s.c. 10 Rev. Rep. 85 ;
 Burgess v. Wheate, 1 W. Bl. 150 ;
 2 Story Eq. Jur. (13th ed.), § 1216.
 1 Milner v. Ramsey, 48 Ala. 287 ;
 Williams v. Young, 17 Cal. 403, 406 ;
 Burger v. Potter, 32 Ill. 70 ;
 Clark v. Bell, 2 B. Mon. (Ky.) 1 ;
 Emison v. Risque, 9 Bush (Ky.) 24 ;
 Clark v. Hunt, 3 J. J. Marsh. (Ky.) 553, 558 ;
 Mullikin v. Mullikin, 1 Bland Ch. (Md.) 538 ;
 Ely v. Ely, 72 Mass. (6 Gray) 439 ;
 Converse v. Blumrich, 14 Mich. 109, 124 ;
 Payne v. Harrell, 40 Miss. 498 ;
 Jones v. Conde, 6 John. Ch. (N.

Y.) 77 ;
 Edwards v. Edwards, 5 Heisk. (Tenn.) 123 ;
 Codwise v. Taylor, 4 Sneed (Tenn.) 346 ;
 Eskridge v. McClure, 2 Yerg. (Tenn.) 84 ;
 Wilson v. Davisson, 2 Robt. (Va.) 384.
 2 See: Roper v. McCook, 7 Ala. 318 ;
 Bottorf v. Conner, 1 Blackf. (Ind.) 287 ;
 Pratt v. Van Wyck, 5 Gill & J. (Md.) 495 ;
 Ford v. Smith, 1 McA. (D. C.) 592.
 3 Campbell v. Roach, 45 Ala. 667 ;
 Richardson v. Baker, 5 J. J. Marsh. (Ky.) 323 ;
 Pratt v. Clark, 57 Mo. 189 ;
 Stewart v. Caldwell, 54 Mo. 536 ;
 Dubois v. Hull, 43 Barb. (N. Y.) 26 ;
 Bradley v. Bosley, 1 Barb. Ch. (N. Y.) 125.
 4 Angier v. Masterson, 6 Cal. 61 ;
 Rankert v. Clow, 16 Tex. 9 ;

gage the profits were set against the interest, and there was no presumption of foreclosure arising from the length of time which the mortgagee was in possession. Should the profits of the land be in excess of the interest of the sum loaned, the court decreed an account against the mortgagee, notwithstanding the agreement.¹ It was not unfrequently the case that the parties made the mortgage upon trust that the mortgagee should, after discharging the interest and expenses, apply the surplus of the rents and profits towards the payment of the principal sum, which agreement was enforced by the courts.²

SECTION II.—NATURE AND VALIDITY.

- SEC. 2047. Who may make mortgage—Common-law doctrine.
- SEC. 2048. Same—Married woman.
- SEC. 2049. Same—Imbeciles and lunatics.
- SEC. 2050. Same—Corporation.
- SEC. 2051. Same—Guardians, etc.
- SEC. 2052. Who may take a mortgage.
- SEC. 2053. What may be mortgaged.
- SEC. 2054. Same—Improvements.
- SEC. 2055. Same—After-acquired property.
- SEC. 2056. Same—Growing crops.
- SEC. 2057. What mortgage carries.
- SEC. 2058. Same—Essentials of mortgage—Introductory.
- SEC. 2059. Same—Parties to mortgage.
- SEC. 2060. Same—Property to be mortgaged.
- SEC. 2061. Same—Consideration.
- SEC. 2062. Same—Same—Payment of money.
- SEC. 2063. Same—Same—Performance of condition.
- SEC. 2064. Same—Execution and delivery.
- SEC. 2065. Same—Registration.
- SEC. 2066. Form of mortgage.
- SEC. 2067. Same—Defeasance clause.
- SEC. 2068. Same—Same—Form of.
- SEC. 2069. Same—Same—In equity.
- SEC. 2070. Conditional sale or mortgage.
- SEC. 2071. Same—Parol evidence to explain.
- SEC. 2072. Same—Contemporaneous agreements.
- SEC. 2073. Same—Same—Agreement to repurchase.

Howell v. Price, 1 Pr. Wms. 291 ; ¹ Talbot v. Braddil, 1 Vern. 395 ;
 Lonquet v. Scawen, 1 Ves. Sr. Fulthrope v. Foster, 1 Vern.
 402 ; 476.
² Cruise Dig. (4th ed.) 69, § 19 ; ² Coote on Mortg. 207 ;
 4 Kent Com. (13th ed.) 137. Powell on Mortg. 1148a.

SEC. 2074. Subsequent agreements.

SEC. 2075. Validity and effect of mortgages.

SEC. 2076. Invalidity of mortgages.

SECTION 2047. Who may make mortgage—Common-law doctrine.—A mortgage may be executed by any one having legal capacity to act for himself and to enter into a contract, who has an interest in the land at the time of execution of the mortgage.¹ This he may do directly, by executing the mortgage himself, or indirectly, by employing some one to execute it for him.² At common law, infants³ and married women⁴ are regarded as under disabilities which prohibit them from entering into contracts; but where the former do enter into contracts, the contract will be simply voidable, and not void. Hence, where an infant makes a mortgage he may ratify it on coming of age, and when ratified it will be as valid and binding as though he had been of full age at the time of its execution.⁵

SEC. 2048. Same—Married woman.—Although a married woman could not at common law generally enter into a contract so as to bind herself, yet her property is

¹ *Payne v. Patterson*, 77 Pa. St. 134.

² *Campbell v. Tompkins*, 32 N. J. Eq. (5 Stew.) 170;
Zane v. Kennedy, 73 Pa. St. 182;
Page v. Cooper, 16 Beav. 396.

³ *Allen v. Poole*, 54 Miss. 323;
Roberts v. Wiggin, 1 N. H. 73;
s.c. 8 Am. Dec. 38;

Flynn v. Powers, 35 How. (N. Y.) Pr. 279, 289;

Loomer v. Wheelwright, 3 Sandf. Ch. (N. Y.) 135;

Harner v. Dipple, 31 Ohio St. 72;
s.c. 27 Am. Rep. 496;

Callis v. Day, 38 Wis. 643.

⁴ *Breckenridge v. Ormsby*, 1 J. J. Marsh. (Ky.) 236; s.c. 19 Am. Dec. 71;

Savage v. Holyoke, 59 Me. 345, 365;

Martin v. Dwelly, 6 Wend. (N. Y.) 9; s.c. 21 Am. Dec. 245.

⁵ *Keegan v. Cox*, 116 Mass. 289;
Bank v. Chamberlain, 15 Mass. 220;

Hubbard v. Cummings, 1 Me. (1

Greenl.) 11;

Dana v. Coombs, 6 Me. (6 Greenl.) 89; s.c. 19 Am. Dec. 194;

Davis v. Dudley, 70 Me. 236; s.c. 35 Am. Rep. 318;

Young v. McKee, 13 Mich. 552;
Cogley v. Cushman, 16 Minn. 397;

Allen v. Poole, 54 Miss. 323;

Uecker v. Koehn, 21 Neb. 559;
s.c. 32 N. W. Rep. 583;

Kinnen v. Maxwell, 66 N. C. 45;
Heath v. West, 28 N. H. (8 Fost.) 101;

Robbins v. Eaton, 10 N. H. 561;
Walsh v. Powers, 43 N. Y. 23;

s.c. 3 Am. Rep. 654;

Palmer v. Miller, 25 Barb. (N. Y.) 399;

Ottman v. Moak, 3 Sandf. Ch. (N. Y.) 431;

Richardson v. Boright, 9 Vt. 368;

Bigelow v. Kinney, 3 Vt. 353;
s.c. 21 Am. Dec. 589;

Gillespie v. Bailey, 12 W. Va. 70;
s.c. 29 Am. Rep. 445.

held liable in equity for her debts and engagements, whether oral or in writing,¹ or partly in writing and partly oral.² In this country married women's enabling acts have been passed in a number of the states, by which the wife's capacity to make contracts has been enlarged, and she is enabled to bind her property the same as though she was sole.³ But under a statute enabling a married woman to contract in the same manner as if single, a married woman, living with her husband, can only be made liable for necessities sold to her and on her credit, where she expressly contracts to pay therefor out of her separate estate, or the circumstances show an intention on her part to assume the liability exclusive of the husband.⁴

- ¹ *Deering v. Boyle*, 8 Kan. 525 ; s.c. 12 Am. Rep. 480 ;
Hobson v. Hobson, 8 Bush (Ky.) 665 ;
Willard v. Eastham, 81 Mass. (15 Gray) 328 ; s.c. 77 Am. Dec. 366 ;
Webb v. Hoselton, 4 Neb. 308 ; s.c. 19 Am. Rep. 638 ;
Johnson v. Cummins, 16 N. J. Eq. (1 C. E. Gr.) 97 ; s.c. 84 Am. Dec. 142 ;
Jacques v. M. E. Church, 17 John. (N. Y.) 548 ; s.c. 8 Am. Dec. 447 ;
Elliott v. Gower, 12 R. I. 79 ; s.c. 34 Am. Rep. 600 ;
Todd v. Lee, 15 Wis. 365 ;
Smith v. Thompson, 2 McA. (D. C.) 291 ; s.c. 29 Am. Rep. 621 ;
Stead v. Nelson, 2 Beav. 245 ;
Hulme v. Tenant, 1 Bro. C. C. 16 ;
Pride v. Bubb, L. R. 7 Ch. 64 ; s.c. 1 Moak Eng. Rep. 426 ;
Matthewinan's Case, L. R. 3 Eq. 781 ;
Shetlock v. Shattock, L. R. 2 Eq. 182 ; s.c. 35 Beav. 489 ; 35 L. J. Ch. 509 ; 12 Jur. N. S. 405 ; 14 L. T. 452 ; 14 W. R. 600 ;
Murray v. Barlee, 3 Mylne & K. 209 ;
Peacock v. Monk, 2 Ves. Sr. 190.
- The common-law doctrine has been adopted in a number of states in the United States.**
- ² *Williams v. Urnston*, 35 Ohio St. 296 ; s.c. 35 Am. Rep. 611 ;
Elliott v. Gower, 12 R. I. 79 ; s.c. 34 Am. Rep. 600 ;
- Krouskop v. Shontz*, 51 Wis. 204 ; s.c. 37 Am. Rep. 817.
- ³ *Short v. Battle*, 52 Ala. 456 ;
Layman v. Shultz, 60 Ind. 541 ;
Wicks v. Mitchell, 9 Kan. 80 ;
Deering v. Boyle, 8 Kan. 525.
- ⁴ *Nourse v. Henshaw*, 123 Mass. 96 ;
Labare v. Colby, 99 Mass. 559 ;
Northwestern Mut. Life Ins. Co. v. Allis, 23 Minn. 337 ;
Metropolitan Bank of St. Louis v. Taylor, 62 Mo. 338 ;
Miller v. Brown, 47 Mo. 504 ; s.c. 4 Am. Rep. 345 ;
Hammond v. Corbett, 51 N. H. 311 ;
Wilson v. Herbert, 41 N. J. L. (12 Vr.) 454 ; s.c. 32 Am. Rep. 243 ;
Van Kirk v. Skillman, 34 N. J. L. (5 Vr.) 109 ;
Eckert v. Reuter, 33 N. J. L. (4 Vr.) 226 ;
Maxan v. Scott, 55 N. Y. 247 ;
Corn Exchange Ins. Co. v. Babcock, 42 N. Y. 613 ; s.c. 1 Am. Rep. 601 ;
De Mott v. McMullen, 8 Abb. Pr. (N. Y.) N. S. 335 ;
Smith v. Allen, 1 Lans. (N. Y.) 101 ;
Weir v. Groat, 6 Thomp. & C. (N. Y.) 444 ; s.c. 4 Hun (N. Y.) 193 ;
Baken v. Harder, 6 Thomp. & C. (N. Y.) 440 ; s.c. 4 Hun (N. Y.) 272 ;
Williams v. Urmston, 35 Ohio St. 296 ; s.c. 35 Am. Rep. 611 ;
Moore v. Fuller, 6 Oreg. 272 ; s.c. 25 Am. Rep. 524 ;

SEC. 2049. **Same—Imbeciles and lunatics.**—The rule in regard to the execution of a mortgage by a person of unsound mind or weak intellect is the same as that governing one executed by an infant, that is, it is voidable and not void where it was not procured through an undue advantage taken because of the unsoundness or weakness of mind of the mortgagor.¹

SEC. 2050. **Same—Corporations.**—Mortgages may also be executed by corporations in the corporate name and under the corporate seal;² but where a mortgage on corporate lands is executed by the president of the company in his own name,³ or by the shareholders of the corporation,⁴ and the statute requires that it be executed by the corporation, the instrument will be invalid, although the corporate seal is attached.⁵

SEC. 2051. **Same—Guardians, etc.**—Power to mortgage real estate in their charge to raise money for a specified purpose is sometimes conferred upon guardians and other persons acting in a representative and fiduciary capacity;⁶ but in such case the power must be strictly pursued in order to render the instrument valid and binding.⁷

SEC. 2052. **Who may take mortgage.**—The disabilities

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|---|---|
| Elliott v. Gower, 12 R. I. 79; s.c.
34 Am. Rep. 600; | Co., 43 N. H. 343; |
| Priest v. Cone, 51 Vt. 495; s.c.
31 Am. Rep. 695; | Flint v. Clinton Co., 12 N. H.
333; |
| Dale v. Robinson, 51 Vt. 20; s.c.
31 Am. Rep. 669; | Hatch v. Barr, 1 Ohio 390. |
| Krouskop v. Shontz, 51 Wis. 204;
s.c. 37 Am. Rep. 817; | ³ Brinley v. Mann, 56 Mass. (2 Cush.)
337; |
| Smith v. Thompson, 2 McAr. (D.
C.) 291; s.c. 29 Am. Rep. 261; | Zoller v. Ide, 1 Neb. 439; |
| Johnson v. Gallagher, 3 DeG. F.
& J. 494; s.c. 30 L. J. Ch. 298; | Hatch v. Barr, 1 Ohio 390. |
| 7 Jur. N. S. 273; 4 L. T. 72; 9
W. R. 506. | See: Veasey v. Graham, 17 Ga.
99; |
| ¹ Van Horn v. Keenan, 28 Ill. 448;
Marmon v. Marmon, 47 Iowa 121. | Isham v. Bennington Iron Co.,
19 Vt. 230. |
| ² Miners' Ditch Co. v. Zellerbach, 37
Cal. 543; | ⁴ Isham v. Bennington Iron Co., 19
Vt. 230; |
| Holbrook v. Chamberlin, 116
Mass. 155; | Hill v. Manchester & Salford
Water Works Co., 5 Barn. &
Ad. 866; s.c. 27 Eng. C. L.
364. |
| Hutchins v. Byrnes, 75 Mass. (9
Gray) 367; | ⁵ Osborne v. Tunis, 25 N. J. L. (1
Dutch.) 633. |
| Tenney v. East Warren Lumber | ⁶ Black v. Dressell, 20 Kan. 153;
Edwards v. Taliaferro, 34 Mich. 13. |
| | ⁷ Edwards v. Taliaferro, 34 Mich. 13. |

affecting the execution of a mortgage do not apply to the acceptance thereof. Any one who has the capacity to take and hold real estate may take under a mortgage.¹ Thus aliens,² corporations,³ infants,⁴ and married women⁵ are capable of holding and enforcing mortgages.

¹ See: *Fay v. Cheney*, 31 Mass. (14 Pick.) 399;

Appleton v. Boyd, 7 Mass. 131.

² *Billings v. Hauver*, 65 Cal. 593; s.c. 4 Pac. Rep. 639;

Ferguson v. Neville, 61 Cal. 356;

Halstead v. Commissioners, 56 Ind. 363;

Trustees of Louisville v. Gray, 1 Litt. (Ky.) 146, 149;

Dudley v. Grayson, 6 T. B. Mon. (Ky.) 259;

McCreery v. Allender, 4 Har. & M. (Md.) 409;

Waugh v. Riley, 49 Mass. (8 Met.) 290;

Fox v. Southack, 12 Mass. 142, 143;

Foss v. Crisp, 37 Mass. (20 Pick.) 121;

Scanlon v. Wright, 30 Mass. (13 Pick.) 523; s.c. 25 Am. Dec. 344;

Territory v. Lee, 2 Mont. 124;

Marx v. McGlynn, 88 N. Y. 358;

Hall v. Hall, 81 N. Y. 130;

People v. Snyder, 41 N. Y. 397;

Munro v. Merchant, 28 N. Y. 9;

Wadsworth v. Wadsworth, 12 N. Y. 376;

Jackson v. Lunn, 3 John. Cas. (N. Y.) 109;

Bradstreet v. Supervisors, 13 Wend. (N. Y.) 546;

Marshall v. Conrad, 5 Call (Va.) 364;

Jones v. McMasters, 61 U. S. (20 How.) 8; bk. 15 L. ed. 805;

Gouverneur v. Robertson, 24 U. S. (11 Wheat.) 332; bk. 6 L. ed. 488;

Hughes v. Edwards, 22 U. S. (9 Wheat.) 489; bk. 6 L. ed. 142;

Orr v. Hodgson, 17 U. S. (4 Wheat.) 453; bk. 4 L. ed. 613.

See: *Harley v. State*, 40 Ala. 689;

Crane v. Reeder, 21 Mich. 24; s.c. 4 Am. Rep. 430;

Maynard v. Maynard, 36 Hun (N.

Y.) 227, *et seq.*;

Emmett v. Emmett, 14 Lea (Tenn.) 369;

Phillips v. Moore, 100 U. S. 208; bk. 25 L. ed. 603;

Osterman v. Baldwin, 73 U. S. (6 Wall.) 116, 121; bk. 18 L. ed. 730;

Hammekin v. Clayton, 2 Woods C. C. 336; s.c. Fed. Cas. No. 5996;

Ante, § 241.

³ *Peru Bridge Co. v. Hendricks*, 18 Ind. 11;

Bank of Brighton v. Smith, 87 Mass. (5 Allen) 413;

Parish v. Wheeler, 22 N. Y. 494;

Silver Lake Bank v. North, 4 John. Ch. (N. Y.) 370;

Jackson v. Brown, 5 Wend. (N. Y.) 590;

Morris v. Way, 16 Ohio 469;

Gordon v. Preston, 1 Watts (Pa.) 385; s.c. 26 Am. Dec. 75.

Where taken in furtherance of the purposes for which the corporation was chartered:

Bennett v. Union Bank, 5 Humph. (Tenn.) 612;

Western Bank of Scotland v. Tallman, 17 Wis. 530;

Andrews v. Hart, 17 Wis. 297;

Lyon v. Ewings, 17 Wis. 61;

Cornell v. Hichens, 11 Wis. 353;

Blunt v. Walker, 11 Wis. 334; s.c. 78 Am. Dec. 709;

Clark v. Farrington, 11 Wis. 306;

Madison, etc., Plank Road Co. v. Watertown, etc., Plank Road Co., 5 Wis. 173;

Bank of United States v. Dandridge, 25 U. S. (12 Wheat.) 64; bk. 6 L. ed. 552;

Farmers' Loan & Trust Co. v. McKinney, 6 McL. C. C. 1; s.c. 8 Fed. Cas. 1048.

⁴ *Parker v. Lincoln*, 12 Mass. 16.

⁵ *Campbell v. Galbreath*, 12 Bush (Ky.) 459;

Tucker v. Fenno, 110 Mass. 311;

Cutler v. Lincoln, 57 Mass. (3

Cush.) 125;

Draper v. Jackson, 16 Mass. 480;

Boston Bank v. Chamberlain, 15

Mass. 220.

SEC. 2053. **What may be mortgaged.**—Any vested interest in land which is capable of being assigned and transferred may be mortgaged ;¹ thus a mortgage may be given not only upon a fee-simple but also upon an estate for life or for years, and a person in possession under a contract for title has such an interest in the land as he can mortgage.² A mortgage may also be executed upon a contingent interest, or a possibility coupled with an interest ;³ improvements on land separate and apart from the land itself ;⁴ rights in remainder and reversion ;⁵ the interest a mortgagee holds in the lands which have been already mortgaged to him ;⁶ and land

Where a mortgage is made to an infant having a legal guardian, and the mortgagor or his assignee would redeem, it is proper to join the infant and the guardian in a bill brought for that purpose. The court will, however, appoint some other suitable person, who has no interest in the business, as guardian to the infant, to defend his interest in the suit.

Parker v. Lincoln, 12 Mass. 16.

See : *Mansur v. Pratt*, 101 Mass. 60 ;

Botham v. McIntier, 36 Mass. (19 Pick.) 346.

¹ *Miller v. Tipton*, 6 Blackf. (Ind.) 238 ;

Neligh v. Michenor, 11 N. J. Eq. (3 Stock.) 539 ;

Dorsey v. Hall, 7 Neb. 460 ;

Hagar v. Brainerd, 44 Vt. 294 ;

Bull v. Sykes, 7 Wis. 449.

² *Kidd v. Teeple*, 22 Cal. 255 ;

Whitney v. Buckman, 13 Cal. 536 ;

Holbrook v. Betton, 5 Fla. 99 ;

Hosmer v. Carter, 68 Ill. 98 ;

Baker v. Bishop, 45 Ill. 264 ;

Miller v. Tipton, 6 Blackf. (Ind.) 238 ;

Lanfair v. Lanfair, 35 Mass. (18 Pick.) 299, 304 ;

Sinclair v. Armitage, 12 N. J. Eq. (1 Beas.) 174 ;

Neligh v. Michenor, 11 N. J. Eq. (3 Stock.) 539 ;

Van Rennselaer v. Dennison, 35 N. Y. 393 ;

Wilson v. Wilson, 32 Barb. (N. Y.) 328 ;

Henry v. Davis, 7 John. Ch. (N. Y.) 40 ;

Parkist v. Alexander, 1 John. Ch. (N. Y.) 394, 398 ;

Attorney-General v. Purmort, 5 Paige Ch. (N. Y.) 620 ;

Philadelphia, W. & B. R. v. Woelpper, 64 Pa. St. 371 ; s.c. 3 Am. Rep. 596 ;

Hagan v. Brainard, 44 Vt. 294 ;

Jarvis v. Dutcher, 16 Wis. 307 ;

Mowry v. Wood, 12 Wis. 413 ;

Bull v. Sykes, 7 Wis. 449 ;

Hutchins v. King, 68 U. S. (1 Wall.) 53 ; bk. 17 L. ed. 544.

³ *Hosmer v. Carter*, 68 Ill. 98 ;

Lanfair v. Lanfair, 35 Mass. (18 Pick.) 299, 304 ;

Neligh v. Michenor, 11 N. J. Eq. (3 Stock.) 539 ;

Van Rennselaer v. Dennison, 35 N. Y. 393 ;

Wilson v. Wilson, 32 Barb. (N. Y.) 328 ;

Massey v. Papin, 65 U. S. (24 How.) 362 ; bk. 16 L. ed. 734.

See : *Landes v. Brant*, 51 U. S. (10 How.) 348 ; bk. 13 L. ed. 449 ;

Bissell v. Penrose, 49 U. S. (8 How.) 317 ; bk. 12 L. ed. 1095.

Thus it was held in *Massey v. Papin*, *supra*, that an imperfect Spanish claim, by virtue of a concession, was, by the laws of Missouri, subject to sale and assignment, and therefore subject to be mortgaged for a debt.

⁴ See : *Post*, § 2049.

⁵ *McGuire v. Van Pelt*, 55 Ala. 344 ; *Curtis v. Root*, 20 Ill. 53.

⁶ *Cutts v. York Mfg. Co.*, 18 Me. 190 ;

held by right of pre-emption.¹ But a mere possibility, or expectancy without a present interest, is not subject to being mortgaged.²

SEC. 2054. **Same—Improvements.**—Improvements made upon real property may be mortgaged separate and apart from the land upon which they stand, where such is the intention of the parties to the contract,³ in which case the lien on the mortgage will be confined to the improvements and not extend to the land upon which the structure is situated. Thus where a lessee erects a building on rented land, with the privilege of removing it, the mortgagee will have a lien upon the improvements only; and this lien will be subject to the lessor's right to retain the improvements on payment of their value. In case of such a contract between the lessor and lessee, the mort-

Murdock v. Chapman, 75 Mass. (9 Gray) 156;

Graydon v. Church, 7 Mich. 36, 59;

Henry v. Davis, 7 John. Ch. (N. Y.) 40.

See: Freeman v. McGaw, 32 Mass. (15 Pick.) 82, 86;

Hunt v. Hunt, 31 Mass. (14 Pick.) 374; s.c. 25 Am. Dec. 400.

In such a case the mortgage will carry whatever estate the mortgagee may have in the property subject to the original mortgagor's right to redeem, but it is thought that notice to the original mortgagor of such mortgage by the mortgagee will require him to make payment to the special mortgagee to the extent of his interest in the property under his mortgage.

Cutts v. York Mfg. Co., 18 Me. 190;

Coffin v. Loring, 91 Mass. (9 Allen) 154;

Murdock v. Chapman, 75 Mass. (9 Gray) 156;

Brown v. Tyler, 74 Mass. (8 Gray) 135;

Graydon v. Church, 7 Mich. 36;

Johnson v. Blydenburgh, 31 N. Y. 427, 432;

Power v. Lester, 23 N. Y. 527;

Hoyt v. Martense, 16 N. Y. 231;

Henry v. Davis, 7 John. Ch. (N.

Y.) 40;

Slee v. Manhattan Co., 1 Paige Ch. (N. Y.) 48.

¹ Whitney v. Buckman, 13 Cal. 536. Right of pre-emption itself cannot be mortgaged.

Gilbert v. Penn., 12 La. An. 235.

² Shipper v. Stokes, 42 Ala. 255; s.c. 94 Am. Dec. 646;

Purcell v. Mather, 35 Ala. 570;

Penn v. Ott, 12 La. An. 233;

Gilbert v. Penn., 12 La. An. 235;

Low v. Pew, 108 Mass. 347; s.c. 11 Am. Rep. 357.

Thus the mere right of pre-emption cannot be made the subject of a mortgage (Gilbert v. Penn., 12 La. An. 235), although land held by right of pre-emption may be.

Whitney v. Buckman, 12 Cal. 536.

³ Jackson v. Brown, 5 Wend. (N. Y.) 590;

Gordon v. Preston, 1 Watts (Pa.) 385; s.c. 26 Am. Dec. 75;

Western Bank of Scotland v. Tallman, 17 Wis. 530;

Andrews v. Hart, 17 Wis. 297;

Lyon v. Ewings, 17 Wis. 61;

Cornell v. Hichens, 11 Wis. 353;

Blunt v. Walker, 11 Wis. 334; s.c. 78 Am. Dec. 709;

Clark v. Farrington, 11 Wis. 306;

Madison, etc., Plank Road Co. v. Watertown, etc., Plank Road Co., 5 Wis. 173.

gage becomes a chattel real.¹ But where land has been mortgaged and improvements have subsequently been made thereon by the mortgagor or by his alienee, with or without notice of the existence of the lien, the mortgage will cover such improvements without a stipulation to that effect in the mortgage.²

SEC. 2055. **Same—After-acquired property.**—At common law a person could not grant or charge that which was not in his possession and under his control at the time of the transaction;³ but in equity the rule is otherwise, and courts will sustain mortgages or assignments of contingent interests and expectancies, and also of things not yet in existence, but resting in possibility only, where the agreement is fairly entered into and not against public policy.⁴ Judge STORY says, in *Mitchell v. Winslow*,⁵ it seems to be the clear result of all the authorities that wherever the parties, by their contract, intended to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or not, or, if personal property, whether it is then *in esse* or not, it attaches, in equity, as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy.⁶

¹ *Griffin v. Marine Co.*, 52 Ill. 130.

² *Martin v. Beatty*, 54 Ill. 100;
Rice v. Dewey, 54 Barb. (N. Y.) 455.

See: *Union Water Co. v. Murphy's Fluming Co.*, 22 Cal. 620, 621;

Post, § 2083.

³ *Booker v. Jones*, 55 Ala. 266;
Ross v. Wilson, 7 Bush (Ky.) 29;
Barnard v. Eaton, 56 Mass. (2

Cush.) 294, 295;

Pierce v. Emery, 32 N. H. 484;
Looker v. Peckwell, 38 N. J. L.

(9 Vr.) 253;

Payne v. Patterson, 77 Pa. St. 124;

Parker v. Jacobs, 14 S. C. 112;
s.c. 37 Am. Rep. 724.

⁴ *Seymour v. Canandaigua*, N. F. & R. Co., 25 Barb. (N. Y.) 284;

s.c. 14 How. (N. Y.) Pr. 531;

Stover v. Eycleshimer, 3 Keyes (N. Y.) 620;

Mitchell v. Winslow, 2 Story C. C. 630; s.c. Fed. Cas. No. 9673.

See: *McCaffrey v. Woodin*, 65 N. Y. 459; s.c. 22 Am. Rep. 644;

Field v. Mayor, etc., of New York, 6 N. Y. 179; s.c. 57 Am. Dec. 435;

Williams v. Briggs, 11 R. I. 476; s.c. 23 Am. Rep. 518;

Frazer v. Hilliard, 2 Strob. (S. C.) L. 309;

Langton v. Horton, 1 Hare 549.

⁵ 2 Story C. C. 630; s.c. Fed. Cas. No. 9673.

⁶ This doctrine has been fully established by the case of *Holroyd v. Marshall*, 10 H. of L. Cas. 191,

Thus there may be a mortgage of a growing crop,¹ or of the future-acquired property of a railroad, which will be

- overruling *Mogg v. Baker*, 3 Mees. & W. 195, and recognized in *McCaffrey v. Woodin*, 65 N. Y. 459; s.c. 22 Am. Rep. 644, followed in *Parker v. Jacobs*, 14 S. C. 112; s.c. 37 Am. Rep. 724, and may now be regarded as the established doctrine in this country.
- Floyd v. Morrow*, 26 Ala. 353;
Robinson v. Mauldin, 11 Ala. 977;
Apperson v. Moore, 30 Ark. 56; s.c. 21 Am. Rep. 170;
Buck v. Seymour, 46 Conn. 156;
Rowan v. Sharp's Rifle Mfg. Co., 29 Conn. 282;
Gregg v. Sanford, 24 Ill. 17; s.c. 76 Am. Dec. 719;
Scharfenburg v. Bishop, 35 Iowa 60;
Dunham v. Isett, 15 Iowa 284;
Jessup v. Bridge, 11 Iowa 572; s.c. 79 Am. Dec. 513;
Phillips v. Winslow, 18 B. Mon. (Ky.) 431; s.c. 68 Am. Dec. 729;
Amonett v. Amis, 16 La. An. 225;
Emerson v. European, etc., R. Co., 67 Me. 387; s.c. 24 Am. Rep. 39;
Morrill v. Noyes, 56 Me. 458; s.c. 96 Am. Dec. 486;
Sillers v. Lester, 48 Miss. 513;
Rutherford v. Stewart, 79 Mo. 216;
Wright v. Bircher, 72 Mo. 179; s.c. 37 Am. Rep. 433;
Haven v. Emery, 33 N. H. 66;
Pierce v. Emery, 32 N. H. 484;
Coe v. Delaware & L. R. Co., 34 N. J. Eq. (7 Stew.) 266;
Smithurst v. Edmunds, 14 N. J. Eq. (1 McC.) 408;
Willink v. Morris Canal Co., 4 N. J. Eq. (3 H. W. Gr.) 377;
Hoyle v. Plattsburgh, etc., R. Co., 51 Barb. (N. Y.) 45; s.c. 13 Am. Rep. 595;
Benjamin v. Elmira, etc., R. Co., 49 Barb. 441; s.c. 54 N. Y. 675;
Seymour v. Canandaigua, etc., R. Co., 25 Barb. (N. Y.) 284;
Otis v. Sill, 8 Barb. (N. Y.) 102;
Coopers v. Wolf, 15 Ohio St. 523;
Williams v. Winsor, 12 R. I. 9;
Cook v. Corthell, 11 R. I. 482;
Williams v. Briggs, 11 R. I. 476, 478;
Rauch v. Dech, 116 Pa. St. 157; s.c. 9 Atl. Rep. 180;
Philadelphia, etc., Co. v. Woelper, 64 Pa. St. 366;
Chew v. Barnett, 11 Serg. & R. (Pa.) 389;
Phelps v. Murray, 2 Tenn. Ch. 746;
Watkins v. Wyatt, 9 Baxt. (Tenn.) 250; s.c. 40 Am. Rep. 90; 16 Alb. L. J. 205;
Tedford v. Wilson, 3 Head (Tenn.) 311, 312;
Crisp v. Miller, 5 Heisk. (Tenn.) 697;
Pierce v. Milwaukee R. Co., 24 Wis. 551;
Farmers' Loan & Trust Co. v. Fisher, 17 Wis. 114, 144;
Hill v. La Crosse & M. R. Co., 11 Wis. 214;
Farmers' Loan & Trust Co. v. Commercial Bank, 11 Wis. 207;
Branch v. Jesup, 106 U. S. 468; bk. 27 L. ed. 279;
Fosdick v. Southern Car Co., 99 U. S. 256; bk. 25 L. ed. 344;
Fosdick v. Schall, 99 U. S. 235; bk. 25 L. ed. 339;
Shaw v. Bill, 95 U. S. 10; bk. 24 L. ed. 333;
Beall v. White, 94 U. S. 382; bk. 24 L. ed. 173;
Butt v. Ellett, 86 U. S. (19 Wall.) 544; bk. 22 L. ed. 183;
United States v. New Orleans, etc., R. Co., 79 U. S. (12 Wall.) 362; bk. 20 L. ed. 434;
Galveston, H. & H. R. Co. v. Cowdrey, 78 U. S. (11 Wall.) 459; bk. 20 L. ed. 199;
Dunham v. Cincinnati, P. & C. R. Co., 68 U. S. (1 Wall.) 254; bk. 17 L. ed. 584;
Pennock v. Coe, 64 U. S. (23 How.) 117; bk. 16 L. ed. 847;
Pullman v. Cincinnati, & C. Air-Line R. Co., 4 Biss. C. C. 35; s.c. Fed. Cas. No. 11462;
Barnard v. Norwich, etc., R. Co., 4 Cliff. C. C. 351; 3 Cent. L. J. 608; 5 Am. L. Reg. 361; 14 Nat. Bankr. Reg. N. S. 469; 22 Int. Rev. Rec. 27; 2 Fed. Cas. 841;

¹ See : *Post*, § 2056.

effective as soon as the property is acquired.¹ Whether a mortgage by a railroad of property to be acquired by the corporation after the execution of the mortgage and used in the exercise of its franchise will include the rolling stock will depend upon the character the court attributes thereto. Upon the question whether the rolling stock is held to be real or personal property, there is a conflict of decision. If the rolling stock is regarded as realty it will of course pass with the mortgage of the franchise, otherwise not.² The property to which a mortgagor acquires an equitable title only is within the description of after-acquired property in a mortgage.³

- Brett v. Carter, 2 Low. C. C. 458 ;
s.c. 2 N. Y. Wkly. Dig. 331 ; 14
Nat. Bankr. Reg. 301 ; 22 Int.
Rev. Rec. 152 ; 3 Cent. Law J.
286 ; 4 Fed. Cas. 67 ;
Mitchell v. Winslow, 2 Story C.
C. 630 ; s.c. 6 Law Rep. 347 ;
Fed. Cas. 9673 ;
Campbell v. Texas & N. O. R. Co.,
2 Woods C. C. 263 ; s.c. 4 Fed.
Cas. 1188.
¹ Benjamin v. Elmira, etc., R. R.
Co., 49 Barb. (N. Y.) 441 ; s.c.
54 N. Y. 675 ;
Philadelphia, W. & B. R. Co. v.
Woelpper, 64 Pa. St. 366 ; s.c.
3 Am. Rep. 596 ;
Pierce v. Milwaukee & St. P. R.
Co., 24 Wis. 551 ; s.c. 1 Am.
Rep. 203 ;
Galveston R. Co. v. Cowdrey, 78
U. S. (11 Wall.) 481 ; bk. 20 L.
ed. 199 ;
Pullman v. Cincinnati & C. A. R.
R. Co., 4 Biss. C. C. 35 ; s.c.
Fed. Cas. No. 11462.
² Rowan v. Sharp's Rifle Co., 29
Conn. 282 ;
Coe v. McBrown, 22 Ind. 252 ;
Phillips v. Winslow, 18 B. Mon.
(Ky.) 431 ; s.c. 68 Am. Dec. 729 ;
Emerson v. European & N. A. R.
Co., 67 Me. 387 ; s.c. 24 Am.
Rep. 39 ;
Morrill v. Noyes, 56 Me. 458 ; s.c.
96 Am. Dec. 486 ;
Parkhurst v. Northern Cent. R.
Co., 19 Md. 472 ; s.c. 81 Am.
Dec. 648 ;
Howe v. Freeman, 80 Mass. (14
Gray) 566 ;
Sillers v. Lester, 48 Miss. 513 ;
Pierce v. Emery, 32 N. H. 484 ;
Willink v. Morris Canal, 4 N. J.
Eq. (3 H. W. Gr.) 377 ;
Benjamin v. Elmira, etc., R. R.
Co., 54 N. Y. 675 ;
Hoyle v. Plattsburgh & M. R. Co.,
54 N. Y. 314 ; s.c. 13 Am. Rep.
595 ;
Coopers v. Wolf, 15 Ohio St.
523 ;
Philadelphia, W. & B. R. Co. v.
Woelpper, 64 Pa. St. 366 ; s.c.
3 Am. Rep. 596 ;
Chew v. Barret, 11 Serg. & R.
(Pa.) 389 ;
Pierce v. Milwaukee & St. P. R.
Co., 24 Wis. 551 ; s.c. 1 Am.
Rep. 203 ;
Galveston R. Co. v. Cowdrey, 78
U. S. (11 Wall.) 459, 481 ; bk.
20 L. ed. 199 ;
Dunham v. Railway Co., 68 U.
S. (1 Wall.) 254 ; bk. 17 L. ed.
584 ;
Pennock v. Coe, 64 U. S. (23
How.) 117 ; bk. 16 L. ed. 436 ;
Spies v. Chicago & E. I. R. Co.,
40 Fed. Rep. 34 ; s.c. 6 L. R. A.
565.
In a railroad mortgage the words
"hereafter to belong to the
party of the first part," used in
describing lines of road be-
tween certain specified points,
which are included in a mort-
gage to secure income bonds,
do not cover additional lines
outside of the specified limits,
which are subsequently ac-
quired by the mortgagor.
Spies v. Chicago & E. I. R. Co.,
40 Fed. Rep. 34 ; s.c. 6 L. R. A.
565.
³ Brady v. Johnson, 75 Md. 445 ;

SEC. 2056. **Same—Growing crops.**—A valid mortgage may be executed upon growing crops whatever their stage of maturity and the amount of work required to perfect them;¹ and in some states upon crops, the seed for which has not yet been planted.²

SEC. 2057. **What mortgage carries.**—The general rule is that a mortgage carries with it what is necessary for the protection of the security. Thus a mortgage upon a

- s.c. 26 Atl. Rep. 49; 20 L. R. A. 737.
- ¹ *Adams v. Tanner*, 5 Ala. 740; *Robinson v. Mauldin*, 11 Ala. 977; *Evans v. Lamar*, 21 Ala. 333; *McKenzie v. Lampley*, 31 Ala. 526, 528; *Booker v. Jones*, 55 Ala. 266; *Ellis v. Martin*, 60 Ala. 394; *Wyatt v. Watkins*, 9 Baxt. (Tenn.) 250; s.c. 40 Am. Rep. 90; 16 Alb. L. J. 205; 30 Am. Rep. 63 note; *Greer v. Turner*, 47 Ark. 17; s.c. 14 S. W. Rep. 383; *Beard v. State*, 43 Ark. 284; *Meadow v. Wise*, 41 Ark. 285; *Jarratt v. McDaniel*, 32 Ark. 598; *Apperson v. Moore*, 30 Ark. 56; s.c. 21 Am. Rep. 170; *Parks v. Webb*, 48 Ark. 293; s.c. 3 S. W. Rep. 521; *Hammock v. Creekmore*, 46 Ark. 264; s.c. 3 S. West. Rep. 180; *Arques v. Wasson*, 51 Cal. 630; s.c. 21 Am. Rep. 718; *Hansen v. Dennison*, 7 Ill. App. 73; *Hutchinson v. Ford*, 9 Bush (Ky.) 318; s.c. 15 Am. Rep. 711; *Bryant v. Pennell*, 61 Me. 108; s.c. 14 Am. Rep. 550; *Everman v. Robb*, 52 Miss. 653; s.c. 24 Am. Rep. 682; *Sellers v. Lester*, 48 Miss. 513; *Melin v. Reynolds*, 32 Minn. 52; s.c. 19 N. W. Rep. 81; *Cotten v. Willoughby*, 83 N. C. 75; s.c. 35 Am. Rep. 564; *Cuddworth v. Scott*, 41 N. H. 456; *McCaffery v. Wodin*, 65 N. Y. 459; s.c. 22 Am. Rep. 644; *Williams v. Briggs*, 11 R. I. 176; s.c. 23 Am. Rep. 518; *Moore v. Byrum*, 10 S. C. 452; s.c. 30 Am. Rep. 58; *Kimball v. Sattley*, 55 Vt. 285; s.c. 45 Am. Dec. 614; *Sterling v. Baldwin*, 42 Vt. 306; *Fitch v. Burk*, 38 Vt. 683; *Butt v. Ellett*, 86 U. S. (19 Wall.) 544; bk. 22 L. ed. 183. ² *Hurst v. Bell*, 72 Ala. 336; *Thrash v. Bennett*, 57 Ala. 156; *Redd v. Burrus*, 58 Ga. 574; *Hutchinson v. Ford*, 9 Bush (Ky.) 318; s.c. 15 Am. Rep. 711; *Tripp v. Brownell*, 66 Mass. (12 Cush.) 376; *Jones v. Richardson*, 51 Mass. (10 Met.) 481; *Gardner v. Hoeg*, 35 Mass. (18 Pick.) 168; *Macomber v. Parker*, 31 Mass. (14 Pick.) 497; *Evermann v. Robb*, 52 Miss. 653; s.c. 24 Am. Rep. 682; 3 Cent. L. J. 735; *Rawlings v. Hunt*, 90 N. C. 270; *Harris v. Jones*, 83 N. C. 317; *Cotten v. Willoughby*, 83 N. C. 75; s.c. 35 Am. Rep. 564; *Robinson v. Ezzell*, 72 N. C. 231; *Andrew v. Newcomb*, 32 N. Y. 417; *Bank of Lansinburgh v. Crary*, 1 Barb. (N. Y.) 542; *Watkins v. Wyatt*, 9 Baxt. (Tenn.) 250; s.c. 40 Am. Rep. 90; 16 Alb. L. J. 205; 30 Am. Rep. 63 note; *McGee v. Fitzer*, 37 Tex. 27; *Comstock v. Scales*, 7 Wis. 159; *Butt v. Ellett*, 86 U. S. (19 Wall.) 544; bk. 22 L. ed. 183; *Senter v. Mitchell*, 16 Fed. Rep. 206; *Lunn v. Thornton*, 1 Mann. G. & S. 379; s.c. 50 Eng. C. L. 379. See: *Hutchinson v. Ford*, 9 Bush (Ky.) 318; s.c. 15 Am. Rep. 711; *Milliman v. Neher*, 20 Barb. (N. Y.) 37.

building generally carries with it the land on which it stands, and which is essential to its use, where such land is owned by the mortgagor.¹ The grant of a barn, a shop, a house, a well, or a mill carries the land under it, and necessary to its enjoyment and use ;² and a mortgage of a stone foundation of an unfinished house carries with it the land on which it stands.³ A mortgage of realty covers all articles essential to the use of such realty, and without which it would cease to be of value.⁴ Thus hop-poles used upon a farm cultivated in growing hops are a part of the real estate,⁵ and are covered by a mortgage of the lands. All buildings erected upon the lands after the execution of the mortgage become a part of the real estate, and are subject to the mortgage ;⁶ they

¹ *Greenwood v. Murdock*, 75 Mass. (9 Gray) 20 ; s.c. 69 Am. Dec. 272 ;

Wilson v. Hunter, 14 Wis. 6, 83. See : *Snow v. Orleans*, 126 Mass. 453, 456 ;

Scanlan v. Geddes, 112 Mass. 15, 17 ;

Owen v. Fields, 102 Mass. 90, 102 ;

Johnson v. Rayner, 72 Mass. (6 Gray) 107, 110 ;

Forbush v. Lombard, 54 Mass. (13 Met.) 109 ;

Inhabitants of Cheshire v. Inhabitants of Shutesbury, 48 Mass. (7 Met.) 566.

² *Johnson v. Rayner*, 72 Mass. (6 Gray) 107, 110 ;

Forbush v. Lombard, 54 Mass. (13 Met.) 109 ;

Inhabitants of Cheshire v. Inhabitants of Shutesbury, 48 Mass. (7 Met.) 566.

³ *Snow v. Orleans*, 126 Mass. 453, 456 ;

Scanlan v. Geddes, 112 Mass. 15, 17 ;

Owens v. Field, 102 Mass. 90, 102 ;

Greenwood v. Murdock, 75 Mass. (9 Gray) 20 ; s.c. 69 Am. Dec. 272.

In *Greenwood v. Murdock*, 75 Mass. (9 Gray) 20 ; s.c. 69 Am. Dec. 272, the court say : " Mortgage of all right, title, and interest which mortgagor now has in foundation or stone work of a building in course of construction, and which he may have in and unto said building dur-

ing its erection and completion and after it is completed, for the purpose of securing advances to enable him to erect the building, passes the land on which the building stands."

⁴ *Bond v. Cope*, 71 N. C. 97 ;

Hoyle v. Plattsburgh & M. R. Co., 51 Barb. (N. Y.) 45.

See : *Union Water Co. v. Murphy's Fluming Co.*, 22 Cal. 620 ;

Allen v. Woodard, 125 Mass. 400 ; s.c. 28 Am. Rep. 250 ;

Johnston v. Morrow, 60 Mo. 339 ;

In re McManus, L. R. 10 Ch. 322 ; s.c. 12 Moak Eng. Rep. 743 ;

Meux v. Jacobs, L. R. 7 H. L. Cas. 481 ; s.c. 13 Eng. Rep. 1, 14.

In the mortgage of a railroad, however, only so much of the franchise will pass to the mortgagee as is necessary to make the grant beneficial to him.

Eldridge v. Smith, 34 Vt. 484.

⁵ *Ante*, § 96.

See : *Sullivan v. Toole*, 26 Hun (N. Y.) 203.

⁶ *Buckout v. Swift*, 27 Cal. 433 ; s.c. 87 Am. Dec. 90.

See : *Aldrich v. Husband*, 131 Mass. 480 ;

Westgate v. Wixon, 128 Mass. 304 ; *Madigan v. McCarthy*, 108 Mass. 376 ;

Morris v. French, 106 Mass. 326 ; *Howard v. Fessenden*, 96 Mass. (14 Allen) 124 ;

Gibbs v. Estey, 81 Mass. (15 Gray) 587 ;

cannot be removed or treated as personalty and attached by the creditors of the mortgagor.¹ But where buildings on the land at the time the mortgage is given are removed therefrom, some courts hold that they are thereby withdrawn from the operation of the mortgage lien,² while others hold that where a building is thus removed, without the consent of the mortgagee, the mortgage lien will remain upon the building, though it will not attach to the lot to which it is removed, and that such house will be ordered sold in those cases where the proceeds of the mortgaged lot, after the removal, are insufficient to pay the debt, but not otherwise.³ This is on the principle that courts of equity will enforce the lien of the mortgagee upon fixtures which have been removed to his detriment.⁴

SEC. 2058. **Essentials of mortgage—Introductory.**—To constitute a valid mortgage there must be (1) parties capable of making a mortgage; (2) parties capable of accepting a mortgage;⁵ (3) property *in esse*, or to be afterwards acquired, identified, or sufficiently described to be capable of identification;⁶ (4) a sufficient consideration,⁷ and the

Murphy v. Marland, 62 Mass. (8 Cush.) 575;

Eastman v. Foster, 49 Mass. (8 Met.) 19;

Milton v. Colby, 46 Mass. (5 Met.) 78.

See: *Post*, § 2083.

¹ Westgate v. Wixon, 128 Mass. 304;

Murphy v. Marland, 62 Mass. (8 Cush.) 575;

Eastman v. Foster, 49 Mass. (8 Met.) 19;

Milton v. Colby, 46 Mass. (5 Met.) 78.

² Hill v. Gwin, 51 Cal. 47;

Buckout v. Swift, 27 Cal. 433; s.c. 87 Am. Dec. 90;

Gardner v. Finley, 19 Barb. (N. Y.) 317.

³ Hamlin v. Parsons, 12 Minn. 108; s.c. 90 Am. Dec. 284;

Hutchins v. King, 68 U. S. (1 Wall.) 59; bk. 17 L. ed. 544.

⁴ Witmer's Appeal, 45 Pa. St. 455; s.c. 84 Am. Dec. 505;

Pyle v. Pennock, 2 Watts & S.

(Pa.) 390; s.c. 37 Am. Dec. 517;

Voorhis v. Freeman, 2 Watts & S. (Pa.) 116; s.c. 37 Am. Dec. 490;

Gray v. Holdship, 17 Serg. & R. 413; s.c. 17 Am. Dec. 680.

⁵ See: *Post*, § 2059.

⁶ Coogan v. Burling Mills, 124 Mass. 390;

Robinson v. Brennan, 115 Mass. 582;

Tucker v. Field, 51 Miss. 191.

See: *Post*, § 2059.

⁷ Ricketson v. Richardson, 19 Cal. 330;

Lewis v. De Forest, 20 Conn. 427;

Michigan Ins. Co. v. Brown, 11 Mich. 265;

McKinster v. Babcock, 26 N. Y. 378;

Shirras v. Caig, 11 U. S. (7 Cr.) 34; bk. 3 L. ed. 260.

See: *Post*, § 2061.

Description of debt secured—Accuracy
—Shirras v. Caig.—The validity of a mortgage does not depend upon the fact that the debt in-

intent and purpose of the mortgage may be shown by parol for the purpose of establishing the consideration ;¹ (5) the proper execution of the instrument ; (6) its delivery,² and (7) the registration of the instrument.³

SEC. 2059. **Same—Parties to mortgage.**—We have already seen that any one who is capable of transferring real estate may execute a mortgage thereon,⁴ and that any one who is capable of taking and holding real property may take a mortgage thereon.⁵

SEC. 2060. **Same—Property to be mortgaged.**—It has already been pointed out that any interest, vested or contingent, in real property may be mortgaged, provided only it be a present vested interest, and not a future contingent one ;⁶ but to be valid and binding the property must be sufficiently described to enable the court to enforce the lien against it. The first great requisite in the description is that it shall be sufficient for the purpose of identification.⁷ Where the description is uncertain the mortgage will be void for that reason.⁸

tended to be secured is truly stated in the instrument ; but it will stand as a security for the real equitable claims of the mortgagees, whether they exist at the date of the mortgage, or arise afterwards upon the face of the mortgage before notice of defendant's equity.

Shirras v. Caig, 11 U. S. (7 Cr.) 34 ; bk. 3 L. ed. 260.

See : *Wood v. Weimer*, 104 U. S. 786, 793 ; bk. 26 L. ed. 781 ;

Jones v. Guaranty & I. Co., 101 U. S. 622, 631 ; bk. 25 L. ed. 1030, 1036 ;

Lawrence v. Tucker, 64 U. S. (23 How.) 14, 27 ; bk. 16 L. ed. 474, 478 ;

Baldwin v. Raplee, 4 Ben. D. C. 433, 442 ; s.c. 2 Fed. Cas. No. 802.

¹ *McKinster v. Babcock*, 26 N. Y. 378 ;

Shirras v. Caig, 11 U. S. (7 Cr.) 34 ; bk. 3 L. ed. 260.

See : *Truscott v. King*, 6 N. Y. 147 ;

Bank, etc., v. Finch, 3 Barb. Ch. (N. Y.) 293 ;

Lawrence v. Tucker, 64 U. S. (23 How.) 14 ; bk. 16 L. ed. 474.

The consideration necessary to support a mortgage may either be the payment of money, or the performance of an obligation.

See : *Post*, §§ 2062, 2063.

² See : *Post*, § 2064.

³ See : *Post*, § 2065.

⁴ See : *Ante*, § 2047.

⁵ See : *Ante*, § 2052.

⁶ See : *Ante*, § 2053.

⁷ *Began v. O'Reilly*, 32 Cal. 11 ;

Hancock v. Watson, 18 Cal. 137 ;

⁸ *Thurman v. Jenkins*, 58 Tenn. (2 Baxt.) 426.

See : *Tryon v. Sutton*, 13 Cal. 490 ;

Overton v. Hollinshade, 5 Heisk. (Tenn.) 683 ;

Williamson v. Steele, 3 Lea (Tenn.) 527 ;

Farquharson v. McDonald, 2 Heisk. (Tenn.) 404 ;

Sugg v. Tillman, 2 Swan (Tenn.) 208.

SEC. 2061. **Same—Consideration.**—A mortgage, like any other contract, must be found upon a sufficient considera-

De Leon v. Higuera, 15 Cal. 483;
Whitney v. Buckman, 13 Cal. 536;

Usina v. Wilder, 58 Ga. 178;
Kruse v. Scripps, 11 Ill. 98;
Murphy v. Hendricks, 57 Ind. 593, 597;

Cochran v. Utt, 42 Ind. 267;
White v. Hyatt, 40 Ind. 385;
Gray v. Stivers, 24 Ind. 174;
Blakemore v. Tabor, 22 Ind. 466;
English v. Roche, 6 Ind. 62;

Boyd v. Ellis, 11 Iowa 97;
Starling v. Blair, 4 Bibb (Ky.) 288;
Tucker v. Field, 51 Miss. 191;
Coogan v. Burling Mills, 124

Mass. 390;
Robinson v. Brennan, 115 Mass. 582;

Slater v. Breese, 36 Mich. 77;
Cooper v. Bigley, 13 Mich. 463;
Boon v. Pierpont, 28 N. J. Eq. (1 Stew.) 7;

Lee v. Woodworth, 3 N. J. Eq. (2 H. W. Gr.) 36;

Peck v. Mellams, 10 N. Y. 509;
Keiffer v. Starn, 27 La. An. 282;
Baker v. Bank of Louisiana, 2 La. An. 371;

Ells v. Sims, 2 La. An. 251;
Langley v. Vaughn, 10 Heisk. (Tenn.) 553;

Overton v. Holinshade, 5 Heisk. (Tenn.) 683;

Williamson v. Steele, 3 Lea (Tenn.) 527;

Thurman v. Jenkins, 58 Tenn. (2 Baxt.) 426;

Wilson v. Boyce, 92 U. S. 320; bk. 23 L. ed. 608.

Description of property mortgaged.—

In *Coogan v. Burling Mills*, *supra*, a deed of mortgage conveyed seven different parcels of land, none of which were described by metes and bounds, but all by reference to other deeds. The first parcel included a mill with the connected water privileges; the seventh the dam about half a mile above, through which the water was conducted through the bed of an old canal to the mill, and the other five lots were between the mill and the dam. The sixth parcel was described as "lying north of

the fourth tract and containing two acres to secure the water rights, for a description of which reference is had to" three recorded deeds, the first of which described, by metes and bounds, only the easterly half of a dam and the feeder to the canal, the second described several parcels of land, all by reference to other deeds, among which was a deed also conveying, by metes and bounds, the easterly half of the dam and feeder, and, in addition, the canal from the mouth of the feeder to the north line of the fourth tract, together with the mill privilege and land then owned by the grantor. The second and third of the deeds referred to, also by reference to other deeds, included the land in controversy, and several other tracts of land embraced in other clauses of the mortgage. It was held that all the deeds referred to in the sixth clause were to be considered, and that the mortgage included the entire mill privilege.

The court say: "The plaintiffs contend that the sixth clause should be held to embrace only the land described in the first deed referred to, namely, the half of the dam and feeder. But we can see no reason for thus restricting the grant to the lot described in one of the deeds referred to; all the deeds referred to must be taken into account in determining what is conveyed; nor is there any ambiguity created by the fact that several of the lots conveyed are described more than once. It is a mode of description adopted throughout the deed in all its clauses, and seems to have been used in order to make sure that the whole estate of the grantors was covered. It is a settled rule that, although a reference to a recorded deed may not always be construed to exclude

tion. The consideration will be sufficient if there be any benefit to the mortgagor or to a third person, or any obligation assumed or prejudice sustained on the part of the mortgagee, at the request of the mortgagor.¹ While mortgages are usually given for the purpose of either securing the payment of money or the performance of some act, yet they are equally valid where executed for the purpose of saving the mortgagee against loss on account of the mortgagor,² as where the mortgagee endorses a note as security,³ or executes a note without consideration for the accommodation of the mortgagor,⁴ and the like. It is not essential that the consideration

a parcel already described by metes and bounds, yet such reference must convey additional land described in the deed referred to, unless otherwise controlled. In this case all the description of the sixth clause, except the statement that the land 'contains two acres to secure water rights,' consists in references to recorded deeds, and the rule stated is therefore applicable. *Foss v. Crisp*, 37 Mass. (20 Pick.) 121; *Whiting v. Dewey*, 32 Mass. (15 Pick.) 428. Moreover, unless this be the true construction of this clause, it would follow that there was a tract of land owned by the grantors lying between the mouth of the feeder and the fourth described parcel, through which the water from the defendant's dam was conveyed a distance of thirty rods through the old canal to the mill, which was not conveyed by the mortgage, and which was absolutely necessary to the value of the estate as a mill property."

¹ See: *Magruder v. State Bank*, 18 Ark. 9;

Pacific Iron Works v. Newhall, 34 Conn. 67;

Simpson v. Robert, 35 Ga. 180;

Mell v. Mooney, 30 Ga. 413;

Conwell v. Clifford, 45 Ind. 392;

Jones v. Jones, 20 Iowa 388;

Wearse v. Peirce, 41 Mass. (24 Pick.) 141;

Austin v. Grant, 1 Mich. 490;

McDowell v. Fisher, 25 N. J. Eq. (10 C. E. Gr.) 93;

Haden v. Buddensick, 4 Hun (N. Y.) 649;

Banks v. Walker, 2 Sandf. Ch. (N. Y.) 344;

Akerly v. Vilas, 21 Wis. 88, 89.

² *Magruder v. State Bank*, 18 Ark. 9;

Simpson v. Robert, 35 Ga. 180;

Duncan v. Miller, 64 Iowa 223; s.c. 20 N. W. Rep. 161;

Haden v. Buddensick, 49 How. (N. Y.) Pr. 241.

³ *Forbes v. McCoy*, 15 Neb. 632; s.c. 20 N. W. Rep. 17.

Indemnity mortgage—Foreclosure.—Where a mortgage is given as an indemnity for endorsing a note, and the like, the mortgagee can maintain no action upon the mortgage until he has sustained injury by paying the debt or a portion thereof.

Forbes v. McCoy, 15 Neb. 632; s.c. 20 N. W. Rep. 17.

See: *Lathrop v. Atwood*, 21 Conn. 117;

Stout v. Folger, 34 Iowa 74; s.c. 11 Am. Rep. 138;

Gregory v. Hartley, 6 Neb. 356;

Churchill v. Hunt, 3 Den. (N. Y.) 321;

Thomas v. Allen, 1 Hill (N. Y.) 145;

Douglass v. Clark, 14 John. (N. Y.) 177;

Re Negus, 7 Wend. (N. Y.) 499;

Wilson v. Stillwell, 9 Ohio St. 467; s.c. 75 Am. Dec. 477.

⁴ *Duncan v. Miller*, 64 Iowa 223; s.c. 20 N. W. Rep. 161.

should pass at the time of the execution of the mortgage ; it may either be prior or contemporary or subsequent, or partly prior and partly subsequent ;¹ but in those cases where the consideration is subsequent the mortgage will be inoperative until the consideration arises.² Thus a mortgage executed for the purpose of raising money thereon for the mortgagor, and without any delivery to or consideration being paid therefor by the mortgagee, only has life and validity from the time of its assignment and delivery to an assignee for value ; and this transaction cannot have a retroactive operation so as to give effect to the mortgage at an earlier day, to the prejudice of others having rights, legal or equitable, existing at that time. Nor can these rights be affected or destroyed by any act or representation of the mortgagor.³

SEC. 2062. **Same—Same—Payment of money.**—The usual object of executing a mortgage is to secure the payment of money, although, as we have seen in the preceding section, a mortgage may also be given for the purpose of securing the performance of an act,⁴ protecting against a contingent liability, and the like. Where the mortgage is given to secure the payment of money, the amount must be ascertained,⁵ or ascertainable by refer-

¹ *Duncan v. Miller*, 64 Iowa 223 ; s.c. 20 N. W. Rep. 171.

See : *Wright v. Bundy*, 11 Ind. 398 ;

Cooley v. Hobart, 8 Iowa 358 ;

Schafer v. Reilly, 50 N. Y. 61 ;

Mullensen's Estate, 68 Pa. St. 212.

² *Forbes v. McCoy*, 15 Neb. 632 ; s.c. 20 N. W. Rep. 17.

See : *Lathrop v. Atwood*, 21 Conn. 117 ;

Stout v. Folger, 34 Iowa 74 ; s.c. 11 Am. Rep. 138 ;

Gregory v. Hartley, 6 Neb. 356 ;

Churchhill v. Hunt, 3 Den. (N. Y.) 321 ;

Thomas v. Allen, 1 Hill (N. Y.) 145 ;

Douglass v. Clark, 14 John. (N. Y.) 177 ;

Re Negus, 7 Wend. (N. Y.) 499 ;

Wilson v. Stillwell, 9 Ohio St. 467 ; s.c. 75 Am. Dec. 477.

³ It was held in *Schafer v. Reilly*,

50 N. Y. 61, that where such a mortgage was executed and recorded and subsequently negotiated, but before its assignment and delivery another person acquired a lien upon the mortgaged premises, the latter lien had the priority ; and this was so, although the assignee, before taking the assignment, required and obtained from the mortgagor an affidavit that the mortgage advanced the whole sum of principal secured by the mortgage without abatement, and that there was no offset, defense, or counterclaim thereto.

⁴ See : *Post*, § 2063.

⁵ When debt a fixed sum, the amount should be stated.

Hart v. Chalker, 14 Conn. 77 ;

Pearce v. Hall, 12 Bush (Ky.) 209.

Other cases hold that the amount of the debt secured need not

ence to some other instrument, as a note or bond,¹ or book account,² and the like ; and where there is a note

be stated, whether that amount be certain or uncertain.

See : *Pike v. Collins*, 33 Me. 38 ;
Sumersworth Savings Bank v. Roberts, 38 N. H. 22.

¹ *Lewis v. De Forrest*, 20 Conn. 427 ;
Merrills v. Swift, 18 Conn. 257 ;
s.c. 27 Am. Dec. 682 ;

Hart v. Chalker, 14 Conn. 77 ;

Booth v. Barnum, 9 Conn. 286,
290 ; s.c. 23 Am. Dec. 339 ;

Met. Bank v. Godfrey, 23 Ill.
602 ;

Pike v. Collins, 33 Me. 38 ;

Baxter v. McIntire, 79 Mass. (13
Gray) 168 ;

Gilman v. Moody, 43 N. H. 329 ;
Sumersworth Savings Bank v.

Roberts, 38 N. H. 22, 32 ;

Sharpe v. Gerry, 18 N. H. 245 ;
Stuyvesant v. Hall, 2 Barb. Ch.
(N. Y.) 151 ;

Truscott v. King, 6 Barb. (N. Y.)
346 ;

Gill v. Pinney, 12 Ohio St. 38 ;

Hurd v. Robinson, 11 Ohio St.
232 ;

Tousley v. Tousley, 5 Ohio St.
232 ;

Stanford v. Andrews, 12 Heisk.
(Tenn.) 664 ;

McDaniel v. Colvin, 16 Vt. 300 ;
s.c. 42 Am. Dec. 512 ;

Soule v. Albe, 31 Vt. 142 ;

Seymour v. Darrow, 31 Vt. 122 ;
Shirras v. Caig, 11 U. S. (7 Cr.)

34 ; bk. 3 L. ed. 260.

Compare : *St. John v. Camp*, 17
Conn. 222 ;

Crane v. Deming, 7 Conn. 387 ;

Pettibone v. Griswold, 4 Conn.
158 ; s.c. 10 Am. Dec. 106.

Where the sum to be paid described in the mortgage is a given amount, "or thereabouts," the mortgage will be held to be security for an amount not materially larger than the sum mentioned.

Booth v. Barnum, 9 Conn. 286 ;
s.c. 23 Am. Dec. 339.

Describing the note secured by giving the date, the amount, the time of payment, and the rate of interest has been held to be sufficient without giving the name of the maker.

Hough v. Bailey, 32 Conn. 288 ;

Ogborn v. Eliason, 77 Ind. 393 ;

Partridge v. Swazey, 46 Me. 414 ;

Boyd v. Parker, 43 Md. 182 ;

Aull v. Lee, 61 Mo. 160 ;

Sumersworth Bank v. Roberts,
38 N. H. 22 ;

Stanford v. Andrews, 12 Heisk.
(Tenn.) 664 ;

Follett v. Heath, 15 Wis. 601.

Same—A mere description of the legal effect of the note will not be a sufficient description.

Aull v. Lee, 61 Mo. 160 ;

Ricketson v. Richardson, 16 Cal.
330.

See : *Hough v. Bailey*, 32 Conn.
288 ;

Frink v. Branch, 16 Conn. 260 ;

Booth v. Barnum, 9 Conn. 286 ;
s.c. 23 Am. Dec. 339 ;

Kellogg v. Frazier, 40 Iowa 502 ;

Partridge v. Swazey, 46 Me. 414 ;

Williams v. Hilton, 35 Me. 547 ;
s.c. 58 Am. Dec. 729 ;

Boyd v. Baker, 43 Md. 182 ;

Warner v. Brooks, 80 Mass. (14
Gray) 107 ;

Johns v. Church, 29 Mass. (12
Pick.) 557 ;

Kimball v. Myers, 21 Mich. 276 ;

Aull v. Lee, 61 Mo. 160 ;

Gilman v. Moody, 43 N. H. 329 ;

Sheafe v. Gerry, 18 N. H. 245 ;

Boody v. Davis, 20 N. H. 140 ;
s.c. 51 Am. Dec. 210 ;

Robertson v. Stark, 15 N. H. 109,
112 ;

McKinstier v. Babcock, 20 N. Y.
375 ;

Hurd v. Robinson, 11 Ohio St.
232 ;

Moore v. Fuller, 6 Oreg. 272 ; s.c.
25 Am. Rep. 524 ;

Stanford v. Andrews, 12 Heisk.
(Tenn.) 664 ;

McDaniels v. Calvin, 16 Vt. 300 ;

Paine v. Benton, 32 Wis. 491 ;

Follett v. Heath, 15 Wis. 601 ;

Hughes v. Edwards, 22 U. S. (9
Wheat.) 489 ; bk. 6 L. ed. 142.

² *Machette v. Wanless*, 1 Colo. 225 ;

Lewis v. De Forrest, 20 Conn. 427 ;

Mix v. Cowles, 20 Conn. 420 ;

Merrills v. Swift, 18 Conn. 257 ;
s.c. 46 Am. Dec. 315 ;

Booth v. Barnum, 9 Conn. 286 ;
s.c. 23 Am. Dec. 339 ;

Emery v. Owings, 7 Gill (Md.)
488 ;

Michigan Ins. Co. v. Brown, 11
Mich. 265 ;

or bond the amount need not be specifically stated, or set out in the mortgage, if it is otherwise sufficiently de-

De Mott v. Benson, 4 Edw. Ch. (N. Y.) 297 ;

Esterly v. Purdy, 50 How. (N. Y.) Pr. 350 ;

Vanmeter v. Vanmeter, 3 Gratt. (Va.) 148 ;

Seymour v. Darrow, 31 Vt. 142 ;

Fisher v. Otis, 3 Chand. (Wis.) 83 ;

Shirras v. Caig, 11 U. S. (7 Cr.) 34 ; bk. 3 L. ed. 260 ;

United States v. Sturges, 1 Paine C. C. 525 ; s.c. Fed. Cas. No. 16414.

Description of notes secured by mortgage—New Hampshire doctrine—

Boody v. Davis.—It is held by the

Supreme Court of New Hampshire in the case of Boody v.

Davis, 20 N. H. 140 ; s.c. 51 Am. Dec. 210, that the omission of the sum, the date, or the name of one of the signers of a note is not fatal, provided it can be identified, and this case is followed by Sumersworth Savings Bank v. Roberts, 38 N. H. 25, and Gilman v. Moody, 43 N. H. 239, 245. In the first case the court say : "In Bassett v. Bassett, 10 N. H. 64, it was decided that a deed containing a proviso that if the 'grantor should comply with the condition of a certain bond, executed by him to the grantee at the same time, then the deed to be void' is valid as a mortgage, notwithstanding that the sum to be paid, or the matters to be performed, are not particularly set forth in the deed itself. In that case the date of the bond and the parties to it were correctly set forth ; and so far that case differs from the one before us. The fact that the deed and bond were executed at the same time was referred to as the ground upon which it might be held that the case was not within the statute. But the main ground of that decision was that it appeared upon the face of the deed that it was intended to be conditional and not absolute, and the statute did not require the con-

dition to be more particularly set forth. * * * It is true, there must be in the deed a certain description, and one of such a character as to enable a person upon the evidence to determine what was intended. But that description need not embrace every particular ; and although it may in some respects be erroneous, yet if the description be sufficient, after rejecting the erroneous part, such erroneous part may be rejected, when the facts shown *aliunde* require it, and effect given to the residue."

Same—Same—Massachusetts rule—

Johns v. Church.—The Supreme Judicial Court of Massachusetts, in the case of Johns v. Church, 29 Mass. (12 Pick.) 557, 560 ; s.c. 23 Am. Dec. 651, in which a note was described in a mortgage as being for \$236, but the note produced was for \$256, corresponding in other respects with the description in the mortgage, held that the note was a sufficient description upon evidence being given that the note produced was the only note which the plaintiff had signed as surety. So when the note was described in the mortgage as dated in the year one thousand seventeen hundred and ninety-eight, and the note produced was dated in the year 1798, showing a mistake of one thousand years, yet as the note agreed with the other terms of the description, and as there was manifestly a mistake in the mortgage, it was held sufficient.

Hall v. Tufts, 35 Mass. (18 Pick.) 455, 460 ;

Trowbridge v. Cushman, 41 Mass. (24 Pick.) 310, 314.

Same—Vermont doctrine—Edgell v. Stanfords.—A different rule seems to prevail in Vermont. Thus in the case of Edgell v. Stanfords, 31 Vt. 202, 204, where the amount of the sum secured by the note was misstated in the mortgage, the

scribed so that it it can be recognized and distinguished from other obligations.¹ The general rule is, that debts to be paid must be so defined and described that other debts may not be substituted therefor; and then, no matter what form the debt may assume, so long as it can be traced, the mortgage will secure it.² In those cases where the description is not sufficiently particular to insure the identification of the debt, parol evidence may be introduced to show the connection between the debt and the mortgage, and for the purpose of supplying any deficiencies there may be in the description.³ The exact amount of the debt need not be set out in the in-

court find in their opinion, in part upon the correspondence between pleadings and evidence in similar cases, and in part on the admissibility of parol evidence to show mistake in written contracts, and upon the want of power in courts of law to correct such mistakes. It is thought that the rules as to variance and pleading do not apply to a case like this, nor is it a mere question of correcting a mistake in a written contract that is presented. If the amount of the note was the only description given of it, and that was a mistake, the doctrine of *Edgell v. Stanfords* would apply. In commenting upon the Vermont case Judge WILCOX says in *Boody v. Davis*, 20 N. H. 140; s.c. 51 Am. Dec. 210: "It is also said in that case that the plaintiff offered parol evidence to show that the note produced was the one intended to be described. We do not think such evidence of intention, as an independent fact, could properly be received. But when it is said that the note produced corresponded with that described in the mortgage, except as to the amount, then the question is whether the points of coincidence are sufficient to afford a reasonable assurance that the note produced was the one intended; in which case the erroneous part of the description

may be rejected in conformity with the maxim, *Falso demonstratio non nocet*."

¹ *Sumersworth Savings Bank v. Roberts*, 38 N. H. 22.

² *Van Wagener v. Van Wagener*, 7 N. J. Eq. (3 Halst.) 27;

Patterson v. Johnston, 7 Ohio 225.

See: *Bramhall v. Flood*, 41 Conn. 68;

Booth v. Barnum, 9 Conn. 286; s.c. 23 Am. Dec. 339;

Hubbard v. Savage, 8 Conn. 215; 215;

Crane v. Deming, 7 Conn. 387;

Stoughton v. Pasco, 5 Conn. 442; s.c. 13 Am. Dec. 72;

Pettibone v. Griswold, 4 Conn. 158; s.c. 10 Am. Dec. 106;

Riggs v. Armstrong, 23 W. Va. 760.

³ *Doe v. McLoskey*, 1 Ala. 708;

Babcock v. Lisk, 57 Ill. 327;

Crafts v. Crafts, 79 Mass. (13 Gray) 168;

Baxter v. McIntire, 79 Mass. (13 Gray) 166;

Hall v. Tufts, 35 Mass. (18 Pick.) 455;

Johns v. Church, 29 Mass. (12 Pick.) 557;

Aull v. Lee, 61 Mo. 160;

New Hampshire Bank v. Willard, 10 N. H. 210;

Bell v. Fleming, 12 N. J. Eq. (1 Beas.) 13;

Jackson v. Bowen, 7 Cow. (N. Y.) 13;

Gill v. Pinney, 12 Ohio St. 38;

Hurd v. Robinson, 11 Ohio St. 232.

strument, because a mortgage may be given to secure an unliquidated debt,¹ or future advances;² though in some states a mortgage given to secure unliquidated damages is invalid.³ Where a mortgage is given to secure future advances the amount to be advanced need not be specified, provided only it can be otherwise ascertained by the description.⁴ A mortgage may also be given to secure a balance that may remain after the application of certain credits, or a sum to be ascertained by an award.⁵ The consideration named in a mortgage does not determine the amount of the mortgage debt secured, and is no notice of the amount due, nor a limitation of the amount secured by the instrument.⁶ When a mortgage is given to secure the payment of a specific sum of money, it must conform, in a reasonable degree, to the particulars of the description; otherwise it will not be covered by the mortgage.⁷ It is thought that an

¹ *Stoughton v. Pasco*, 5 Conn. 442; s.c. 13 Am. Dec. 72;

Esterly v. Purdy, 50 How. Pr. (N. Y.) 350;

De Mott v. Benson, 4 Edw. Ch. (N. Y.) 297.

In *De Mott v. Benson*, *supra*, the court hold that where a bond and mortgage are given on a settlement of accounts, balances being struck and assented to at the time, they are *prima facie* evidence of the amount; and when the mortgagor denies the extent of the amount, the burden of proof is on the latter—on the principle of surcharging and falsifying. And where (as in the case before the court) there is no general order or decree throwing open the accounts and allowing a general accounting, the defendant is only at liberty to surcharge and falsify as to the particular items pointed out by his answer, and cannot have benefit of error in other items, although, on a reference, they may be apparent.

² *Hubbard v. Savage*, 8 Conn. 215; *Brackett v. Sears*, 15 Mich. 244; *Witczinski v. Everman*, 51 Miss. 841; *Summers v. Roos*, 42 Miss. 749;

s.c. 2 Am. Rep. 653;

Foster v. Reynolds, 38 Mo. 553;

Holt v. Creamer, 34 N. J. Eq. (7 Stew.) 181, 188;

Farnum v. Burnett, 21 N. J. Eq. (6 C. E. Gr.) 87;

Ackerman v. Hunsicker, 85 N. Y. 43, 47; s.c. 39 Am. Rep. 621;

Robinson v. Williams, 22 N. Y. 380;

Murray v. Barney, 34 Barb. (N. Y.) 336;

Taylor v. Cornelius, 60 Pa. St. 187;

Burgess v. Eve, L. R. 13 Eq. 450; s.c. 2 Moak Eng. Rep. 379.

³ *Bethlehem v. Annis*, 40 N. H. 34; s.c. 77 Am. Dec. 700;

⁴ *Hubbard v. Savage*, 8 Conn. 215; *Crane v. Deming*, 7 Conn. 387;

Allen v. Lathrop, 46 Ga. 133;

Frye v. Bank of Illinois, 11 Ill. 367;

Hughes v. Worley, 1 Bibb (Ky.) 200;

Shirras v. Caig, 11 U. S. (7 Cr.) 34; bk. 3 L. ed. 260;

United States v. Hooe, 7 U. S. (3 Cr.) 73; bk. 2 L. ed. 370.

⁵ *Emery v. Owings*, 7 Gill (Md.) 488; s.c. 48 Am. Dec. 580.

⁶ *Keyes v. Bump Admr.*, 59 Vt. 391; s.c. 9 Atl. Rep. 598.

⁷ *Babcock v. Lisk*, 57 Ill. 327;

Storms v. Storms, 3 Bush (Ky.) 77;

immaterial variation would not affect the validity, and that when the variation is material the mortgage will be valid for the amount stated, where that amount is within the sum secured by the mortgage.¹ Where the mortgage is given for a specified amount it cannot be so extended as to cover other debts or future advances, where such extension will prejudice third persons who have acquired rights in the property.²

SEC. 2063. **Same—Same—Performance of a condition.**—A valid mortgage may also be executed securing the performance of a condition on the part of the mortgagor, such as a condition to support the mortgagee,³ or to se-

- Doyle v. White, 26 Me. 341 ;
Hall v. Tufts, 35 Mass. (18 Pick.) 455 ;
Walker v. Paine, 31 Barb. (N. Y.) 213 ;
Follett v. Heath, 15 Wis. 601.
See : Baxter v. McIntire, 79 Mass. (13 Gray) 168.
¹ Whitney v. Buckman, 13 Cal. 536 ;
Hickox v. Lowe, 10 Cal. 197 ;
Brookings v. White, 49 Me. 479, 483 ;
Mitchell v. Barnham, 44 Me. 246 ;
Smith v. People's Bank, 24 Me. 185 ;
Rice v. Rice, 21 Mass. (4 Pick.) 349 ;
Brown v. Dewey, 1 Sandf. Ch. (N. Y.) 56 ;
Jaques v. Weeks, 7 Watts (Pa.) 261, 268 ;
Russell v. Southard, 53 U. S. (12 How.) 139 ; bk. 13 L. ed. 927 ;
Wharf v. Howell, 5 Binn. (Pa.) 499.
See : Hough v. Bailey, 32 Conn. 289 ;
Chester v. Wheelwright, 15 Conn. 562 ;
Kimball v. Myers, 21 Mich. 276 ;
McGready v. McGready, 17 Mo. 597 ;
Cushman v. Luther, 53 N. H. 562 ;
Large v. Van Doren, 14 N. J. Eq. (1 McC.) 203 ;
Stoddard v. Hart, 23 N. Y. 556.
² Belloc v. Davis, 38 Cal. 242 ;
Tunno v. Roberts, 16 Fla. 738 ;
Burchard v. Frazer, 23 Mich. 224 ;
McGready v. McGready, 17 Mo. 597 ;
Large v. Van Doren, 14 N. J. Eq. (1 McC.) 208 ;
Taylor v. Atlantic R. Co., 55 How. (N. Y.) Pr. 275 ;
Beekman Fire Ins. Co. v. 1st Meth. Church, 29 Barb. (N. Y.) 65 ;
Stoddard v. Hart, 23 N. Y. 556 ;
Townsend v. Empire Stone Dressing Co., 6 Duer (N. Y.) 208.
³ Cook v. Bartholomew, 60 Conn. 24 ; s.c. 22 Atl. Rep. 444 ; 3 L. R. A. 452.
See : Hubbard v. Hubbard, 94 Mass. (12 Allen) 586 ;
Jenkins v. Stetson, 91 Mass. (9 Allen) 128 ;
Pettee v. Case, 84 Mass. (2 Allen) 546 ;
Gilson v. Gilson, 84 Mass. (2 Allen) 115 ;
Marsh v. Austin, 83 Mass. (1 Allen) 235 ;
Gibson v. Taylor, 72 Mass. (6 Gray) 310 ;
Fiske v. Fiske, 37 Mass. (20 Pick.) 499 ;
Thayer v. Richards, 36 Mass. (19 Pick.) 398 ;
Lanfair v. Lanfair, 35 Mass. (18 Pick.) 299 ;
Wilder v. Whittemore, 15 Mass. 262, 263 ;
Bryant v. Erskine, 55 Me. 153 ;
Hill v. More, 40 Me. 515 ;
Brown v. Leach, 35 Me. 39, 41 ;
Hawkins v. Clermont, 15 Mich. 511 ;
Daniels v. Eisenlord, 10 Mich. 454 ;
Evans v. Norris, 6 Mich. 369 ;

cure the fidelity of a designated person.¹ Where a mortgage is given for the purpose of securing an obligation to support the mortgagee,² the obligation will prevent an alienation of the mortgaged premises, or their sale under execution, except by the consent of the mortgagee,³ and the interest of the mortgagee will not be assignable, because the benefit derived from the mortgage is of a personal character.⁴ In such a case the mortgagor is entitled to remain in possession until after condition broken.⁵ In mortgages for securing the performance of a condition, such as to support the mortgagee, the mortgagor may redeem the land on the payment of a sum of money which would be equivalent to the support to be rendered,⁶ which may be regarded as compensation to the mortgagee in damages for failure to perform.⁷ Mortgages executed, securing the performance of a condition to support, usually specify the place where the

Bethlehem v. Annis, 40 N. H. 34;

77 Am. Dec. 700 ;

Eastman v. Batchelder, 36 N. H.

141 ; s.c. 72 Am. Dec. 295 ;

Rhoades v. Parker, 10 N. H. 83 ;

Flanders v. Lamphear, 9 N. H.

201 ;

Dearborn v. Dearborn, 9 N. H.

117 ;

Soper v. Guernsey, 71 Pa. St.

219 ;

Henry v. Tupper, 29 Vt. 358 ;

Furbish v. Sears, 2 Cliff. C. C.

454 ; s.c. Fed. Cas. No. 5160.

¹ *Stoughton v. Pasco*, 5 Conn. 442 ;

s.c. 13 Am. Dec. 72.

² A deed granting land for a certain money consideration, with a condition that, if the grantor shall support the grantee during her natural life and give her decent burial, the deed shall be void, otherwise it shall remain of full force and effect, —constitutes a mortgage which may be foreclosed on failure to fulfill the condition.

Cook v. Bartholomew, 60 Conn.

24 ; s.c. 22 Atl. Rep. 444 ; 13 L.

R. A. 452.

Mitchell v. Burnham, 57 Me. 314,

322 ;

Bryant v. Erskine, 55 Me. 156 ;

Brown v. Leach, 35 Me. 39, 41 ;

Marsh v. Austin, 83 Mass. (1

Allen) 235 ;

Wales v. Mellen, 67 Mass. (1 Gray)

512 ;

Daniels v. Eisenlord, 10 Mich.

454, 455 ;

Bethlehem v. Annis, 40 N. H. 34 ;

s.c. 77 Am. Dec. 700 ;

Eastman v. Batchelder, 36 N. H.

141 ; s.c. 72 Am. Dec. 295 ;

Rhoades v. Parker, 10 N. H. 83 ;

Dearborn v. Dearborn, 9 N. H.

117 ;

Flanders v. Lamphear, 9 N. H.

201 ;

Soper v. Guernsey, 71 Pa. St. 219,

224 ;

Austin v. Austin, 9 Vt. 420.

⁴ *Bethlehem v. Annis*, 40 N. H. 34 ;

s.c. 77 Am. Dec. 700 ;

Bryant v. Erskine, 55 Me. 153.

⁵ *Flanders v. Lamphear*, 9 N. H.

201 ;

Soper v. Guernsey, 71 Pa. St.

224.

⁶ *Fiske v. Fiske*, 37 Mass. (20 Pick.)

499 ;

Wilder v. Whittemore, 15 Mass.

262 ;

Bryant v. Erskine, 55 Me. 153 ;

Hoyt v. Bradley, 27 Me. 242 ;

Bethlehem v. Annis, 40 N. H. 44 ;

s.c. 77 Am. Dec. 700 ;

Austin v. Austin, 9 Vt. 420.

⁷ *Hoyt v. Bradley*, 27 Me. 242 ;

Austin v. Austin, 9 Vt. 420.

support is to be furnished ; in those cases where the instrument is silent upon the subject the law requires the support to be furnished at a place convenient to both mortgagor and mortgagee, but will not permit the mortgagor to insist that it shall be at his own table.¹

SEC. 2064. **Same—Execution and delivery.**—To render a mortgage valid and bind the property, it must be properly executed, and duly delivered and accepted by the mortgagee.² Thus if not signed, though properly witnessed, acknowledged, and delivered, it will be void.³ Where properly signed and acknowledged, an actual delivery is not necessary, provided there is some act which in contemplation of law amounts to a delivery.⁴ It is thought that any act upon the part of the mortgagor subsequent to the execution of the mortgage, after parting with the possession of the instrument, which recognizes the rights of the mortgagee, will constitute a delivery.⁵ Thus it has been said that the filing of a mortgage for record by the mortgagor, and its subsequent

¹ Hubbard v. Hubbard, 94 Mass. (12 Allen) 586 ;

Jenkins v. Stetson, 91 Mass. (9 Allen) 128 ;

Pettee v. Case, 84 Mass. (2 Allen) 546 ;

Fiske v. Fiske, 37 Mass. (20 Pick.) 499 ;

Thayer v. Richards, 36 Mass. (19 Pick.) 398 ;

Wilder v. Whittemore, 15 Mass. 262 ;

Holmes v. Fisher, 13 N. H. 9 ;

Rhoades v. Parker, 10 N. H. 83 ;

Flanders v. Lamphear, 9 N. H. 201.

Freeman v. Peay, 23 Ark. 439 ; *

Hoadley v. Hadley, 48 Ind. 452, 462 ;

Milliken v. Ham, 36 Ind. 166 ;

Foley v. Howard, 8 Iowa 56 ;

Croft v. Bunster, 9 Wis. 503.

See : Haskill v. Sevier, 25 Ark. 152 ;

Carnall v. Duval, 22 Ark. 136 ;

Goodman v. Randall, 44 Conn. 321 ;

Dooley v. Potter, 140 Mass. 49 ;

Hawkes v. Pike, 105 Mass. 560 ;
s.c. 7 Am. Rep. 554 ;

Powell v. Conant, 33 Mich. 396 ;

Burson v. Huntington, 21 Mich. 415 ; s.c. 4 Am. Rep. 497 ;

Nazro v. Ware, 38 Minn. 443 ;
s.c. 38 N. W. Rep. 359 ;

Terhune v. Oldis, 44 N. J. Eq. 146 ; s.c. 14 Atl. Rep. 638 ;

Durfee v. Knowles, 2 N. Y. St. Rep. 466 ;

Flint v. Phipps, 16 Oreg. 437 ;
s.c. 19 Pac. Rep. 543 ;

Shirley v. Bunch, 16 Oreg. 33 ;
s.c. 18 Pac. Rep. 351 ;

Chipman v. Tucker, 38 Wis. 43 ;
s.c. 20 Am. Rep. 1 ;

Andrews v. Thayer, 30 Wis. 228 ;

Fisher v. Beckworth, 30 Wis. 55 ;

Truman v. McCollum, 20 Wis. 360.

² Goodman v. Randall, 44 Conn. 321.

³ Foley v. Howard, 8 Iowa 56 ;

Truman v. McCollum, 20 Wis. 360.

⁴ Dooley v. Potter, 140 Mass. 49 ;
s.c. 2 N. E. Rep. 935 ;

Nazro v. Ware, 38 Minn. 443 ;
s.c. 38 N. W. Rep. 359 ;

Wolf v. Driggs, 44 N. J. Eq. 363 ;
s.c. 14 Atl. Rep. 480 ;

Terhune v. Oldis, 44 N. J. Eq. 146 ; s.c. 14 Atl. Rep. 638.

possession by the mortgagee, is sufficient proof of its delivery and acceptance;¹ but mere registration does not operate as a delivery,² because this does not constitute the actual or implied acceptance necessary to constitute a good delivery.³ No definite or specific formality is prescribed by law as necessary to constitute a delivery, but it must be the concurrent act of two parties. It must appear that the grantor parts with the control and possession of the instrument with the intention that it should operate immediately as a transfer of title, and that it passes into the hands or is placed at the disposal of the grantee, or of some person in his behalf, duly authorized in the premises.⁴ Thus where the person named as mortgagee in the mortgage never had any knowledge of the instrument, or interest therein, and it never came into his possession, the mortgage will be void for want of proper delivery.⁵ And where a mortgagor placed the mortgage which he executed individually to himself as administrator, without recording it, in a receptacle used for keeping papers belonging both

¹ *Haskill v. Sevier*, 25 Ark. 152 ;
Carnall v. Duvall, 22 Ark. 136.

² *Hawkes v. Pike*, 105 Mass. 560.

In *Lee v. Fletcher*, 46 Minn. 49 ;
 s.c. 48 N. W. Rep. 456 ; 12 L.
 R. A. 171, it is said "that the
 delivery of a mortgage by the
 mortgagor, for record at his
 own expense, a few hours be-
 fore he killed himself, may
 constitute a good delivery to
 the mortgagee, although the
 latter had no knowledge of
 the instrument until after the
 mortgagor's death."

³ *Bell v. Pierce*, 146 Mass. 58 ; s.c.
 15 N. E. Rep. 119 ;

Hawkes v. Pike, 105 Mass. 560 ;
Chase v. Breed, 71 Mass. (5 Gray)
 440 ;

4 Kent Com. (13th ed.) 454.

⁴ *Hawkes v. Pike*, 105 Mass. 560 ;
Harrison v. Phillips' Academy, 12
 Mass. 456 ;

Maynard v. Maynard, 10 Mass.
 456 ;

Jackson v. Phipps, 12 John. (N.
 Y.) 418 ;

Elmore v. Marks, 39 Vt. 538.

⁵ *Hawkes v. Pike*, 105 Mass. 560 ;

Lee v. Fletcher, 46 Minn. 49 ; s.c.
 48 N. W. Rep. 456 ; 12 L. R.
 A. 171.

In *Hawkes v. Pike*, *supra*, a reg-
 ister of deeds wrote a deed,
 which the grantor signed and
 sealed and left with him to be
 recorded. The register had no
 authority from the grantee,
 who was absent, to receive or
 keep the deed for him, and
 gave the deed back to the
 grantor after recording it.
 The court held that there was
 no delivery of the deed to the
 grantee. The court say: "The
 register of deeds may have
 been the person agreed upon as
 the agent of the grantee, and
 in such a case a deed left with
 him for record is a sufficient
 delivery. But registration of
 itself does not operate as a
 delivery, nor does it supersede
 the necessity of proof of a de-
 livery."

Citing: *Parker v. Hill*, 49 Mass.
 (8 Met.) 447 ;

Samson v. Thornton, 44 Mass. (3
 Met.) 275.

to himself and the estate, in which place it was found after his death, this was held not to constitute such a delivery as is required, and a subsequent recording by his successor was held to be ineffectual.¹ But a mortgage being beneficial to the mortgagee, its acceptance may be presumed by the court, and possession of the instrument is sufficient to warrant the presumption of acceptance.² But such possession is only *prima facie*, and not conclusive evidence of delivery.³ A delivery of a mortgage, to be within the rule, must be absolute.⁴ And where a mortgage is placed in the hands of a third person, to be delivered to the mortgagee upon the happening of a specified event, this does not constitute a delivery within the rule, and a delivery by such third person before the happening of the specified event will be no delivery at all.⁵

SEC. 2065. **Same—Registration.**—In most if not all the

¹ *Burditt v. Colburn*, 63 Vt. 231; s.c. 13 L. R. A. 676; 12 Atl. Rep. 572.

² *Bell v. Farmers' Bank of Ky.*, 11 Bush (Ky.) 34; s.c. 21 Am. Rep. 205;

Chandler v. Temple, 58 Mass. (4 Cush.) 285;

Wolverton v. Collins, 34 Iowa 238.

³ *Chandler v. Temple*, 58 Mass. (4 Cush.) 285.

⁴ *Wall v. Hickey*, 112 Mass. 171; *Chipman v. Tucker*, 38 Wis. 43; s.c. 20 Am. Rep. 1.

See: *Powell v. Conant*, 33 Mich. 396;

Burson v. Huntington, 21 Mich. 415; s.c. 4 Am. Rep. 497;

Andrews v. Thayer, 30 Wis. 228.

⁵ *Wall v. Hickey*, 112 Mass. 171; *Chipman v. Tucker*, 38 Wis. 43; s.c. 24 Am. Rep. 1.

See: *Chandler v. Temple*, 58 Mass. (4 Cush.) 285;

Mills v. Gore, 37 Mass. (20 Pick.) 28;

Maynard v. Maynard, 10 Mass. 456;

Wheelwright v. Wheelwright, 2 Mass. 447;

Powell v. Conant, 33 Mich. 396;

Burson v. Huntington, 21 Mich. 415; s.c. 4 Am. Rep. 497;

Andrews v. Thayer, 30 Wis. 228.

In *Wall v. Hickey*, *supra*, in which the delivery of the deed was conditional, the court say: "The attempt to take advantage of that permission by recording the deed, and to disregard the condition on which alone the defendants received it, was a breach of good faith, and a fraud in equity, if not so at law. Against such fraud equity will relieve by intercepting the legal title in the hands of the parties who have thus unfairly acquired it, and either compelling them to release the property to the uses intended, or to hold it subject to the trust."

See: *Brainerd v. Brainerd*, 15 Conn. 575;

Washburn v. Merrills, 1 Day (Conn.) 139; s.c. 2 Am. Dec. 59;

Daniels v. Alvord, 2 Root (Conn.) 196;

Joynes v. Statham, 3 Atk. 388;

Walker v. Walker, 2 Atk. 98;

Bartlett v. Pickersgill, 1 Eden 515;

Dickson v. Parker, 2 Ves. Sr. 219, 225;

Browne on Stat. Frs., § 94;

Kerr on Fraud & Mist. 47-50;

1 Story Eq. Jur. (13th ed.), § 330-768.

states of the Union, to render a mortgage valid and binding as between third persons, it is necessary that the mortgage be duly registered in accordance with the provisions of the registration act of the state in which the land is located ; but such registration is not necessary to the validity of the instrument as between the parties.¹ The object of registration of instruments affecting the title to land is to give notice to all the world as to the condition and in whom the title rests ; the sole purpose of the registry of mortgages is to protect innocent purchasers and subsequent lienholders. In the absence of registration laws, prior grantees and mortgagees are superior in right as they are in time, and will be protected as against subsequent deeds and mortgages.² This is on the ground that where equities are otherwise equal, priority in time controls, for *qui prior est tempore, portior est pure*, is a maxim of equity as well as of law.³

SEC. 2066. **Form of mortgage.**—In the absence of any statutory requirement, no particular form is necessary in order to constitute a valid mortgage.⁴ The form in general use consists of a deed similar in terms to that of an ordinary deed of conveyance, qualified by a defeasance clause,⁵ setting forth the condition on which the conveyance shall be void. The condition on which the

¹ Spielmann v. Kliet, 36 N. J. Eq. (9 Stew.) 205 ;

Parkist v. Alexander, 1 John. Ch. (N. Y.) 394 ;

Berry v. Mutual Ins. Co., 2 John. Ch. (N. Y.) 603 ;

Johnson v. Stagg, 2 John. (N. Y.) 510 ;

McLaughlin v. Ihmsen, 85 Pa. St. 364 ;

Tryon v. Munson, 77 Pa. St. 250.

² Berry v. Mut. Ins. Co., 2 John. Ch. (N. Y.) 603.

See : Reeves v. Hayes, 95 Ind. 521, 544 ;

James v. Morey, 2 Cow. (N. Y.) 246 ;

Ely v. Scofield, 35 Barb. (N. Y.) 330.

³ Watson v. Le Row, 6 Barb. (N. Y.) 481, 485 ;

Grosvenor v. Allen, 9 Paige Ch. (N. Y.) 74, 76 ;

Skeel v. Spraker, 8 Paige Ch. (N. Y.) 182 ;

Lynch v. Utica Ins. Co., 18 Wend. (N. Y.) 236, 253 ;

Downer v. South Ralston Bank, 39 Vt. 25, 30 ;

Boone v. Chiles, 35 U. S. (10 Pet.) 177 ; bk. 9 L. ed. 388 ;

Shirras v. Caig, 11 U. S. (7 Cr.) 34, 38 ; bk. 3 L. ed. 260, 265 ;

Phillips v. Phillips, 4 DeG. F. & J. 208, 215 ;

Coray v. Eyre, 1 DeG. J. & S. 149 ;

2 Pom. Eq. Jur., § 132.

⁴ De Leon v. Higuera, 15 Cal. 483 ;

Burnside v. Terry, 45 Ga. 621 ;

Mason v. Moody, 26 Miss. 184 ;

Cotterell v. Long, 20 Ohio 464.

See : Porter v. Muller, 53 Cal. 677.

⁵ See : Post, § 2067, et seq.

conveyance is void is usually the payment of money,¹ or the performance of a specified condition.² Any deed which shows upon its face that it is intended to secure the payment of money, or the performance of a condition, is a mortgage; and where a deed in fee-simple is shown to have been executed merely for the purpose of securing the payment of money, or the performance of a condition, it is, in equity, simply a mortgage, though absolute in its terms.³ In common law a mortgage to be valid must be executed with all the formalities required for the execution of a deed;⁴ thus the instrument must be signed either by the mortgagor, or by another in his presence and by his direction,⁵ and must be sealed,⁶ and in many of the states must be witnessed and acknowledged.⁷ If any of these requisites are

¹ See: *Ante*, § 2062.

² See: *Ante*, § 2063.

³ See: *English v. Lane*, 1 Port. (Ala.) 328;

Woodworth v. Guzman, 1 Cal. 203;

Burnside v. Terry, 45 Ga. 621;

Edrington v. Harper, 3 J. J. Marsh. (Ky.) 353; s.c. 20 Am. Dec. 145;

Delabay v. McConnell, 5 Ill. (4 Scam.) 156;

Gibson v. Eller, 13 Ind. 124;

Davis v. Stonestreet, 4 Ind. 101;

Newman v. Samuels, 17 Iowa 528;

Bank of Westminster v. Whyte, 1 Md. Ch. 536; s.c. 3 Md. Ch. 508;

Howe v. Russell, 36 Me. 115;

Steel v. Steel, 86 Mass. (4 Allen) 417, 419;

Gilson v. Gilson, 84 Mass. (2 Allen) 115;

Nugent v. Riley, 42 Mass. (1 Met.) 117;

Parks v. Hall, 19 Mass. (2 Pick.) 206, 211;

Mason v. Moody, 26 Miss. 184;

Wilson v. Drumrite, 21 Mo. 325;

M'Brayer v. Roberts, 2 Dev. (N. C.) Eq. 75;

Hodges v. Tenn. Marine, etc., Ins. Co., 8 N. Y. 416;

Henry v. Davis, 7 John. Ch. (N. Y.) 40;

James v. Morey, 2 Cow. (N. Y.) 246;

Clark v. Henry, 2 Cow. (N. Y.) 324;

Cotterell v. Long, 20 Ohio 464;

Stoever v. Stoever, 9 Serg. & R. (Pa.) 484;

Yarborough v. Newell, 10 Yerg. (Tenn.) 376;

Bigelow v. Topliff, 25 Vt. 273; s.c. 60 Am. Dec. 264;

Chowning v. Cox, 1 Rand. (Va. 306; s.c. 10 Am. Dec. 530;

Rogan v. Walker, 1 Wis. 527;

Russell v. Southard, 53 U. S. (12 How.) 139; bk. 13 L. ed. 927;

Morris v. Nixon, 42 U. S. (1 How.) 118; bk. 11 L. ed. 69;

Hughes v. Edwards, 22 U. S. (9 Wheat.) 489; bk. 6 L. ed. 142;

Conway v. Alexander, 11 U. S. (7 Cr.) 218; bk. 3 L. ed. 321;

Flagg v. Mann, 2 Sumn. C. C. 486; s.c. Fed. Cas. No. 4847;

2 Co. Litt. (19th ed.) 205;

4 Kent's Com. (13th ed.) 461.

⁴ *Racouillat v. Rene*, 32 Cal. 450;

Hebron v. Centre Harbor, 11 N. H. 571;

Erwin v. Shuey, 8 Ohio St. 509, 510;

Woods v. Wallace, 22 Pa. St. 171;

Re Helen Mill Co., 3 Sawy. C. C. 88.

⁵ *Fouch v. Wilson*, 59 Ind. 93.

⁶ *Freeman v. Peay*, 23 Ark. 439;

Goodman v. Randall, 44 Conn. 321.

⁷ See: *Jacoway v. Gault*, 20 Ark. 190; s.c. 73 Am. Dec. 494;

omitted the instrument will be inoperative as a mortgage at law, though in equity it may be treated as a valid mortgage between the parties.¹

SEC. 2067. *Same—Defeasance clause.*—The form of mortgage generally in use in this country contains the terms upon which the conveyance may be defeated;² but it is not essential that the defeasance clause should be contained in the same instrument, it being sufficient if contained in a separate instrument executed and delivered by the mortgagee to the mortgagor.³ Where the defeasance is contained in a separate instrument it must be of as high a nature as the deed itself, which is to be defeated by it,⁴ and the second instrument must be de-

- Gardner v. Moore, 51 Ga. 268 ;
 Jones v. Berkshire, 15 Iowa 248 ;
 s.c. 83 Am. Dec. 412 ;
 Ross v. Worthington, 11 Minn.
 438 ; s.c. 88 Am. Dec. 95 ;
 Todd v. Outlaw, 79 N. C. 235 ;
 Sanborn v. Robinson, 54 N. H.
 239 ;
 Frost v. Beekman, 1 John. Ch.
 (N. Y.) 288 ;
 Harper v. Barsh, 10 Rich. (N. C.)
 Eq. 149 ;
 Van Thornily v. Peters, 26 Ohio
 St. 471 ;
 Moore v. Thomas, 1 Oreg. 201.
¹ Daggett v. Rankin, 31 Cal. 321 ;
 Price v. Cutts, 29 Ga. 142, 148 ;
 s.c. 74 Am. Dec. 52 ;
 Abbott v. Godfrey, 1 Mich. 178,
 198 ;
 Jones v. Brewington, 58 Mo. 565 ;
 Black v. Gregg, 58 Mo. 565 ;
 Harrington v. Fortner, 58 Mo.
 468 ;
 Dunn v. Raley, 58 Mo. 134 ;
 McQuie v. Rag, 58 Mo. 56 ;
 McClurg v. Phillips, 49 Mo. 315 ;
 Burnside v. Wayman, 49 Mo.
 356 ;
 Coe v. Columbus, P. & I. R. Co.
 10 Ohio St. 372 ;
 Lake v. Doud, 10 Ohio 415.
² Elliott v. Wood, 53 Barb. (N. Y.)
 285, aff'd in 45 N. Y. 71 ;
 Whitney v. French, 25 Vt. 663.
 See : Baker v. Wind, 1 Ves. 160.
³ Scott v. Henry, 8 Eng. (Ark.) 112 ;
 Ogden v. Grant, 6 Dana (Ky.)
 473 ;
 Edrington v. Harper, 3 J. J.
 Marsh. (Ky.) 353 ; s.c. 20 Am.
 Dec. 145 ;
 Clement v. Bennett, 70 Me. 207 ;
 Warren v. Lewis, 53 Me. 463 ;
 Archambau v. Green, 21 Minn.
 520 ;
 Odell v. Montross, 68 N. Y. 499 ;
 Perkins v. Dibble, 10 Ohio 433 ;
 Corpman v. Baccastow, 84 Pa.
 St. 363 ;
 Baxter v. Dear, 24 Tex. 17 ; s.c.
 76 Am. Dec. 89 ;
 Lanahan v. Sears, 102 U. S. 318 ;
 bk. 26 L. ed. 180.
⁴ Freeman v. Baldwin, 13 Ala. 246 ;
 Clark v. Lyon, 46 Ga. 202, 203 ;
 Preschbaker v. Freman, 32 Ill.
 483 ;
 Crassen v. Swoveland, 22 Ind.
 427 ;
 Edrington v. Harper, 3 J. J.
 Marsh. (Ky.) 353 ; s.c. 20 Am.
 Dec. 145 ;
 Warren v. Lewis, 53 Me. 463 ;
 Adams v. Stevens, 49 Me. 362 ;
 Richardson v. Woodbury, 43 Me.
 206 ;
 French v. Sturdivant, 8 Me. (8
 Greenl.) 246 ;
 Eaton v. Green, 39 Mass. (22
 Pick.) 526 ;
 Bodwell v. Webster, 30 Mass. (13
 Pick.) 411 ;
 Flint v. Sheldon, 13 Mass. 443 ;
 Harrison v. Trustees, 12 Mass.
 456, 459 ;
 Enos v. Sutherland, 11 Mich.
 538 ;
 Archambau v. Green, 21 Minn.
 520 ;

livered contemporaneously with the mortgage,¹ although the instruments need not be executed at the same time and bear the same date,² because the date does not form a part of the subject of the mortgage.³

SEC. 2068. **Same—Same—Form of defeasance.**—No particular form of defeasance is necessary, provided only the instrument shows clearly the intent of the parties, and that the deed is to have the effect of a mortgage. Whenever the contract is for the payment of money, the law presumes the instrument to be a mortgage, although it is in form an absolute deed ; and any instrument under seal

Hill v. Edwards, 11 Minn. 22 ;
 Baldwin v. Jenkins, 23 Miss. 206 ;
 Watson v. Dickena, 20 Miss. (12 Smed. & M.) 608 ;
 Sharkey v. Sharkey, 47 Mo. 543 ;
 Copeland v. Yoakum, 38 Mo. 349 ;
 Robinson v. Willoughby, 65 N. C. 520 ;
 Lund v. Lund, 1 N. H. 39 ;
 Clark v. Henry, 2 Cow. (N. Y.) 324 ;
 Dey v. Dunham, 2 John. Ch. (N. Y.) 191 ;
 Lane v. Shears, 1 Wend. (N. Y.) 433 ;
 Marshall v. Stewart, 17 Ohio 358 ;
 Perkins v. Dibble, 10 Ohio 433 ;
 Houser v. Lamont, 55 Pa. St. 311 ; s.c. 93 Am. Dec. 755 ;
 Stoever v. Stoever, 9 Serg. & R. (Pa.) 434 ;
 Kelly v. Thompson, 7 Watts (Pa.) 401 ;
 Hammonds v. Hopkins, 3 Yerg. (Tenn.) 525 ;
 Baxter v. Dear, 24 Tex. 17 ; s.c. 76 Am. Dec. 89 ;
 Whitney v. French, 25 Vt. 663 ;
 Plato v. Roe, 14 Wis. 453 ;
 Baker v. Wind, 1 Ves. Sr. 160.
 See : Guthrie v. Kahle, 46 Pa. St. 331.
¹ Bryant v. Cowart, 21 Ala. 9 ;
 Scott v. Henry, 13 Ark. 112 ;
 Preschbaker v. Freman, 32 Ill. 483 ;
 Bennock v. Whipple, 12 Me. 346 ;
 s.c. 28 Am. Dec. 186 ;
 Hale v. Jewell, 7 Me. (7 Greenl.) 435 ; s.c. 22 Am. Dec. 212 ;
 McIntier v. Shaw, 88 Mass. (6 Allen) 83 ;

Nugent v. Riley, 42 Mass. (1 Met.) 117 ;
 Bodwell v. Webster, 30 Mass. (13 Pick.) 411 ;
 Newhall v. Bart, 24 Mass. (7 Pick.) 156, 157 ;
 Scott v. McFarland, 13 Mass. 308, 309 ;
 Harrison v. Phillips' Academy, 12 Mass. 456 ;
 Kelleran v. Brown, 4 Mass. 443 ;
 Brown v. Holyoke, 53 Me. 9 ;
 McLaughlin v. Shepherd, 32 Me. 143 ;
 Sweetland v. Sweetland, 3 Mich. 482 ;
 Bickford v. Daniels, 2 N. H. 71 ;
 Lund v. Lund, 1 N. H. 49 ;
 Crane v. Bonnell, 16 N. J. Eq. (1 C. E. Gr.) 264 ;
 Holmes v. Grant, 8 Paige Ch. (N. Y.) 243 ;
 Haines v. Thomson, 70 Pa. St. 434 ;
 Reitenbaugh v. Ludwick, 31 Pa. St. 131 ;
 Wilson v. Shoenberger, 31 Pa. St. 295 ;
 Kelly v. Thompson, 7 Watts (Pa.) 401 ;
 Colwell v. Woods, 3 Watts (Pa.) 188 ; s.c. 27 Am. Dec. 345.
² Bryan v. Cowart, 21 Ala. 92 ;
 Scott v. McFarland, 13 Mass. 309 ;
 Harrison v. Phillips' Academy, 12 Mass. 456 ;
 Cotton v. McKee, 68 Me. 486 ;
 Hale v. Jewell, 7 Me. 435 ; s.c. 22 Am. Dec. 212 ;
 Haines v. Thomson, 70 Pa. St. 434.
³ Lyon v. McIlvaine, 24 Iowa 9 ;
 Hoit v. Russell, 56 N. H. 559.

providing for the contingent acceptance of a deed of conveyance, and requiring a reconveyance of the estate granted upon the payment of a stipulated sum of money within a prescribed time, is a valid defeasance deed, and makes an absolute deed of conveyance a mortgage.¹ In

¹ *Steel v. Steel*, 86 Mass. (4 Allen) 417, 420;

Gilson v. Gilson, 84 Mass. (2 Allen) 115;

Belton v. Avery, 2 Root (Conn.) 279; s.c. 1 Am. Dec. 70;

Watkins v. Gregory, 6 Blackf. (Ind.) 113;

Harrison v. Lemon, 3 Blackf. (Ind.) 51;

Ogden v. Grant, 6 Dana (Ky.) 473;

Hicks v. Hicks, 5 Gill & J. (Md.) 75;

Woodward v. Pickett, 74 Mass. (8 Gray) 617;

Shaw v. Norfolk Co. R. Co., 71 Mass. (5 Gray) 162, 181;

Nugent v. Riley, 42 Mass. (1 Met.) 117; s.c. 35 Am. Dec. 355;

Lanfair v. Lanfair, 35 Mass. (18 Pick.) 299;

Rice v. Rice, 21 Mass. (4 Pick.) 349;

Carey v. Rawson, 8 Mass. 159;

Taylor v. Weld, 5 Mass. 109;

Erskine v. Townsend, 2 Mass. 493; s.c. 3 Am. Dec. 71;

Batty v. Snook, 5 Mich. 231;

Pugh v. Holt, 27 Miss. 461;

Carr v. Holbrook, 1 Mo. 240;

Gillis v. Martin, 2 Dev. (N. C.) Eq. 470; s.c. 25 Am. Dec. 729;

Hebron v. Centre Harbor, 11 N. H. 571;

Peterson v. Clark, 15 John. (N. Y.) 205;

Stewart v. Hutchings, 13 Wend. (N. Y.) 485;

Holmes v. Grant, 8 Paige Ch. (N. Y.) 243;

Marshall v. Stewart, 17 Ohio 358;

Kunkle v. Wolfersberger, 6 Watts (Pa.) 126;

Coldwell v. Woods, 3 Watts (Pa.) 188; s.c. 27 Am. Dec. 345;

Read v. Gaillard, 2 Desau. (S. C.) 552; s.c. 2 Am. Dec. 696;

Austin v. Downer, 25 Vt. 558;

Breckenbridge v. Auld, 1 Rob. (Va.) 148.

To constitute a mortgage for the payment of money there must be a

subsisting debt therefor, showing the relation of debtor and creditor, and this relation may be expressed or implied; consequently there need be no bond or note, or any other independent personal security therefor, in order to constitute a transaction a mortgage.

Holmes v. Grant, 8 Paige Ch. (N. Y.) 242.

See: *Reed v. Reed*, 75 Me. 273;

Varney v. Hawes, 68 Me. 442;

Brookings v. White, 49 Me. 479. 483;

Mitchell v. Burnham, 44 Me. 286;

Smith v. People's Bank, 24 Me. 185;

Henry v. Davis, 7 John. Ch. (N. Y.) 40;

3 Pom. Eq. Jur. 174.

Deed securing performance of act a mortgage.—If it can be gathered from the whole of a deed that it was intended only as security for the performance of a particular duty, it will be considered as a mortgage, although there is no express provision that upon the fulfillment of the condition the deed shall be void.

Steel v. Steel, 86 Mass. (4 Allen) 417.

Deed securing payment of money—Mortgage when.—An absolute deed of land and a bond made at the same time to reconvey upon the payment of a sum of money, though unaccompanied by any collateral personal security for such payment, constitute a mortgage; and the mortgagee's right under the same will pass by a devise of "all the obligations for money due him."

Rice v. Rice, 21 Mass. (4 Pick.) 349.

See: *Union Savings Bank v. Pool*, 143 Mass. 203-205; s.c. 9 N. E. Rep. 545;

Murray v. Riley, 140 Mass. 490, 493; s.c. 6 N. E. Rep. 512;

other words, when it appears that such was the object and intention of the parties, the court will construe an

Commonwealth v. Reading Savings Bank, 137 Mass. 431, 443;
Wartfield v. Fisk, 136 Mass. 219;
Caffney v. Hicks, 131 Mass. 124, 126;

Trow v. Berry, 113 Mass. 139, 147;

Campbell v. Dearborn, 109 Mass. 130, 141; s.c. 12 Am. Rep. 671;

Murphy v. Calley, 83 Mass. (1 Allen) 107;

Woodward v. Pickett, 74 Mass. (8 Gray) 617;

Bailey v. Bailey, 71 Mass. (5 Gray) 505;

Stetson v. Gulliver, 56 Mass. (2 Cush.) 494, 499;

Trull v. Skinner, 34 Mass. (17 Pick.) 213, 215;

Flagg v. Mann, 31 Mass. (14 Pick.) 467, 479;

Bodwell v. Webster, 30 Mass. (13 Pick.) 411, 415;

Rice v. Rice, 21 Mass. (4 Pick.) 349;

Erskine v. Townsend, 2 Mass. 493; s.c. 3 Am. Dec. 71.

A written instrument under seal, not acknowledged, in which the signer agrees to maintain his father and mother during their natural lives, and as security for the fulfillment of the agreement conveys and grants to them, "each and severally, a life lien or dower or lien of maintainance for life" in real estate, is a mortgage; and an action for possession of the premises described in it may be sustained against him, by the father alone, after breach of the agreement to maintain him.

Gilson v. Gilson, 84 Mass. (2 Allen) 115.

See: *Cochran v. Goodell*, 131 Mass. 464, 466.

In the case of *Shaw v. Norfolk Co. R. Co.*, 71 Mass. (5 Gray) 162, 181, the court say: "The deed of indenture contains in itself all the provisions, and has all the characteristics, of that species of conveyance. It conveys an estate in fee to the grantees, to have and to hold the same to them, and their

survivors and successors, but upon express condition, that if payment of the bonds and the interest accruing upon them shall be truly made, as the same respectively fall due, the indenture itself shall thereupon become void and of no effect. The conveyance being thus defeasible when the condition annexed to it shall have been performed according to its legal effect, and by means of such performance, can be regarded in no other light than in that of a mortgage of the estate conveyed."

Nugent v. Riley, 42 Mass. (1 Met.) 117; s.c. 35 Am. Dec. 355;

Erskine v. Townsend, 2 Mass. 493; s.c. 3 Am. Dec. 71.

Lease for years—Covenant to reconvey—A mortgage.—In *Nugent v. Riley*, 42 Mass. (1 Met.) 117; s.c. 35 Am. Dec. 355, it is held that a lease for years by indenture, in which the lessor acknowledged the receipt, in advance, of a gross sum, in full for rent of the demised premises during the term, and in which the lessee covenants to reconvey the premises on payment of said sum and interest thereon, is a mortgage; and the rights and duties of the parties are like those of mortgagors and mortgagees of estates of freehold.

In *Lanfair v. Lanfair*, 35 Mass. (18 Pick.) 299, land was conveyed by L. to S., and at the same time an indenture was executed by the parties which set forth that S. "demised, granted, and to farm let" the premises to L., to have and to hold during the life of L., for the purpose that S. should maintain L. for life; and that "the lease aforesaid is given by S. for the purpose of securing to L. the maintainance aforesaid." S. died in the lifetime of L. It was held that the indenture was a mortgage; and that after the death of L. the widow of S. was entitled to dower in the land,

absolute deed to be a mortgage.¹ Courts of equity construe conveyances to be mortgages, whatever may be the form of the contract, where the grantee agrees to receive back his money with legal interest, or a larger amount, within a specified time thereafter, and to reconvey the property.² In some of the states in order to convert an absolute deed into a mortgage as against any one except the maker, a separate deed of defeasance is required to be recorded ;³ but in the absence of such statutory provision any notice, either actual or constructive, will be sufficient to bind subsequent purchasers and mortgagees. But where the defeasance is by separate instrument which is not recorded, parties purchasing or taking subsequent incumbrances without notice of the defeasance will take the land relieved from the effects of the instrument.⁴

SEC. 2069. **Same—Same—In equity.**—In equity if the instrument containing the defeasance does not fulfill all the legal requirements of a deed it will still be good, and the conveyance will be treated and enforced as a mortgage

- as against a person claiming under S.
- See: *Steel v. Steel*, 86 Mass. (12 Allen) 115 ;
- Gilson v. Gilson*, 84 Mass. (2 Allen) 115 ;
- Woodward v. Pickett*, 74 Mass. (8 Gray) 617 ;
- Nugent v. Riley*, 42 Mass. (1 Met.) 117 ; s.c. 35 Am. Dec. 355 ;
- Taylor v. Weld*, 5 Mass. 109.
- ¹ *Holmes v. Grant*, 8 Paige Ch. (N. Y.) 243.
- See: *Sears v. Dixon*, 33 Cal. 326, 333 ;
- Page v. Rogers*, 31 Cal. 293, 305 ;
- Taylor v. Weld*, 5 Mass. 109 ;
- Robinson v. Cropsey*, 6 Paige Ch. (N. Y.) 480 ;
- Clark v. Henry*, 2 Cow. (N. Y.) 324 ;
- Hughes v. Edwards*, 22 U. S. (9 Wheat.) 489 ; bk. 6 L. ed. 142.
- ² *Holmes v. Grant*, 8 Paige Ch. (N. Y.) 243.
- See: *Brown v. Dewey*, 2 Barb. (N. Y.) 33 ; s.c. 1 Sandf. Ch. (N. Y.) 56, 64 ;
- Dennison v. Ely*, 1 Barb. (N. Y.) 610, 626.
- ³ See ; *Tomlinson v. Monmouth Ins. Co.*, 47 Me. 232 ;
- Russell v. Waite*, 1 Miss. (Walk.) 31.
- ⁴ *Wyatt v. Stewart*, 34 Ala. 716 ;
- Halsey v. Martin*, 23 Cal. 645 ;
- Knight v. Dyer*, 57 Me. 174, 177 ; s.c. 99 Am. Dec. 765 ;
- Purrington v. Pierce*, 38 Me. 447 ;
- Newhall v. Pierce*, 22 Mass. (5 Pick.) 450 ;
- Harrison v. Trustees Phillips' Academy*, 12 Mass. 456 ;
- James v. Johnston*, 6 John. Ch. (N. Y.) 417 ;
- Dey v. Dunham*, 2 John. Ch. (N. Y.) 182 ;
- Walton v. Cronly*, 14 Wend. (N. Y.) 63 ;
- Brown v. Dean*, 3 Wend. (N. Y.) 208 ;
- Friedly v. Hamilton*, 17 Serg. & R. (Pa.) 70 ;
- Henderson v. Pilgrim*, 22 Tex. 464, 475.

against all persons having actual notice of its real character.¹

SEC. 2070. **Conditional sale or mortgage.**—In those cases where the papers do not show that a security was meant, it is incumbent upon the party seeking to establish a mortgage to show that a mortgage was intended ;² but in all doubtful cases a court of equity will construe a transaction to be a mortgage rather than a conditional sale.³ Whether a particular conveyance is a mortgage or a conditional sale must be determined from the circumstances of each case.⁴ The intention of the parties as gathered from the situation and surrounding facts, as well as from the instruments evidencing the transaction, is to control in determining whether a particular transaction was a mortgage or a conditional sale.⁵ Thus if it can be gathered from the whole of a deed that it was intended only as security for the performance of a particular duty, it will be construed to be a mortgage, although there is no express provision that, upon the fulfillment of the condition, the deed shall be void.⁶ Where a deed and a contract were executed in reference to real estate on the same day, they are to be construed together in order to determine whether the transaction is a condi-

¹ *Murphy v. Calley*, 83 Mass. (1 Allen) 107 ;

Eaton v. Green, 39 Mass. (22 Pick.) 526 ;

Flagg v. Mann, 31 Mass. (14 Pick.) 467 ;

Cutler v. Dickinson, 25 Mass. (8 Pick.) 386 ;

Warren v. Lovis, 53 Me. 463 ;

Jewett v. Bailey, 5 Me. 87 ;

Kelleran v. Brown, 4 Mass. 443, 444 ;

Gillis v. Martin, 2 Dev. (N. C.) Eq. 470 ; s.c. 25 Am. Dec. 729 ;

Woods v. Wallace, 23 Pa. St. 171 ;

Delaire v. Keenan, 3 Desau. (S. C.) 74 ; s.c. 4 Am. Dec. 604 ;

2 Story Eq. Jur (3d ed.) 1018.

² *Gassert v. Bogk*, 7 Mont. 585 ; s.c. 19 Pac. Rep. 281 ; 1 L. R. A. 240.

³ *McNeill v. Norsworthy*, 39 Ala. 156 ;

Sears v. Dixon, 33 Cal. 326 ;

Davis v. Stonestreet, 4 Ind. 101 ;

Honore v. Hutchings, 8 Bush (Ky.) 687 ;

King v. Newman, 2 Munf. (Va.) 40 ;

Kent v. Lasley, 24 Wis. 654 ;

Russell v. Southard, 53 U. S. (12 How.) 139 ; bk. 13 L. ed. 927 ;

Conway v. Alexander, 11 U. S. (7 Cr.) 218 ; bk. 3 L. ed. 321.

⁴ *Robertson v. Campbell*, 2 Call (Va.) 421 ;

Heath v. Williams, 30 Ind. 495 ;

Cornell v. Hall, 22 Mich. 377, 383.

⁵ *Hughes v. Sheaff*, 19 Iowa 335 ;

Oldham v. Halley, 2 J. J. Marsh. (Ky.) 113, 114 ;

Steel v. Steel, 86 Mass. (4 Allen) 417 ;

Cornell v. Hall, 22 Mich. 377, 383.

⁶ *Steel v. Steel*, 86 Mass. (4 Allen) 417.

tional sale or a mortgage.¹ Where there is no continuing indebtedness and the grantor has the privilege of refunding, if he please, within a given time, and take a reconveyance of the land, the transaction is a conditional sale, and not a mortgage;² and in all those cases where the language used in the instrument of conveyance is unequivocal, the relation of debtor and creditor not being created by the transaction, and never having existed previously, if the vendee takes and retains possession of the property, and there is nothing to indicate an intention to transfer the property as a mere security, the transaction will be regarded as a conditional sale.³ The inadequacy of the consideration paid is a circumstance tending to show that a transaction was a mortgage, and not a conditional sale;⁴ but inadequacy of consideration alone will not be a controlling circumstance, unless gross.⁵ Where the transaction was a mortgage at its inception it continues to be such, and where it was a conditional sale, no lapse of time will convert it into a mortgage.⁶

¹ *Holmes v. Grant*, 8 Paige Ch. (N. Y.) 243;
Ruffier v. Wormack, 30 Tex. 332, 341.

² *Lee v. Kilburn*, 69 Mass. (3 Gray) 594;
Flagg v. Mann, 31 Mass. (14 Pick.) 467;
Turner v. Kerr, 44 Mo. 429, 433;
Brewster v. Baker, 20 Barb. (N. Y.) 364;
Holmes v. Grant, 8 Paige Ch. (N. Y.) 243;
Baker v. Thrasher, 4 Den. (N. Y.) 493.

³ *Holmes v. Grant*, 8 Paige Ch. (N. Y.) 243;
Rockwell v. Humphrey, 57 Wis. 410; s.c. 15 N. W. Rep. 394.
 See: *Logwood v. Hussey*, 60 Ala. 417;
Pearson v. Seay, 35 Ala. 612;
West v. Hendrix, 28 Ala. 226;
Henley v. Hotaling, 41 Cal. 22;
Hughes v. Sheaff, 19 Iowa 343;
McNamara v. Culver, 22 Kan. 661;
Woodward v. Pickett, 74 Mass. (8 Gray) 617;
Hoopes v. Bailey, 28 Miss. 328;
Slowey v. McMurray, 27 Mo. 113; s.c. 72 Am. Dec. 251;

Saxton v. Hitchcock, 49 Barb. (N. Y.) 220;
Rich v. Doane, 35 Vt. 125;
Smith v. Crosby, 47 Wis. 160; s.c. 2 N. W. Rep. 104;
Conway v. Alexander, 11 U. S. (7 Cr.) 237; bk. 3 L. ed. 321, 328;
Goodman v. Grierson, 2 Ball & B. 278;
Perry v. Meddowcroft, 4 Beav. 197;
Williams v. Owen, 5 Myl. & C. 303.

⁴ *Carr v. Rising*, 62 Ill. 14, 19;
Campbell v. Dearborn, 109 Mass. 144; s.c. 12 Am. Rep. 671;
Slowey v. McMurray, 27 Mo. 113; s.c. 72 Am. Dec. 251;
Hill v. Grant, 46 N. Y. 496;
Brown v. Dewey, 2 Barb. (N. Y.) 28;
Gibbs v. Penny, 43 Tex. 560;
Wharf v. Howell, 5 Binn. (Pa.) 499;
Langton v. Norton, 5 Beav. 9;
Davis v. Thomas, 1 Ry. & M. 506.
⁵ *Elliott v. Maxwell*, 7 Ired. (N. C.) Eq. 246.

See: *Freeman v. Wilson*, 51 Miss. 329.

⁶ *Kearney v. Macombe*, 16 N. J. Eq. (1 C. E. Gr.) 189;

SEC. 2071. **Same—Parol evidence to explain.**—Whether a deed absolute on its face can be shown by parol to have been intended as a mortgage is a question upon which the authorities are in conflict, it having been held that such evidence is admissible in Arkansas,¹ California,² Illinois,³ Indiana,⁴ Iowa,⁵ Kansas,⁶ Maine,⁷ Maryland,⁸ Massachusetts,⁹ Michigan,¹⁰ Minnesota,¹¹ Mississippi,¹² Missouri,¹³ Nebraska,¹⁴ New Jersey,¹⁵ New York,¹⁶ Nevada,¹⁷

- Tibbs v. Morris, 44 Barb. (N. Y.) 138.
 See : Jackson v. Richards, 6 Cow. (N. Y.) 617, 619 ;
 Morrison v. Brand, 5 Daly (N. Y.) 40 ;
 Peugh v. Davis, 96 U. S. 332 ; bk. 24 L. ed. 775.
¹ Anthony v. Anthony, 23 Ark. 479 ;
 Jordan v. Fenno, 13 Ark. 593.
² Farmer v. Grose, 42 Cal. 169 ;
 Jackson v. Lodge, 36 Cal. 28, 44, 65 ;
 Pierce v. Robinson, 13 Cal. 116 ;
 Lee v. Evans, 8 Cal. 424, 433.
Parol evidence is admissible to prove a deed a mortgage only in cases of fraud or mistake, held in
 Lee v. Evans, 8 Cal. 424, 433.
³ Ruckman v. Alwood, 71 Ill. 158 ;
 Klock v. Walter, 70 Ill. 416 ;
 Reigard v. McNeil, 38 Ill. 400 ;
 Roberts v. Richards, 36 Ill. 339 ;
 Sutphen v. Cushman, 35 Ill. 186 ;
 Wynkoop v. Cowing, 21 Ill. 570.
⁴ Heath v. Williams, 30 Ind. 495 ;
 Crane v. Buchanan, 29 Ind. 570 ;
 Conwell v. Evill, 4 Blackf. (Ind.) 67.
⁵ Zuver v. Lyons, 40 Iowa 510, 570 ;
 Johnson v. Smith, 39 Iowa 549 ;
 Roberts v. McMahan, 4 G. Greene (Ia.) 34.
⁶ Moore v. Wade, 8 Kan. 380, 381.
⁷ Richardson v. Woodbury, 43 Me. 206 ;
 Whitney v. Batchelder, 32 Me. 313 ;
 Hale v. Jewell, 7 Me. (7 Greenl.) 435 ; s.c. 22 Am. Dec. 212.
⁸ Price v. Gover, 40 Md. 102 ;
 Chase's Case, 1 Bland Ch. (Md.) 206 ; s.c. 17 Am. Dec. 277, 300.
⁹ Hassan v. Barrett, 115 Masz. 256 ;
 Pond v. Eddy, 113 Mass. 149 ;
 McDonough v. O'Neil, 113 Mass. 92 ;
 McDonough v. Squire, 111 Mass. 217, 256 ;
 Campbell v. Dearborn, 109 Mass. 130 ; s.c. 12 Am. Rep. 671 ;
 Glass v. Hulbert, 102 Mass. 24 ; s.c. 3 Am. Rep. 418 ;
 Flagg v. Mann, 31 Mass. (14 Pick.) 467, 478.
¹⁰ Emerson v. Atwater, 7 Mich. 12 ;
 Swetland v. Swetland, 3 Mich. 482 ;
 Fuller v. Parrish, 3 Mich. 211, 223 ;
 Wadsworth v. Loranger, Harr. (Mich.) 113.
¹¹ Weide v. Gehl, 21 Minn. 449 ;
 Belote v. Morrison, 8 Minn. 87.
¹² Klein v. McNamara, 54 Miss. 90 ;
 Freeman v. Wilson, 51 Miss. 329 ;
 Littlewort v. Davis, 50 Miss. 403 ;
 Anding v. Davis, 38 Miss. 574, 594 ; s.c. 77 Am. Dec. 658.
¹³ O'Neill v. Capelle, 62 Mo. 202 ;
 Slowey v. McMurray, 27 Mo. 113, 116 ; s.c. 72 Am. Dec. 251 ;
 Hogel v. Lindell, 10 Mo. 483.
¹⁴ Schade v. Bessenger, 3 Neb. 140.
¹⁵ Sweet v. Parker, 22 N. J. Eq. (7 C. E. Gr.) 453 ;
 Philips v. Hulsizer, 20 N. J. Eq. (5 C. E. Gr.) 308 ;
 Crane v. Bonnell, 2 N. J. Eq. (1 H. W. Gr.) 264.
¹⁶ Carr v. Carr, 52 N. Y. 251, 258, aff'g 4 Lans. (N. Y.) 314 ;
 Fieder v. Darrin, 50 N. Y. 437 ;
 Horn v. Keteltas, 46 N. Y. 605 ; s.c. 42 How. (N. Y.) Pr. 138 ;
 Murrar v. Walker, 31 N. Y. 399 ;
 Strong v. Stewart, 4 John. Ch. (N. Y.) 167 ;
 Swart v. Service, 21 Wend. (N. Y.) 36 ; s.c. 34 Am. Dec. 211.
¹⁷ Cookes v. Culbertson, 9 Nev. 199.

Ohio,¹ Pennsylvania,² Rhode Island,³ Tennessee,⁴ Texas,⁵ Vermont,⁶ Virginia,⁷ West Virginia,⁸ Wisconsin,⁹ and in the United States courts;¹⁰ but in Georgia,¹¹ and New Hampshire,¹² the right has been denied. In Connecticut,¹³ Florida,¹⁴ Georgia,¹⁵ and Ken-

¹ *Cotterell v. Long*, 20 Ohio 464;
Miller v. Stokely, 5 Ohio St. 194;
Miami Express Co. v. United States Bank, Wright (Ohio) 252.

² *Palmer v. Guthrie*, 76 Pa. St. 441;
Rhines v. Baird, 41 Pa. St. 256;
Kerr v. Gilmore, 6 Watts (Pa.) 405.

³ *Nichols v. Reynolds*, 1 R. I. 30; s.c. 36 Am. Dec. 238.

⁴ *Nichols v. Cabe*, 3 Head (Tenn.) 92, 93;
Ruggles v. Williams, 1 Head (Tenn.) 141;
Haynes v. Swann, 6 Heisk. (Tenn.) 560.

⁵ *Gibbs v. Penny*, 43 Tex. 560;
Fowler v. Stoneum, 11 Tex. 478; s.c. 62 Am. Dec. 490;
Mead v. Randolph, 8 Tex. 191;
Carter v. Carter, 5 Tex. 93.

⁶ *Hills v. Loomis*, 42 Vt. 562;
Wright v. Bates, 13 Vt. 341, 348.

⁷ *Snively v. Pickle*, 29 Gratt. (Va.) 27;

Bird v. Wilkinson, 4 Leigh (Va.) 266;

Ross v. Norville, 1 Wash. (Va.) 14; s.c. 1 Am. Dec. 422.

⁸ *Klinck v. Price*, 4 W. Va. 4; s.c. 6 Am. Rep. 268.

⁹ *Wilcox v. Bates*, 26 Wis. 465;
Rogan v. Walker, 1 Wis. 527.

¹⁰ *Wyman v. Babcock*, 60 U. S. (19 How.) 289; bk. 15 L. ed. 644; s.c. 2 Curtis' C. C. 386, 398; Fed. Cas. No. 18113;

Russell v. Southard, 53 U. S. (12 How.) 139; bk. 13 L. ed. 927;

Morris v. Nixon, 42 U. S. (1 How.) 118; bk. 11 L. ed. 69;

Sprigg v. Bank of Mt. Pleasant, 39 U. S. (14 Pet.) 201, 208; bk. 10 L. ed. 419;

Hughes v. Edwards, 22 U. S. (9 Wheat.) 489; bk. 6 L. ed. 142;

Jenkins v. Eldridge, 3 Story C. C. 181; s.c. Fed. Cas. No. 7266;

Flagg v. Mann, 2 Sumn. C. C. 486; s.c. Fed. Cas. No. 4847;

Taylor v. Luther, 2 Sumn. C. C. 228; s.c. Fed. Cas. No. 13796;
Bentley v. Phelps, 2 Wood. & M. C. C. 403; s.c. 3 Fed. Cas. 252.

¹¹ In Georgia by statute the admissibility of parol evidence in such cases is limited to where there is fraud in the procurement of the deed.

See: *Broach v. Barfield*, 57 Ga. 601;

Spence v. Steadman, 49 Ga. 133.

¹² *Boody v. Davis*, 20 N. H. 140; s.c. 51 Am. Dec. 210;

Bassett v. Bassett, 10 N. H. 64;
Porter v. Nelson, 4 N. H. 130.

¹³ *French v. Burns*, 35 Conn. 359;
Brainerd v. Brainerd, 15 Conn. 575;

Collins v. Tillou's Admr., 26 Conn. 368; s.c. 68 Am. Dec. 398;

Inhabitants of Reading v. Inhabitants of Weston, 8 Conn. 117; s.c. 20 Am. Dec. 97;

Washburn v. Merrills, 1 Day (Conn.) 139; s.c. 2 Am. Dec. 59.

In the case of *Osgood Bank v. Thompson*, 30 Conn. 27, the question is said to be a doubtful one.

Parol evidence to show absolute deed a mortgage—Connecticut rule—In *Inhabitants of Reading v. Inhabitants of Weston*, 8 Conn. 117; s.c. 20 Am. Dec. 97, the court say: "In the case before us the parol evidence adduced by the plaintiff, to prove an absolute deed to be a deed on condition, was entirely inadmissible. No case determined in a court of law, proving its admissibility, has been cited; nor am I aware that any such case exists. On the contrary, in *Flint v. Sheldon*, 13 Mass. 443; s.c. 7 Am. Dec. 162, it was adjudged that an absolute deed of land cannot be varied by parol evidence

¹⁴ *Chaires v. Brady*, 10 Fla. 133.

¹⁵ *Biggers v. Bird*, 55 Ga. 650;

Spence v. Steadman, 49 Ga. 133.

tucky,¹ admissibility of parol evidence is limited to those cases where the failure to reduce the defeasance to writing arose through some fraud, accident, or mistake ; as where a deed is made absolute on its face so as to cover up a usurious contract.² The general rule may be said to be that in courts of law parol evidence is inadmissible to show that an absolute deed was intended only as a mortgage ;³ but in courts of equity such evidence is admissible for the purpose of showing the object of the conveyance, as intended and understood by the parties, was to create a security for the debt, and not an absolute conveyance.⁴ Thus where the plaintiff purchased land with

showing that it was for a loan and payment of a sum of money. This determination is directly in point for the defendants. It has been so frequently adjudged, by the courts on both sides of the Atlantic, as to have the resistless force of a maxim, that parol evidence cannot be received, in a court of law, to contradict, vary, or materially affect, by way of explanation, a written contract: *Skinner, et al. v. Hendrick*, 1 Root (Conn.) 253 ; s.c. 1 Am. Dec. 43 ; *Stackpole v. Arnold*, 11 Mass. 27 ; s.c. 6 Am. Dec. 150 ; *Jackson d. Van Vechten v. Sill*, 11 John. (N. Y.) 201 ; s.c. 6 Am. Dec. 363 ; 3 Stark. Evi. 1002 ; 1 Phil. Evi. 423. 441."

¹ *Blanchard v. Kenton*, 4 Bibb (Ky.) 451 ;

Skinner v. Miller, 5 Litt. (Ky.) 84. 86 ;

Thompson v. Patter, 5 Litt. (Ky.) 74 ; s.c. 15 Am. Dec. 44 ;

Edrington v. Harper, 3 J. J. Marsh. (Ky.) 354 ; s.c. 20 Am. Dec. 145.

² *Cook v. Colyer*, 2 B. Mon. (Ky.) 71 ;

Murphy v. Trigg, 1 T. B. Mon. (Ky.) 72 ;

Price v. Gover, 40 Md. 102 ;

Artz v. Grove, 21 Md. 474 ;

Bank of Westminster v. Whyte, 1 Md. Ch. 536 ; s.c. 3 Md. Ch. 508 ;

Kelly v. Bryan, 6 Ired. (N. C.) Eq. 283 ;

Brothers v. Harrill, 2 Jones (N.

C.) Eq. 209 ;

Glisson v. Hill, 2 Jones (N. C.) Eq. 256 ;

Arnold v. Mattison, 3 Rich. (S. C.) Eq. 153.

³ *Bragg v. Massie*, 38 Ala. 89 ; s.c. 79 Am. Dec. 82 ;

Jones v. Trawick, 31 Ala. 253, 256 ;

Parish v. Gates, 29 Ala. 254, 261 ;

Inhabitants of Reading v. Inhabitants of Weston, 8 Conn. 117 ; s.c. 20 Am. Dec. 97 ;

Bryant v. Crosby, 36 Me. 562 ; s.c. 58 Am. Dec. 767 ;

McClane v. White, 5 Minn. 178.

See : *Tillson v. Moulton*, 23 Ill. 468 ;

Swart v. Service, 21 Wend. (N. Y.) 36 ; s.c. 34 Am. Dec. 211.

⁴ *Wells v. Morrow*, 38 Ala. 125 ;

Bragg v. Massie, 38 Ala. 89 ; s.c. 79 Am. Dec. 82 ;

Crews v. Threadgill, 35 Ala. 334 ;

Bryan v. Cowart, 21 Ala. 92 ;

Farmer v. Grose, 42 Cal. 169 ;

Pierce v. Robinson, 13 Cal. 116 ;

Osgood v. Thompson Bank, 30 Conn. 27 ;

Matthews v. Porter, 16 Fla. 466 ;

Chaires v. Brady, 10 Fla. 133 ;

Hancock v. Harper, 86 Ill. 446 ;

Sutphen v. Cushman, 35 Ill. 186 ;

Berberick v. Fritz, 39 Iowa 700 ;

Moore v. Wade, 8 Kans. 380 ;

Baughner v. Merryman, 32 Md. 185 ;

Cook v. Colyer, 2 B. Mon. (Ky.) 71 ;

Campbell v. Dearborn, 109 Mass. 130 ; s.c. 12 Am. Rep. 671 ;

Weide v. Gehl, 21 Minn. 449 ;

McClane v. White, 5 Minn. 178 ;

money borrowed from the defendant, and then conveyed to the defendant by deed absolute, but both parties understood that the conveyance was intended as a security for the loan, the court held that parol proof of these facts was admissible, and rendered the instrument a mortgage.¹ The rule above set out is fully sustained by the

O'Neill v. Capelle, 62 Mo. 202 ;
Hogell v. Lindell, 10 Mo. 483 ;
Dervin v. Jennings, 4 Neb. 97 ;
Sweet v. Parker, 22 N. J. Eq.
 (7 C. E. Gr.) 453 ;
Horn v. Keteltas, 46 N. Y. 610 ;
 s.c. 42 How. (N. Y.) Pr. 138 ;
Brown v. Clifford, 7 Lans. (N.
 Y.) 46 ;
Strong v. Stewart, 4 John. Ch.
 (N. Y.) 167 ;
Sellers v. Stalcup, 7 Ired. (N. C.)
 Eq. 13 ;
Hurley v. Barned, 6 Oreg. 362 ;
Arnold v. Mattison, 3 Rich. (S.
 C.) Eq. 153 ;
Nichols v. Reynolds, 1 R. I. 30 ;
 s.c. 36 Am. Dec. 238 ;
Wing v. Cooper, 37 Vt. 169 ;
Kent v. Lasley, 24 Wis. 654 ;
Russell v. Southard, 53 U. S. (12
 How.) 139 ; bk. 13 L. ed. 927 ;
Taylor v. Luther, 2 Sumn. C. C.
 228 ; s.c. Fed. Cas. No. 13796 ;
Townshend v. Marquis Stang-
room, 6 Ves. 328 ; s.c. 5 Rev.
 Rep. 312.

¹ *Campbell v. Dearborn*, 109 Mass.
 130 ; s.c. 12 Am. Rep. 671. In
 this case the court say : " The
 decisions in the courts of the
 United States, and the opinions
 declared by its judges, are
 uniform in favor of the exist-
 ence of the power, and the
 propriety of its exercise by a
 court of chancery. *Hughes v.*
Edwards, 22 U. S. (9 Wheat.)
 489 ; bk. 6 L. ed. 142 ; *Sprigg*
v. Bank of Mount Pleasant, 39
 U. S. (14 Pet.) 201, 208 ; bk.
 10 L. ed. 419 ; *Morris v. Nixon*,
 42 U. S. (1 How.) 118 ; bk. 11
 L. ed. 69 ; *Russell v. Southard*,
 53 U. S. (12 How.) 139 ; bk. 13
 L. ed. 927 ; *Taylor v. Luther*, 2
 Sumn. C. C. 228 ; s.c. Fed.
 Cas. No. 13796 ; *Flagg v. Mann*,
 2 Sumn. C. C. 486 ; s.c. Fed.
 Cas. No. 4847 ; *Jenkins v. Eld-*
ridge, 3 Story C. C. 181 ; s.c.
 Fed. Cas. No. 7266 ; *Bentley*

v. Phelps, 2 Wood. & M. C. C.
 403 ; s.c. 3 Fed. Cas. 252 ;
Wyman v. Babcock, 60 U. S.
 (19 How.) 289 ; bk. 15 L. ed.
 644 ; s.c. 2 Curtis' C. C. 386,
 398 ; Fed. Cas. No. 18113. Al-
 though not bound by the au-
 thority of the courts of the
 United States, in a matter of
 this sort, still we deem it to be
 important that uniformity of
 interpretation and administra-
 tion of both law and equity
 should prevail in the State and
 Federal courts. We are dis-
 posed, therefore, to yield much
 deference to the decisions
 above referred to, and to follow
 them, unless we can see that
 they are not supported by
 sound principles of jurispru-
 dence, or that they conflict with
 rules of law already settled by
 the decisions of our own courts.
 * * * The decisions in the Fed-
 eral courts go to the full extent
 of affording relief, even in the
 absence of proof of express de-
 ceit or fraudulent purpose at
 the time of taking the deed,
 and although the instrument
 of defeasance 'be omitted by
 design upon mutual confidence
 between the parties.' In *Rus-*
sell v. Southard, 53 U. S. (12
 How.) 139, 148 ; bk. 13 L. ed.
 927, it is declared to be the
 doctrine of the court, 'that,
 when it is alleged and proved
 that a loan on security was real-
 ly intended, and the defendant
 sets up the loan as payment of
 purchase-money, and the con-
 veyance as a sale, both fraud
 and a vice in the consideration
 are sufficiently averred and
 proved to require a court of
 equity to hold the transaction
 to be a mortgage.' The con-
 clusion of the court was, 'that
 the transaction was in sub-
 stance a loan of money upon

decisions of the United States courts,¹ and in England such evidence is admissible in cases of fraud, accident, or mistake.² Some of the states carry the rule so far as to

security of the farm, and, being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage.'

"This doctrine is analogous, if not identical with that which has so frequently been acted upon as to have become a general if not universal rule, in regard to conveyances of land where provision for reconveyance is made in the same or some contemporaneous instrument. In such cases, however carefully and explicitly the writings are made to set forth a sale with an agreement for repurchase, and to cut off and renounce all right of redemption or reconveyance otherwise, most courts have allowed parol evidence of the real nature of the transaction to be given, and, upon proof that the transaction was really and essentially upon the footing of a loan of money, or an advance for the accommodation of the grantor, have construed the instruments as constituting a mortgage; holding that any clause or stipulation therein, which purports to deprive the borrower of his equitable rights of redemption, is oppression, against the policy of the law, and to be set aside by the courts as void. 4 Kent's Com. (6th ed.) 159; Cruise's Dig. (Greenl. ed.), tit. 15, c. 1, § 21; Williams on Real Prop. 353; Story's Eq., § 1019; Adams' Eq. 112; 3 Lead. Cas. in Eq. (3d Am. ed.); White & Tudor's notes to Thornbrough v. Baker, pp. 605 (*874), *et seq.*; Hare & Wallace's note to same case, pp. 624 (*894), *et seq.*"

"The rule has been frequently recognized in Massachusetts, where, until 1855, the courts have held their jurisdiction of foreclosure and redemption of mortgages to be limited to cases of a de-

feasance contained in the deed or some other instrument under seal. *Erskine v. Townsend*, 2 Mass. 493; *Killeran v. Brown*, 4 Mass. 448; *Taylor v. Weld*, 5 Mass. 109; *Carey v. Rawson*, 8 Mass. 159; *Parks v. Hall*, 19 Mass. (2 Pick.) 206, 211; *Rice v. Rice*, 21 Mass. (4 Pick.) 349; *Flagg v. Mann*, 31 Mass. (14 Pick.) 467, 478; *Eaton v. Green*, 39 Mass. (22 Pick.) 526. The case of *Flagg v. Mann* is explicit, not only upon the authority of the court thus to deal with the written instruments of the parties, but also point to the competency of parol testimony to establish the facts by which to control their operation; although, upon consideration of the parol testimony in that case, the court came to the conclusion that there was a sale in fact, and not a mere security for a loan."

¹ *Peugh v. Davis*, 96 U. S. 332; bk. 24 L. ed. 775;

Wynman v. Babcock, 60 U. S. (19 How.) 289; bk. 15 L. ed. 644; s.c. 2 Curtis' C. C. 386, 398; Fed. Cas. No. 18113;

Russell v. Southard, 53 U. S. (12 How.) 139; bk. 13 L. ed. 927; *Morris v. Nixon*, 42 U. S. (1 How.) 118; bk. 11 L. ed. 69;

Sprigg v. Bank of Mt. Pleasant, 39 U. S. (14 Pet.) 201, 208; bk. 10 L. ed. 419;

Hughes v. Edwards, 22 U. S. (9 Wheat.) 489; bk. 6 L. ed. 142;

Jenkins v. Eldridge, 3 Story C. C. 181; s.c. Fed. Cas. No. 7266;

Flagg v. Mann, 2 Sumn. C. C. 486; s.c. Fed. Cas. No. 4847;

Taylor v. Luther, 2 Sumn. C. C. 228; s.c. Fed. Cas. No. 13796;

Bentley v. Phelps, 2 Wood. & B. C. C. 403; s.c. 3 Fed. Cas. 252.

² *Jones v. Statham*, 3 Atk. 388; *Cripps v. Jee*, 4 Bro. C. C. 472;

Lincoln v. Wright, 4 DeG. & J. 16;

Card v. Jaffray, 3 Sch. & L. 374; *Sevier v. Greenway*, 19 Ves. 413.

hold that parol testimony is admissible in courts of law as well as in courts of equity, to show that a deed of conveyance absolute was merely intended as a mortgage.¹

SEC. 2072. **Same—Contemporaneous agreements.**—Where a grantee, by an instrument contemporaneous with his deed, stipulates to reconvey on payment of a stated sum within a designated time, this of itself will not be sufficient to show that the transaction is a mortgage and not a conveyance;² and if the deed be in fact a mortgage, parol evidence will not be admitted to show that such is not the intent of the parties, for the reason that it is not permissible by contemporaneous agreements of the most formal character to withdraw from the mortgage the rights which are incident thereto, or to change the obligations of the parties thereunder. Thus an agreement taking away the right to redeem on condition broken will not affect the rights of the mortgagor under the mortgage, but the contract will simply be void.³ Neither will the parties be permitted by contemporaneous agreement to change their respective rights under the mortgage as

¹ *Jackson v. Lodge*, 36 Cal. 28 ;
Johnson v. Sherman, 15 Cal. 287 ;
Fuller v. Parrish, 3 Mich. 211 ;
Plumer v. Guthrie, 76 Pa. St. 441 ;
Fessler's Appeal, 75 Pa. St. 483 ;
Kellum v. Smith, 33 Pa. St. 158 ;
Despard v. Walbridge, 15 N. Y. 374 ;
Hurley v. Barnard, 6 Oreg. 362 ;
Kent v. Agard, 24 Wis. 378.

² *Gassert v. Bogk*, 7 Mont. 585 ; s.c. 19 Pac. Rep. 281 ; 1 L. R. A. 240.

³ *Robinson v. Farrelly*, 16 Ala. 472 ;
Piere v. Robinson, 13 Cal. 125 ;
Lee v. Evans, 8 Cal. 424 ;
Willets v. Burgess, 34 Ill. 494 ;
Wynkoop v. Cowing, 21 Ill. 570 ;
Davis v. Stonestreet, 4 Ind. 101 ;
Baxter v. Child, 39 Me. 110 ;
Murphy v. Calley, 83 Mass. (1 Allen) 107 ;
Bailey v. Bailey, 71 Mass. (5 Gray) 505 ;
Waters v. Randall, 47 Mass. (6 Met.) 471 ;
Eaton v. Whiting, 20 Mass. (3 Pick.) 484 ;

Batty v. Snook, 5 Mich. 231 ;
Clark v. Condit, 18 N. J. Eq. (3 C. E. Gr.) 358 ;
Youle v. Richards, 1 N. J. Eq. (1 Saxt.) 534 ;
Clark v. Henry, 2 Cow. (N. Y.) 324 ;
Henry v. Davis, 7 John. Ch. (N. Y.) 40 ;
Miami Ex. Co. v. United States Bank, Wright (Ohio) 253 ;
McClurkan v. Thompson, 69 Pa. St. 305 ;
Odenbaugh v. Bradford, 67 Pa. St. 96, 104 ;
Johnston v. Gray, 16 Serg. & R. (Pa.) 361 ;
Rankin v. Mortimere, 7 Watts (Pa.) 372 ;
Cherry v. Bowen, 4 Sneed (Tenn.) 415 ;
Wing v. Cooper, 37 Vt. 181 ;
Plato v. Roe, 14 Wis. 453 ;
Rogan v. Walker, 1 Wis. 527 ;
Newcomb v. Bonham, 1 Vern. 7 ;
Seton v. Slade, 7 Ves. 265 ; s.c. 6 Rev. Rep. 124 ;
 2 Co. Litt. (19th ed.) 205a ;
 1 Spence Eq. Jur. 693.

secured to them by the law. Thus the parties will not be able by such agreement to provide that in case of failure to pay when due, the rate of interest shall be increased, or the time of redemption decreased, so as to impose new duties or curtail the rights of the mortgagor;¹ but it is thought that the parties may, by contemporaneous agreement, postpone the right to redeem for a reasonable time,² and an agreement that upon failure to pay the interest or an installment of the mortgage debt when due the whole debt shall become due and payable, is a valid agreement.³

SEC. 2073. **Same—Same—Agreement to repurchase.**—Where lands are conveyed by a deed absolute on its face, and, as a part of the same transaction, an instrument is given back containing an agreement to reconvey, provided the grantor shall pay a certain sum at or before a specified time, the two instruments taken together may constitute a sale with a contract of repurchase, or a mortgage. If the contract is construed to be a mortgage, on breach of condition, the grantor will have a right to redeem; but if construed to be a sale and contract of repurchase, the agreement must be fulfilled according to its terms, and on breach there will be no equity of redemption.⁴

¹ *Sheckell v. Hopkins*, 2 Md. Ch. 89;
Waters v. Randall, 47 Mass. (6 Met.) 479;
McGready v. McGready, 17 Mo. 597;
McClurkan v. Thompson, 69 Pa. St. 305;
Johnston v. Gray, 16 Serg. & R. (Pa.) 361;
Mayo v. Judah, 5 Munf. (Va.) 495;
Toomes v. Cousett, 3 Atk. 261;
Spurgeon v. Collier, 1 Eden 55;
Price v. Perrie, 1 Freem. Ch. 257;
Leith v. Irvine, 1 My. & K. 277;
Jennings v. Ward, 2 Vern. 520;
Hallifax v. Higgins, 2 Vern. 134;
Willett v. Winnell, 1 Vern. 488;
Howard v. Harris, 1 Vern. 33;
Chambers v. Goldwin, 9 Ves. 254, 271; s.c. 7 Rev. Rep. 181;
Blackburn v. Warwick, 2 Younge

& C. 92.

² *Cowdry v. Day*, 1 Giff. 316;

Talbot v. Braddill, 1 Vern. 183.

³ *Tiernan v. Hinman*, 16 Ill. 400;
Ottawa Plank Road Co. v. Murray, 15 Ill. 337;

Ferris v. Ferris, 28 Barb. (N. Y.) 20; s.c. 16 How. (N. Y.) Pr. 102;

Noyes v. Clark, 7 Paige Ch. (N. Y.) 179; s.c. 32 Am. Dec. 620;
People v. Superior Court of N. Y., 19 Wend. (N. Y.) 104;

Basse v. Gallegger, 7 Wis. 442; s.c. 76 Am. Dec. 225;

James v. Thomas, 5 Barn. & Ad. 40; s.c. 27 Eng. C. L. 27.

⁴ *Grant v. Holmes*, 8 Paige Ch. (N. Y.) 243.

See: *Pearson v. Seay*, 38 Ala. 643;

McKinstry v. Conly, 12 Ala. 678;

Johnson v. Clark, 5 Ark. 321, 340;

There is frequently great difficulty in determining whether a conveyance was intended by the parties as a mortgage, or a mere security for the payment of money, or a conditional sale.¹ Where a doubt exists as to whether the agreement is one to repurchase or a defeasance, the courts are inclined to construe the agreement as a mortgage, such construction being thought more just and equitable, and tending to prevent oppression.² Particularly is this the case where the relation between the parties is that of debtor and creditor, and their intention, as shown on the face of the deed, is that the agreement shall operate as a security for the debt. In order to ascertain the intention of the parties courts will

- Farmer v. Grose*, 42 Cal. 169 ;
Henley v. Hotaling, 41 Cal. 22 ;
Carr v. Rising, 62 Ill. 14 ;
Price v. Karnes, 59 Ill. 277 ;
Pitts v. Cable, 44 Ill. 103 ;
McNamara v. Culver, 22 Kan. 661 ;
French v. Sturdivant, 8 Me. (8 Greenl.) 246 ;
Cornell v. Hall, 22 Mich. 377 ;
Turner v. Kerr, 44 Mo. 429 ;
Holmes v. Fresh, 9 Mo. 201 ;
Merritt v. Brown, 19 N. J. Eq. (3 C. E. Gr.) 286 ;
Macaulay v. Porter, 71 N. Y. 173 ;
Browne v. Dewey, 2 Barb. (N. Y.) 28 ;
Morrison v. Brand, 5 Daly (N. Y.) 40 ;
Kelly v. Bryan, 6 Ired. (N. C.) Eq. 283 ;
McLaurin v. Wright, 2 Ired. (N. C.) Eq. 94 ;
Shutz v. Desenberg, 28 Ohio 371 ;
Lane v. Dickerson, 10 Yerg. (Tenn.) 373 ;
Rich v. Doane, 35 Vt. 125 ;
Conway v. Alexander, 11 U. S. (7 Cr.) 218 ; 3 L. ed. 321 ;
Perry v. Meddowcroft, 4 Beav. 197 ;
Alberson v. White, 2 DeG. & J. 97 ;
Berrell v. Sabine, 1 Vern. 268.
¹ *Holmes v. Grant*, 8 Paige Ch. (N. Y.) 243.
² *Turnipseed v. Cunningham*, 16 Ala. 501 ; s.c. 50 Am. Dec. 190 ;
Scott v. Henry, 13 Ark. 112 ;
Bacon v. Brown, 19 Conn. 29, 34 ;
Heath v. Williams, 30 Ind. 495, 498 ;
Trucks v. Lindsay, 18 Iowa 504 ;
Skinner v. Miller, 5 Litt. (Ky.) 84 ;
Edrington v. Harper, 3 J. J. Marsh. (Ky.) 353, 354 ; s.c. 20 Am. Dec. 145 ;
Secrest v. Turner, 2 J. J. Marsh. (Ky.) 471 ;
Baughner v. Merryman, 32 Md. 185 ;
Eaton v. Green, 39 Mass. (22 Pick.) 526 ;
Swetland v. Swetland, 3 Mich. 482 ;
O'Neill v. Capelle, 62 Mo. 209 ;
Gassert v. Bogk, 7 Mont. 585 ; s.c. 19 Pac. Rep. 281 ; 1 L. R. A. 240 ;
Crane v. Bonnell, 2 N. J. Eq. (1 H. W. Gr.) 264 ;
Gillis v. Martin, 2 Dev. (N. C.) Eq. 470 ; s.c. 25 Am. Dec. 729 ;
Poindexter v. McCannon, 1 Dev. (N. C.) Eq. 373 ; s.c. 18 Am. Dec. 591 ;
Cotterell v. Long, 20 Ohio 464 ;
Russell v. Southard, 53 U. S. (12 How.) 139 ; bk. 13 L. ed. 927.
Where there is a deed and contract to reconvey, and oral evidence has been introduced tending to show that the transaction was one of security, and is such as to leave upon the mind a well-founded doubt as to the nature of the transaction, courts of equity incline to construe the transaction as a mortgage.
Gassert v. Bogk, 7 Mont. 585 ; s.c. 19 Pac. Rep. 281 ; 1 L. R. A. 240.

look not only to the deed and writings themselves, but to all the circumstances surrounding the contract, and for the purpose of ascertaining the intention will receive parol evidence;¹ but parol evidence will not be admitted to rebut the presumption that the instrument is a defeasance,² although a presumption of conditional sale may be rebutted by parol evidence.³ It has been said that if the debt is an old one, and the intention of the parties is to extinguish the debt by the conveyancy, the agreement to repurchase will not convert the deed into a mortgage; but where the conveyance, although by means of an absolute deed, is intended for a mere security for the debt, it will be simply a mortgage.⁴ Gross inadequacy of price

¹ *Skinner v. Miller*, 5 Litt. (Ky.) 84;

Secrest v. Turner, 2 J. J. Marsh. (Ky.) 471;

Edrington v. Harper, 3 J. J. Marsh. (Ky.) 353, 354; s.c. 20 Am. Dec. 145;

Crane v. Bonnell, 2 N. J. Eq. (1 H. W. Gr.) 264;

Poindexter v. McCannon, 1 Dev. (N. C.) Eq. 373; s.c. 18 Am. Dec. 591.

² See: *Ante*, § 2071.

³ *Holmes v. Grant*, 8 Paige Ch. (N. Y.) 243;

Woods v. Wallace, 23 Pa. St. 171.

See: *Pearson v. Seay*, 35 Ala. 612;

McGarron v. Cassidy, 18 Ark. 34;

Henley v. Hotaling, 41 Cal. 22;

Sears v. Dixon, 33 Cal. 326;

Snyder v. Griswold, 37 Ill. 260;

Heath v. Williams, 30 Ind. 495;

Davis v. Stonestreet, 4 Ind. 101;

Watkins v. Gregory, 6 Blackf. (Ind.) 113;

Hughes v. Sheaff, 19 Iowa 335;

Trucks v. Lindsley, 18 Iowa 505;

Montgomery v. Chadwick, 7 Iowa 113, 114;

Trull v. Skinner, 34 Mass. (17 Pick.) 216;

Flagg v. Mann, 31 Mass. (14 Pick.) 467, 483;

Rice v. Rice, 21 Mass. (4 Pick.) 349;

Cornell v. Hall, 22 Mich. 377;

Weatherstly v. Weatherstly, 40 Miss. 462, 469; s.c. 90 Am. Dec.

344, 345;

Poindexter v. McCannon, 1 Dev. (N. C.) Eq. 373; s.c. 18 Am. Dec. 591;

Page v. Foster, 7 N. H. 392;

Kearney v. McComb, 16 N. J. Eq. (1 C. E. Gr.) 189;

Peterson v. Clark, 15 John. (N. Y.) 205;

Glover v. Payn, 19 Wend. (N. Y.) 518;

Robinson v. Cropsey, 2 Edw. Ch. (N. Y.) 138; s.c. 6 Paige Ch. (N. Y.) 480;

Brown v. Dewey, 1 Sandf. Ch. (N. Y.) 56;

Haines v. Thomson, 70 Pa. St. 434, 438;

De France v. De France, 34 Pa. St. 385;

Woods v. Wallace, 23 Pa. St. 171;

Kelly v. Thompson, 7 Watts (Pa.) 401;

Wing v. Cooper, 37 Vt. 179;

Rich v. Doane, 35 Vt. 125;

Pennington v. Hanby, 4 Munf. (Va.) 140;

Conway v. Alexander, 11 U. S. (7 Cr.) 218; bk. 3 L. ed. 321;

2 Cruise Dig. (4th ed.) 74;

4 Kent Com. (13th ed.) 144.

⁴ *West v. Hendrix*, 28 Ala. 226;

Hickox v. Lowe, 10 Cal. 197;

Hillhouse v. Dunning, 7 Conn. 143;

Murphy v. Purifoy, 52 Ga. 480;

Magnusson v. Johnson, 73 Ill. 156;

Pitts v. Cable, 44 Ill. 103;

Hall v. Saville, 3 G. Greene

in such a transaction will of itself be sufficient evidence that a mortgage and not a conditional sale was intended by the parties.¹ In all questions of doubt, each case must be determined upon its own circumstances, and the question is one of fact for the jury whether the transaction was intended by the parties to be an agreement that should operate as a defeasance, or a conditional sale. In those cases where there was no debt between the parties the transaction will be considered a conditional sale, and not a mortgage.² Among the circumstances tending to show that the transaction was intended to be a mortgage and not a conditional sale are inadequacy of price;³ the necessities and financial embarrassment of the grantor; the existence of other securities in the possession of the grantor for the performance of the condition of the original conveyance,⁴ and the like.

- (Iowa) 37; s.c. 54 Am. Dec. 485;
Honore v. Hutchings, 8 Bush (Ky.) 687;
French v. Sturdivant, 8 Mc. (8 Greenl.) 246;
O'Neill v. Capelle, 62 Mo. 202;
Slowey v. McMurray, 27 Mo. 113; s.c. 72 Am. Dec. 251;
Glover v. Payn, 19 Wend. (N. Y.) 518;
Ruffier v. Womack, 36 Tex. 332.
¹ *Oldham v. Halley*, 2 J. J. Marsh. (Ky.) 114;
Holmes v. Grant, 8 Paige Ch. (N. Y.) 243;
Conway v. Alexander, 11 U. S. (7 Cr.) 218; bk. 3 L. ed. 321;
Vernon v. Bethell, 2 Eden 110.
² *Pearson v. Seay*, 35 Ala. 612;
Henley v. Hotaling, 41 Cal. 23;
Reading v. Weston, 7 Conn. 143;
Galt v. Jackson, 9 Ga. 151;
Flagg v. Mann, 31 Mass. (14 Pick.) 467;
Lund v. Lund, 1 N. H. 39;
De France v. De France, 34 Pa. St. 385;
Rich v. Doane, 35 Vt. 125;
Conway v. Alexander, 11 U. S. (7 Cr.) 218; bk. 3 L. ed. 321.
³ *Oldham v. Halley*, 2 J. J. Marsh. (Ky.) 114;
Holmes v. Grant, 8 Paige Ch. (N. Y.) 243;
Conway v. Alexander, 11 U. S. (7 Cr.) 218; bk. 3 L. ed. 321;
Vernon v. Bethell, 2 Eden 110.
⁴ *Pearson v. Seay*, 35 Ala. 612;
Crews v. Threadgill, 35 Ala. 334;
West v. Hendrix, 28 Ala. 236;
Todd v. Hardie, 5 Ala. 698;
Daubenspeck v. Platt, 22 Cal. 330;
Low v. Henry, 9 Cal. 538;
Carr v. Rising, 62 Ill. 14;
Gibson v. Eller, 13 Ind. 124;
Davis v. Stonestreet, 4 Ind. 101;
Wilson v. Patrick, 34 Iowa 361;
Trucks v. Lindsey, 18 Iowa 504;
Edington v. Harper, 3 J. J. Marsh. (Ky.) 353; s.c. 20 Am. Dec. 145;
Thompson v. Banks, 2 Md. Ch. 430;
Campbell v. Dearborn, 109 Mass. 130; s.c. 12 Am. Rep. 671;
Waters v. Randall, 47 Mass. (6 Met.) 479;
Flagg v. Mann, 31 Mass. (14 Pick.) 467;
Warren v. Lewis, 53 Me. 463;
Freeman v. Wilson, 51 Miss. 329;
Slowey v. McMurray, 27 Mo. 113; s.c. 72 Am. Dec. 251;
Elliott v. Maxwell, 7 Ired. (N. C.) Eq. 246;
Sellers v. Stalcup, 7 Ired. (N. C.) Eq. 13;
Baker v. Thrasher, 4 Den. (N. Y.) 493;
Holmes v. Grant, 8 Paige Ch. (N. Y.) 243;
Brown v. Dewey, 1 Sandf. Ch. (N. Y.) 56;

SEC. 2074. **Same—Subsequent agreements.**—A mortgagor may by subsequent agreement deprive himself of his right to redeem, or limit the exercise thereof, provided no undue influence is brought to bear, and no improper advantage taken of his financial condition, by the mortgagee. The courts look with disfavor upon such contracts, and if the transaction is in the slightest degree unfair or a “hard bargain,” it will be annulled by a court of equity.¹

SEC. 2075. **Validity and effect of mortgages.**—In order to mortgage land as a security for a debt or the performance of a condition, it is not necessary that the title should pass. It is sufficient if the intention to pledge the land as a security clearly appears from the instrument, which must be duly executed and recorded as required by statute.² It is not necessary to the validity of a mort-

Haines v. Thompson, 70 Pa. St. 434, 442;
 Hiester v. Maderia, 3 Watts & S. (Pa.) 384;
 Gibbs v. Penny, 43 Tex. 560;
 Luckett v. Townshend, 3 Tex. 119; s.c. 49 Am. Dec. 723;
 Ransone v. Frayser, 10 Leigh (Va.) 592;
 Conway v. Alexander, 11 U. S. (7 Cr.) 218; bk. 3 L. ed. 321;
 Russell v. Southard, 53 U. S. (12 How.) 139; bk. 13 L. ed. 927;
 Perry v. Meddowcroft, 4 Beav. 197;
 Williams v. Owens, 5 Myl. & C. 303.

¹ Locke v. Palmer, 26 Ala. 312;
 Green v. Butler, 26 Cal. 595, 602;
 Mills v. Mills, 26 Conn. 213;
 Carpenter v. Carpenter, 70 Ill. 457;
 Maxfield v. Patchen, 29 Ill. 39, 42;
 Wynkoop v. Cowing, 21 Ill. 570;
 Shubert v. Stanley, 52 Ind. 46;
 Vennum v. Babcock, 13 Iowa 194;
 Patterson v. Yeaton, 47 Me. 308;
 Mason v. Grant, 21 Me. 160;
 Baugher v. Merryman, 32 Md. 185;
 Sheckell v. Hopkins, 2 Md. Ch. 89;
 Falis v. Conway Ins. Co., 89 Mass.

(7 Allen) 46, 49;
 Lawrence v. Stratton, 60 Mass. (6 Cush.) 163;
 Waters v. Randall, 47 Mass. (6 Met.) 479;
 Trull v. Skinner, 34 Mass. (17 Pick.) 213;
 Rice v. Bird, 21 Mass. (4 Pick.) 350;
 Harrison v. Trustees Phillips' Academy, 12 Mass. 456;
 Henry v. Davis, 7 John. Ch. (N. Y.) 40;
 Holdrige v. Gillespie, 2 John. Ch. (N. Y.) 30;
 Marshall v. Stewart, 17 Ohio 356;
 Hyndman v. Hyndman, 19 Vt. 9; s.c. 46 Am. Dec. 171;
 Wright v. Bates, 13 Vt. 341;
 Alexander v. Rodriguez, 79 U. S. (12 Wall.) 323; bk. 20 L. ed. 406;
 Russell v. Southard, 53 U. S. (12 How.) 139; bk. 13 L. ed. 927.
² New Vienna Bank v. Johnson, 47 Ohio St. 306; s.c. 24 N. E. Rep. 503; 8 L. R. A. 614. In this case it is said that the statutes of Ohio regulating the mode of signing, sealing, acknowledging, and recording mortgages are limited in their application to these particulars; the legal or equitable effect of the instrument and its contents is

gage that there should be a note or bond, even though the mortgage purports to secure a subsequent loan and so describes it in the instrument.¹ The general rule is that a mortgage is to be construed, and its validity to be determined, by the law of the place where it is made,² and in force at the time of the execution and delivery.³ This is on the general principle that the validity of a contract is to be determined by the law of the place where it is made,⁴ unless it appears from the face of the instrument that it was to be performed in, or was made in reference to, the laws of some other state or country, in which case it will be governed by the laws of the place of performance.⁵ Thus where a mortgage is executed in one

unaffected thereby; and the rights of the parties and of third persons subsequently dealing with the land are to be determined by the general rules of law and equity applicable to the subject in analogous cases.

¹ *Lee v. Fletcher*, 46 Minn. 49; s.c. 48 N. W. Rep. 456; 12 L. R. A. 171.

² *Beall v. Williamson*, 14 Ala. 55; *Andrews v. Torrey*, 14 N. J. Eq. (1 McC.) 355;

De Wolf v. Johnson, 23 U. S. (10 Wheat.) 367; bk. 6 L. ed. 343.

See: *Dobbin v. Hewett*, 19 La. An. 513;

Cope v. Wheeler, 41 N. Y. 303.

³ *Scheible v. Bacho*, 41 Ala. 423; *Newton v. Wilson*, 31 Ark. 484; *Olson v. Nelson*, 3 Minn. 53; *Harrison v. Styres*, 74 N. C. 290. See: *Stillman v. Looney*, 3 Coldw. (Tenn.) 20.

⁴ *Evans v. Ketterell*, 33 Ala. 449; *Laird v. Hedges*, 26 Ark. 356; *Webster v. Howe Machine Co.*, 54 Conn. 394; s.c. 8 Atl. Rep. 482;

Griswold v. Golding (Ky.), 3 S. W. Rep. 535; s.c. 24 Cent. L. J. 419;

Weil v. Golden, 141 Mass. 364; s.c. 6 N. E. Rep. 229;

Ivey v. Lalland, 42 Miss. 444;

Brown v. Nevitt, 27 Miss. 801;

Gilman v. Stevens, 63 N. H. 342; s.c. 1 Atl. Rep. 202;

Bliss v. Brainard, 42 N. H. 255;

Smith v. Godfrey, 28 N. H. (8 Fost.) 379; s.c. 61 Am. Dec. 617;

Atwater v. Walker, 16 N. J. Eq. (1 C. E. Gr.) 42;

Walker v. Atwater, 14 N. J. Eq. (2 McC.) 562;

Marvin Safe Co. v. Norton, 48 N. J. L. 410; s.c. 7 Atl. Rep. 418; 5 Cent. Rep. 161;

Armour v. McMichael, 36 N. J. L. (7 Vr.) 92, 94;

Hyde v. Goodnow, 3 N. Y. 266;

Crosby v. Berger, 3 Edw. Ch. (N. Y.) 538;

Scoville v. Canfield, 14 John. (N. Y.) 338;

Thompson v. Ketcham, 8 John. (N. Y.) 190; s.c. 5 Am. Dec. 332;

Northrup v. Foot, 14 Wend. (N. Y.) 248;

Touro v. Cassin, 1 Nott & M. (S. C.) L. 173;

Shelton v. Marshall, 16 Tex. 344;

Bainbridge v. Wilcocks, Bald. C. C. 536; s.c. 2 Fed. Cas. 407;

Nicolls v. Rodgers, 2 Paine C. C. 437; s.c. Fed. Cas. No. 10260;

Golden v. Prince, 3 Wash. C. C. 313; s.c. Fed. Cas. No. 5509;

Webster v. Massey, 2 Wash. C. C. 157; s.c. Fed. Cas. No. 17336;

Courtois v. Carpentier, 1 Wash. C. C. 376; s.c. 6 Fed. Cas. 650;

Camfranque v. Burnell, 1 Wash. C. C. 340; s.c. 4 Fed. Cas. 1130.

⁵ *Lee v. Selleck*, 32 Barb. (N. Y.) 522; s.c. 20 How. (N. Y.) Pr. 275;

Sherrill v. Hopkins, 1 Cow. (N. Y.) 103;

state, and the debt is made payable in another, where the land is situated, the legal effect of the contract is governed by the law of the latter state.¹ This is on the principle that all real property, and contracts and instruments affecting the title thereto, is subject exclusively to the laws of the state or territory where the land is situated.² It is a well-settled rule that the title to land can

- Pittsburg & St. L. R. Co. v. Rothschild (Pa.), 4 Atl. Rep. 385; s.c. 4 Cent. Rep. 109;
 Andrews v. Pond, 38 U. S. (13 Pet.) 65; bk. 10 L. ed. 61;
 Bank of the United States v. Daniel, 37 U. S. (12 Pet.) 32; bk. 9 L. ed. 989;
 Bank of the United States v. Donnelly, 33 U. S. (8 Pet.) 361; bk. 8 L. ed. 974;
 Cox v. United States, 31 U. S. (6 Pet.) 172; bk. 8 L. ed. 359;
 Willings v. Consequa, Pet. C. C. 301; s.c. Fed. Cas. No. 17766;
 Pope v. Nickerson, 2 Story C. C. 465; s.c. Fed. Cas. No. 11274;
 Fitch v. Remer, 1 Biss. C. C. 337; s.c. 1 Flipp. D. C. 15; 5 Quart. L. J. 266; 8 Am. L. Reg. 654; 9 Fed. Cas. No. 4836.
¹ Duncan v. Helm, 21 La. An. 418; Fitch v. Remer, 1 Biss. C. C. 337; s.c. 1 Flipp. D. C. 15; 5 Quart. L. J. 266; 8 Am. L. Reg. 654; 9 Fed. Cas. No. 4836.
 See: Townsend v. Riley, 46 N. H. 300;
 Newman v. Kershaw, 10 Wis. 333;
 2 Kent Com. (13th ed.) 459.
² Augusta Ins. Co. v. Morton, 3 La. An. 417, 418;
 Harper v. Hampton, 1 Har. & J. (Md.) 622, 687;
 Blake v. Williams, 23 Mass. (6 Pick.) 286; s.c. 17 Am. Dec. 372;
 Cutter v. Davenport, 18 Mass. (1 Pick.) 81, 86; s.c. 11 Am. Dec. 149;
 Goodwin v. Jones, 3 Mass. 514, 518; s.c. 3 Am. Dec. 173;
 Holmes v. Remsen, 4 John. Ch. (N. Y.) 460; s.c. 20 John. (N. Y.) 254; 8 Am. Dec. 581;
 Chapman v. Robertson, 6 Paige Ch. (N. Y.) 627; s.c. 31 Am. Dec. 264;
 Hosford v. Nichols, 1 Paige Ch. (N. Y.) 220;
 Nicholson v. Leavitt, 4 Sandf. (N. Y.) 252;
 Wills v. Cowper, 2 Ohio 124;
 Milne v. Moreton, 6 Binn. (Pa.) 353; s.c. 6 Am. Dec. 466;
 American & Foreign Christian Union v. Yount, 101 U. S. 352; bk. 25 L. ed. 888;
 Oakey v. Bennett, 52 U. S. (11 How.) 33; bk. 13 L. ed. 593;
 Darby v. Mayer, 23 U. S. (10 Wheat.) 465; bk. 6 L. ed. 367;
 McCormick v. Sullivant, 23 U. S. (10 Wheat.) 192; bk. 6 L. ed. 300;
 Kerr v. Moon, 22 U. S. (9 Wheat.) 566; bk. 6 L. ed. 161;
 Clark v. Graham, 19 U. S. (6 Wheat.) 577; bk. 5 L. ed. 334;
 United States v. Crosby, 11 U. S. (7 Cr.) 115; bk. 3 L. ed. 287;
 Doe ex d. Birtwhistle v. Vardill, 5 Barn. & Cr. 438; s.c. 11 Eng. C. L. 531;
 Phillips v. Hunter, 2 H. Black. 403; s.c. 2 Rev. Rep. 353; s.c. *sub nom.* Hunter v. Potts, 4 Durnf. & E. (4 T. R.) 182; s.c. 2 Rev. Rep. 353;
 Sill v. Worswick, 1 H. Black. 665; s.c. 2 Rev. Rep. 816;
 Elliott v. Minto, 6 Madd. 18;
 Cockerell v. Dickens, 3 Moore P. C. 98, 131, 132;
 Coppin v. Coppin, 2 Pr. Wms. 290, 293;
 Curtis v. Hutton, 14 Ves. 537, 541;
 Brodie v. Barry, 2 Ves. & B. 127, 130; s.c. 13 Rev. Rep. 9;
 Tulloch v. Hartley, 1 Younge & C. 114.
 See: 2 Burge. Comm. on Col. & For. L., pt. 2, c. 9, pp. 840-870;
 4 Id., pt. 2, c. 4, § 5, p. 150;
 Id., c. 5, n. 11, pp. 71, 217;
 Id., c. 12, p. 576;
 Foelix, Conflict des Lois, Revue, Estrang. et Franc., tom. i., §§ 27-37, pp. 216-250, 307-312 (ed. 1740);

only be acquired and lost agreeably to the laws of the place where it is situated,¹ and this general rule applies to mortgages as well as to deeds.² For this reason the validity of a mortgage is to be determined by the law of the state in which the land lies,³ although both parties to it reside in another state, where the instrument is executed.⁴ Thus where a mortgage is executed in one state on land lying in another for the purpose of securing the mortgagee against loss by reason of a liability that he may subsequently incur, such mortgage will be valid and binding where valid according to the laws of the state

- Vattel, b. 2, c. 8, §§ 100-103;
 Pothier, *Costume d'Orleans*, c. 1, §§ 22-24; Id. 3, n. 51;
 Hertii Opera, tom. i., de Collis. leg., § 4, n. 9, p. 125 (ed. 1737);
 Bouhier, *Cout. de Bourg.*, c. 23, §§ 36-63;
 Le Burn, de la Communaute, lib. 1, c. 5, pp. 9, 10;
 D'Agnesseau, *Œuvres*, tom. iv., p. 660 (4to ed.);
 Cochin, *Œuvres*, tom. i., p. 545 (4to ed.);
 1 Froland. Mem., c. 4, p. 49; Id., c. 7, p. 155;
 Liverm. Dissert., §§ 9-162, pp. 28-106;
 Ersk. Inst., B. 3, tit. 2, § 40, p. 515;
 2 Bell Comm. (4th ed.), § 1266, p. 690;
 Henry on Foreign Law, 12, 14, 15; Id. Appx. 169.
¹ Potter v. Titcomb, 22 Me. 300;
 Goddard v. Sawyer, 91 Mass. (9 Allen) 78;
 White v. Howard, 46 N. Y. 144;
 Giddings v. Eastman, Clarke Ch. (N. Y.) 19;
 Abell v. Douglass, 4 Den. (N. Y.) 305;
 Mills v. Fogal, 4 Edw. Ch. (N. Y.) 559;
 Hawley v. James, 7 Paige Ch. (N. Y.) 213; s.c. 32 Am. Dec. 623;
 Chapman v. Robertson, 6 Paige Ch. (N. Y.) 627, 630; s.c. 31 Am. Dec. 264;
 Monroe v. Douglass, 4 Sandf. Ch. (N. Y.) 126; s.c. 5 N. Y. 447;
 Jeter v. Fellowes, 36 Pa. St. 465;
 Donaldson v. Phillips, 18 Pa. St. 170; s.c. 55 Am. Dec. 614;
 Watts v. Waddle, 31 U. S. (6 Pet.) 389; bk. 8 L. ed. 437;
 Darby v. Mayer, 23 U. S. (10 Wheat.) 465; bk. 6 L. ed. 367;
 McCormick v. Sullivant, 23 U. S. (10 Wheat.) 192; bk. 6 L. ed. 300;
 Kerr v. Moon, 22 U. S. (9 Wheat.) 566; bk. 6 L. ed. 161;
 Clark v. Graham, 19 U. S. (6 Wheat.) 577; bk. 5 L. ed. 334;
 United States v. Crosby, 11 U. S. (7 Cr.) 115; bk. 3 L. ed. 287;
 Root v. Brotherson, 4 McL. C. C. 230; s.c. Fed. Cas. No. 12036;
 Perry Mfg. Co. v. Brown, 2 Wood. & M. C. C. 449, 450; s.c. 10 L. Rep. 264; 17 Hunt, Mer. Mag. 596; Fed. Cas. No. 11015;
 Birtwhistle v. Vardill, 5 Barn. & Cr. 438; s.c. 9 Bligh 32-38; 11 Eng. C. L. 531;
 Elliott v. Minto, 6 Madd. 16;
 Curtis v. Hutton, 14 Ves. 537, 541.
² Hosford v. Nichols, 1 Paige Ch. (N. Y.) 220.
³ Goddard v. Sawyer, 91 Mass. (9 Allen) 78;
 Cutter v. Davenport, 18 Mass. (1 Pick.) 86; s.c. 11 Am. Dec. 149;
 Griffin v. Griffin, 18 N. J. Eq. (3 C. E. Gr.) 104;
 Hosford v. Nichols, 1 Paige Ch. (N. Y.) 226;
 McCormick v. Sullivant, 23 U. S. (10 Wheat.) 192, 202; bk. 6 L. ed. 300.
 See: Lyon v. McIlvaine, 24 Iowa 9.
⁴ Goddard v. Sawyer, 91 Mass. (9 Allen) 78.

in which the land lies, although invalid under the laws of the state where executed.¹

SEC. 2076. Invalidity of mortgages.—A mortgage may be invalid either for want of proper execution and delivery,² for want or failure of consideration;³ because of want of, or illegality of, consideration;⁴ or because against public policy.⁵ But at common law no consideration need be proved where the mortgage is under seal. The reason of this is the fact that the presence of the seal is presumptive evidence of a sufficient consideration.⁶ In some

¹ *Goddard v. Sawyer*, 91 Mass. (9 Allen) 78.

² *Magruder v. State Bank*, 18 Ark. 9;

Bramhall v. Flood, 41 Conn. 68;

Hannan v. Hannan, 123 Mass. 441; s.c. 25 Am. Rep. 121;

Fisher v. Meister, 24 Mich. 447;

Bush v. Cooper, 26 Miss. 599; s.c. 59 Am. Dec. 270;

Schneck v. O'Neil, 23 Hun (N. Y.) 209;

Haden v. Buddensick, 4 Hun (N. Y.) 649.

See: *Ante*, § 2064.

A paper made for a deed of trust conveying land to secure a debt, signed by the grantor, but without seal, though not effectual as a deed of trust at law, is an equitable mortgage enforceable in equity, and may be recorded under W. Va. Code, c. 74, § 4, and when recorded is a valid lien against subsequent purchasers and creditors.

Atkinson v. Miller, 34 W. Va. 115; s.c. 11 S. E. Rep. 1007; 9 L. R. A. 544.

³ *Smith v. Newton*, 38 Ill. 230, 235; *Conwell v. Clifford*, 45 Ind. 392;

Mizner v. Kussell, 29 Mich. 229;

Fisher v. Meister, 24 Mich. 447;

Hannan v. Hannan, 123 Mass. 441; s.c. 25 Am. Rep. 121;

Freeland v. Freeland, 102 Mass. 475;

Wearse v. Pierce, 41 Mass. (24 Pick.) 141;

McDowell v. Fisher, 25 N. J. Eq. (10 C. E. Gr.) 93.

See: *Ante*, §§ 2061–2063.

⁴ *Hyatt v. James*, 2 Bush (Ky.) 463; s.c. 92 Am. Dec. 505;

Seuzeneau v. Saloy, 21 La. An.

305, 306;

Baker v. Collins, 91 Mass. (9 Allen) 253;

Micou v. Ashurst, 55 Ala. 607;

Scheible v. Bacho, 41 Ala. 423;

Patterson v. Douner, 48 Cal. 369;

Gilbert v. Holmes, 64 Ill. 548;

Collins v. Blantern, 2 Wils. (Ind.) 347;

Peed v. McKee, 42 Iowa 608; s.c. 20 Am. Rep. 631;

Brewster v. Madden, 15 Kan. 249;

Willey v. Collier, 7 Md. 273; s.c. 61 Am. Dec. 346;

Baker v. Collins, 91 Mass. (9 Allen) 253;

McLaughlin v. Cosgrove, 99 Mass. 4;

Atwood v. Fisk, 101 Mass. 363; s.c. 100 Am. Dec. 124;

Drexler v. Tyrrell, 15 Nev. 114;

Maxfield v. Hoecker, 2 N. Y. Supp. 77;

Riddle v. Hall, 99 Pa. St. 116;

Stillman v. Looney, 3 Coldw. (Tenn.) 20;

Manitowoc Co. v. Board Sup'rs of Sullivan, 51 Wis. 115; s.c. 8 N. W. Rep. 12.

⁵ *Micou v. Ashurst*, 55 Ala. 607;

Gilbert v. Holmes, 64 Ill. 548;

Willey v. Collier, 7 Md. 273; s.c. 61 Am. Dec. 346;

Atwood v. Fisk, 101 Mass. 363; s.c. 100 Am. Dec. 124;

Lautz v. Buckingham, 4 Lans. (N. Y.) 484; s.c. 11 Abb. (N. Y.) Pr. N. S. 64;

Thompson v. Hickery, 8 Abb. (N. Y.) N. C. 159.

⁶ *Farnum v. Burnett*, 21 N. J. Eq. (6 C. E. Gr.) 87;

Parker v. Parmele, 20 John. (N. Y.) 130; s.c. 11 Am. Dec. 253.

states, however, the presumption of consideration afforded by a seal may be rebutted.¹ A mortgage is also void where obtained by duress,² because it is tainted with usury,³ or for the performance of a contract subject to the objection of champerty;⁴ but a mortgage will not be declared void because of the illegality of the consideration, except upon the clearest proof⁵ that its execution was procured through fraud,⁶ or obtained by duress,⁷ and the like. A mortgage will also be void where it is improperly executed, as where it is not signed by the mortgagor;⁸ where the amount of indebtedness⁹ and the name of the mortgagee¹⁰ is left blank and improperly filled in; where

¹ *Craver v. Wilson*, 14 Abb. Pr. (N. Y.) N. S. 374.

² *Eyster v. Hatheway*, 50 Ill. 521; s.c. 99 Am. Dec. 537; *Lightfoot v. Wallis*, 12 Bush (Ky.) 498;

James v. Roberts, 18 Ohio 548;

Cowles v. Raguet, 14 Ohio 38;

Raguet v. Roll, 7 Ohio (pt. I.) 77.

A mortgage making restitution for embezzlement, though executed while under criminal arrest, is not void for duress.

Smillie v. Titus, 32 N. J. Eq. (5 Stew.) 51;

Williams v. Englebrecht, 37 Ohio St. 383.

³ *Birdsall v. Patterson*, 51 N. Y. 43;

Fiedler v. Darrin, 50 N. Y. 437;

Brooks v. Avery, 4 N. Y. 225;

Vickery v. Dickson, 62 Barb. (N. Y.) 272;

Bissell v. Kellogg, 60 Barb. (N. Y.) 617, aff'd 65 N. Y. 432;

McCraney v. Alden, 46 Barb. (N. Y.) 272;

Vickery v. Dickson, 35 Barb. (N. Y.) 96;

Bardwell v. Howe, 1 Clarke Ch. (N. Y.) 281;

Jackson v. Dominick, 14 John. (N. Y.) 435;

Fanning v. Dunham, 5 John. Ch. (N. Y.) 122; s.c. 9 Am. Dec. 283;

Wilson v. Harvey, 4 Lans. (N. Y.) 507;

Bell v. Lent, 24 Wend. (N. Y.) 230;

Fox v. Lipe, 24 Wend. (N. Y.) 164.

A mortgage upon usurious considera-

tion is void as against the mortgagor and those lawfully holding under him, only.

Waterman v. Curtis, 26 Conn. 241;

Maher v. Lanfrom, 86 Ill. 512;

Wright v. Bundy, 11 Ind. 398;

Gerrish v. Mace, 75 Mass. (9 Gray) 235;

Green v. Kemp, 13 Mass. 515; s.c. 7 Am. Dec. 169;

Pinnell v. Boyd, 33 N. J. Eq. (6 Stew.) 190;

Westerfield v. Bried, 26 N. J. Eq. (11 C. E. Gr.) 357;

Berdan v. Sedgwick, 44 N. Y. 626;

More v. Deyoe, 22 Hun (N. Y.) 208, 220;

Greene v. Tyler, 39 Pa. St. 361.

⁴ *Gilbert v. Holmes*, 64 Ill. 548.

⁵ *Stuart v. Phelps*, 39 Iowa 14;

Brigham v. Potter, 80 Mass. (14 Gray) 522.

⁶ *Mason v. Daly*, 117 Mass. 403;

Gross v. McKee, 53 Miss. 536;

Starke v. Etheridge, 71 N. C. 240;

Sanborn v. Osgood, 16 N. H. 112;

Wright v. Morgan, 4 Baxt. (Tenn.) 385.

⁷ *Eyster v. Hatheway*, 50 Ill. 521;

s.c. 99 Am. Dec. 537;

Central Bank v. Copeland, 18

Md. 305.

⁸ *Goodman v. Randall*, 44 Conn. 321.

⁹ *Stebbins v. Watson*, 71 Mich. 467; s.c. 39 N. W. Rep. 721.

¹⁰ *Martin v. Nixon*, 92 Mo. 26; s.c. 4 S. W. Rep. 503;

Shirley v. Burch, 16 Oreg. 83; s.c. 18 Pac. Rep. 351.

the mortgage is executed on Sunday,¹ or was procured through fraud.² But a mortgage will not be invalid as to the amount of the debt actually due, simply because it is made out, without the mortgagor's knowledge, for more than the amount of the debt, in the absence of any fraud.³

SECTION III.—RIGHTS AND LIABILITIES UNDER.

- SEC. 2077. Mortgagor—Interests and rights of.
- SEC. 2078. Same—Same—Right to maintain action.
- SEC. 2079. Same—Same—Before condition broken.
- SEC. 2080. Same—Same—Right to lease.
- SEC. 2081. Same—Same—Right to rents and profits.
- SEC. 2082. Same—Same—Right to emblements.
- SEC. 2083. Same—Same—Right to improve.
- SEC. 2084. Same—Same—Right to convey—Subject to mortgage.
- SEC. 2085. Same—Same—Assumption of mortgage.
- SEC. 2086. Same—Same—Right to redemption.
- SEC. 2087. Same—Same—Same—Loss of.
- SEC. 2088. Same—Same—Same—Contribution on redemption.
- SEC. 2089. Same—Same—Right to possession.
- SEC. 2090. Same—Same—Same—Agreement respecting.
- SEC. 2091. Same—Duties of—To pay taxes.
- SEC. 2092. Same—Same—To protect title.
- SEC. 2093. Same—Same—To preserve premises.
- SEC. 2094. Same—Liability of—To action at law.
- SEC. 2095. Same—Same—To sell equity of redemption.
- SEC. 2096. Mortgagee—Interests and rights of—At common law.
- SEC. 2097. Same—Same—Under statute.
- SEC. 2098. Same—Same—Right to rents and profits.
- SEC. 2099. Same—Duty of—To pay taxes.
- SEC. 2100. Same—Same—To make repairs.

¹ See : *Heller v. Crawford*, 37 Ind. 279 ;

Tracy v. Jenks, 32 Mass. (15 Pick.) 465 ;

Meador v. White, 66 Me. 90 ; s.c. 22 Am. Rep. 551 ;

Adams v. Gay, 19 Vt. 358.

² *Hall v. Heyden*, 41 Ala. 242 ;

Price v. Masterson, 35 Ala. 483 ;

Wiley v. Knight, 27 Ala. 336 ;

Tickner v. Wiswall, 9 Ala. 305 ;

Richardson v. Barrick, 16 Iowa 407 ;

Mason v. Daly, 7 Mass. 403 ;

Sloan v. Holcomb, 29 Mich. 153 ;

Terry v. Tuttle, 24 Mich. 206 ;

State v. Nauert, 2 Mo. App. 295 ;
Reed v. Latson, 15 Barb. (N. Y.) 9 ;

Aikin v. Morris, 2 Barb. (N. Y.) Ch. 140 ;

Abbott v. Allen, 2 John. Ch. (N. Y.) 519 ; s.c. 7 Am. Dec. 554 ;

Champlin v. Laytin, 6 Paige Ch. (N. Y.) 189 ; s.c. 18 Wend. (N. Y.) 407 ; 31 Am. Dec. 382 ;

Allen v. Shackelton, 15 Ohio St. 145 ;

Wright v. Morgan, 4 Baxt. (Tenn.) 385.

³ *Lee v. Fletcher*, 46 Minn. 49 ; s.c. 48 N. W. Rep. 456 ; 12 L. R. A. 171.

- SEC. 2101. Same—Liability of—To account for rents and profits.
 SEC. 2102. Same—Allowance for improvements and disbursements.
 SEC. 2103. Tenure under mortgage.
 SEC. 2104. Same—Adverse possession.
 SEC. 2105. Same—Same—What constitutes.
 SEC. 2106. Same—Merger of interests.

SECTION 2077. **Mortgagor—Interests and rights.**—Under the common-law system of mortgages the mortgagee had the title to the mortgaged premises, but according to the settled modern doctrine the mortgage is a mere security, and the title to the premises being in the mortgagor, his interest in the premises is an estate of inheritance¹ which is in no way affected by the mortgage before entry for condition broken, or foreclosure of the lien.² For all purposes except as respects the mortgage, the mortgagor, and those claiming under him, is the owner of the mortgaged premises, the same after as before the breach of the condition;³ and this estate is liable to be destroyed only by the enforcement of the mortgage.⁴

- ¹ *Chamberlain v. Thompson*, 10 Conn. 243; s.c. 26 Am. Dec. 390;
Wilkens v. Trench, 20 Me. 111;
White v. Whitney, 44 Mass. (3 Met.) 81;
Hitchcock v. Harrington, 6 John. (N. Y.) 290-295; s.c. 5 Am. Dec. 229;
Buchanan v. Monroe, 22 Tex. 537.
² *White v. Rittenmeyer*, 30 Iowa 268;
Kortright v. Cady, 21 N. Y. 343; s.c. 78 Am. Dec. 145.
³ *Savage v. Dooley*, 28 Conn. 411; s.c. 73 Am. Dec. 680;
Cooper v. Davis, 15 Conn. 556;
Chamberlain v. Thompson, 10 Conn. 243; s.c. 26 Am. Dec. 390;
Clark v. Beach, 6 Conn. 142;
Brown v. Snell, 6 Fla. 741;
Clark v. Reyburn, 1 Kan. 281;
Bird v. Decker, 64 Me. 550;
Wilkins v. Trench, 20 Me. 111;
Blaney v. Pearce, 2 Me. (2 Greenl.) 132;
Farnsworth v. Boston, 126 Mass. 3, 4;
Bradley v. Fuller, 40 Mass. (23 Pick.) 1;
Felch v. Taylor, 30 Mass. (13 Pick.) 133;
Eaton v. Whiting, 20 Mass. (3 Pick.) 484;
Willington v. Gale, 7 Mass. 138;
Kennett v. Plummer, 28 Mo. 142;
Orr v. Hadley, 36 N. H. 575, 578;
Bryan v. Butts, 27 Barb. (N. Y.) 503, 505, aff'd 28 How. (N. Y.) Pr. 582;
Collins v. Torry, 7 John. (N. Y.) 273;
Hitchcock v. Harrington, 6 John. (N. Y.) 290; s.c. 5 Am. Dec. 229;
Childs v. Childs, 10 Ohio St. 339; s.c. 75 Am. Dec. 512;
Asay v. Hoover, 5 Pa. St. 21;
Schuylkill Co. v. Thoburn, 7 Serg. & R. (Pa.) 411;
Doe ex d. Lyster v. Goldwin, 2 Ad. & E. N. S. (2 Q. B.) 143; s.c. 42 Eng. C. L. 610;
Beamish v. Overseers, 21 L. J. (N. S.) C. P. 9; s.c. 7 Eng. L. & Eq. 485.
⁴ *Chamberlain v. Thompson*, 10 Conn. 243; s.c. 26 Am. Dec. 390;
White v. Rittenmeyer, 30 Iowa 272;
Bird v. Decker, 64 Me. 550;

SEC. 2078. **Same—Same—Right to maintain action.**—Before breach of condition the mortgagor is the owner of the land mortgaged as against all the world except the mortgagee and those claiming under him, and may exercise all the rights and privileges he could have exercised before the execution of the mortgage; thus he may maintain actions to recover the possession of the property or to recover damages because of waste committed.¹

SEC. 2079. **Same—Same—Before condition broken.**—The mortgagor being the owner of the property as against all the world except the mortgagee before condition broken, he is entitled to the possession;² and this possession is secured to him by statute in many of the states, even after condition broken. The mortgagor's right to the exclusive possession of the premises mortgaged until after default made may be implied from the provisions of the mortgage, notwithstanding the fact that there are no express stipulations to that effect; and where such is the inference a mortgagee who enters upon the land before breach will be liable to the mortgagor in an action for trespass.³ As long as the mortgagor is entitled to

Huckins v. Straw, 34 Me. 166;
Wilkins v. French, 20 Me. 111;
White v. Whitney, 44 Mass. (3

Met.) 81;
Bigelow v. Wilson, 18 Mass. (1

Pick.) 485;
Woods v. Hildebrand, 46 Mo.

284; s.c. 2 Am. Rep. 513;
Kennett v. Plummer, 28 Mo. 142;

Orr v. Hadley, 36 N. H. 575;

Glass v. Ellison, 9 N. H. 69;

Ledyard v. Butler, 9 Paige Ch.
(N. Y.) 132; s.c. 37 Am. Dec.

379;
McTaggart v. Thompson, 14 Pa.

St. 149;

Casborne v. Scarfe, 1 Atk. 606;

Bourne v. Bourne, 2 Hare 35;

Wright v. Rose, 2 Sim. & S. 323;

Thorne v. Thorne, 1 Vern. 141;

Baxter v. Dyer, 5 Ves. 656;

2 Co. Litt. (19th ed.) 205.

¹ Doe v. McLoskey, 1 Ala. 708;

Brown v. Snell, 6 Fla. 741, 745;

Hall v. Lance, 25 Ill. 281;

Bird v. Decker, 64 Me. 550;

Stinson v. Ross, 51 Me. 556; s.c.

81 Am. Dec. 591;

Huckins v. Straw, 34 Me. 166;
Ballard v. Ballard, 71 Mass. (5

Gray) 468;

Ellison v. Daniels, 11 N. H. 274;

Glass v. Ellison, 9 N. H. 69;

Den v. Dimon, 10 N. J. L. (5

Halst.) 156.

See: *Post*, § 2079, *et seq.*

² Kidd v. Teeple, 22 Cal. 255;

McMahan v. Russell, 17 Fla. 698;

Vason v. Ball, 56 Ga. 268;

Taliaferro v. Gay, 78 Ky. 496,

498;

Chick v. Willetts, 2 Kan. 384;

Humphrey v. Hurd, 29 Mich. 44;

Crippen v. Morrison, 13 Mich. 23;

Gallatin Co. v. Beattie, 3 Mont.

173;

Waring v. Smythe, 2 Barb. Ch.

(N. Y.) 119;

Wright v. Henderson, 12 Tex. 43;

Hooper v. Wilson, 12 Vt. 695;

Wood v. Trask, 7 Wis. 566; s.c.

76 Am. Dec. 230.

³ Smith v. Taylor, 9 Ala. 633;

Newall v. Wright, 3 Mass. 138;

Wales v. Mellen, 67 Mass. (1 Gray)

512;

the possession he may exercise all the acts of ownership, and call to his aid all the remedies of owner as respects any injury to the premises, or interference with his possession.¹

SEC. 2080. **Same — Same — Right to lease.**— Being the owner of the land, the mortgagor may lease or otherwise dispose of the premises so long as he does not interfere with the security of the mortgagee.² Such lease will be good as against all the world except the mortgagee, and as against him until after condition broken;³ and he will be entitled to receive the rents and profits⁴ of the mortgaged premises in all cases except where they are necessary to the security of the mortgagee.⁵ Where a lease by the mortgagor is prior to the mortgage, the entry of the mortgagee for condition broken will not in any way affect the lease; but the mortgagee may require the lessee to attorn to him and pay all the rents accruing after notice of entry.⁶ Where the lease is

Flagg *v.* Flagg, 28 Mass. (11 Pick.) 475;

Rhoades *v.* Parker, 10 N. H. 83;
Flanders *v.* Lamphear, 9 N. H. 201;

Soper *v.* Guernsey, 71 Pa. St. 219.

¹ See: Doe *v.* McLoskey, 1 Ala. 708;

Hill *v.* Givin, 51 Cal. 47;
Sparhawk *v.* Bagg, 82 Mass. (16 Gray) 583;

Bird *v.* Decker, 64 Me. 550;
Stinson *v.* Roas, 51 Me. 556; s.c. 81 Am. Dec. 591;
Ante, § 2078.

² Grigg *v.* Banks, 59 Ala. 311;
Bennett *v.* Plummer, 28 Mo. 142.

³ Hutchinson *v.* Dearing, 20 Ala. 798;

McCall *v.* Lenox, 9 Serg. & R. (Pa.) 302, 308.

⁴ See: *Post*, § 2081.

⁵ Falkner *v.* Campbell Printing Press Co., 74 Ala. 359;
Mississippi V., etc., R. Co. *v.* United States Express Co., 81 Ill. 534;

Noyes *v.* Rich, 52 Me. 115;
Boston Bank *v.* Reed, 25 Mass. (8 Pick.) 459;

McCall *v.* Cawthorn, 9 Baxt. (Tenn.) 61;

Easley *v.* Tarkington, 5 Baxt. (Tenn.) 592;

Burk *v.* Bank of Tennessee, 3 Head (Tenn.) 686, 687;

Litterer *v.* Berry, 4 Lea (Tenn.) 193;

Freeland *v.* Harris, 3 Sneed (Tenn.) 264.

⁶ Coker *v.* Pearsall, 6 Ala. 542;
Baldwin *v.* Walker, 21 Conn. 168;

Castleman *v.* Belt, 2 B. Mon. (Ky.) 157;

Mirick *v.* Hoppin, 118 Mass. 582;
Russell *v.* Allen, 84 Mass. (2 Allen) 42;

Fitchburg Cotton Co. *v.* Melvin, 15 Mass. 268;

Burden *v.* Thayer, 44 Mass. (3 Met.) 76, 79; s.c. 37 Am. Dec. 117;

Hemphill *v.* Giles, 66 N. C. 513;
Demarest *v.* Willard, 8 Cow. (N. Y.) 206;

McKircher *v.* Hawley, 16 John. (N. Y.) 289;

Weidner *v.* Foster, 2 Pa. 23;
Myers *v.* White, 1 Rawle (Pa.) 353;

executed subsequent to the mortgage it will be defeated by an entry of the mortgagee for condition broken, and any agreement between the lessee and the mortgagee respecting the continuance of the lease will be in effect a new leasing.¹

SEC. 2081. **Same—Same—Right to rents and profits.**—The mortgagor having the right to lease the mortgaged premises, he will be entitled to the rents and profits arising therefrom, against all the world, except the mortgagee, and as against the mortgagee in all cases except where it is necessary for the mortgagee's security.² This

- Kimball v. Lockwood, 6 R. I. 138;
Henshaw v. Wells, 9 Humph. (Tenn.) 568;
Babcock v. Kennedy, 1 Vt. 457; s.c. 18 Am. Dec. 695;
Rogers v. Humphreys, 4 Ad. & E. 299; s.c. 31 Eng. C. L. 145;
Moss v. Gallimore, Dougl. 279;
De Nicholls v. Saunders, L. R. 5 C. P. 589.
¹ Knox v. Easton, 38 Ala. 345;
Branch Bank v. Fry, 23 Ala. 770
McDermott v. Burke, 10 Cal. 580;
Magill v. Hinsdale, 6 Conn. 464; s.c. 16 Am. Dec. 70;
Gartside v. Outley, 58 Ill. 210; s.c. 11 Am. Rep. 59;
Lynde v. Rowe, 94 Mass. (12 Allen) 100;
Russell v. Allen, 84 Mass. (2 Allen) 42, 44;
Field v. Swan, 51 Mass. (10 Met.) 113;
Morse v. Goddard, 54 Mass. (13 Met.) 177; s.c. 46 Am. Dec. 728;
Smith v. Sheperd, 32 Mass. (15 Pick.) 147; s.c. 25 Am. Dec. 432;
Mayo v. Fletcher, 31 Mass. (14 Pick.) 525;
Hogsett v. Ellis, 17 Mich. 351;
Hemphill v. Giles, 66 N. C. 512;
Souders v. Vansickles, 8 N. J. L. (3 Halst.) 313, 315;
Syracuse City Bank v. Tallman, 31 Barb. (N. Y.) 201, 207;
Jones v. Clark, 20 John. (N. Y.) 51;
McKircher v. Hawley, 16 John. (N. Y.) 289;
Watts v. Coffin, 11 John. (N. Y. 495;
Jackson v. Delancey, 11 John. (N. Y.) 365;
Lane v. King, 8 Wend. (N. Y.) 584; s.c. 24 Wend. (N. Y.) 105;
Peters v. Elkins, 14 Ohio 344;
Kimball v. Lockwood, 6 R. I. 138;
Henshaw v. Wells, 8 Humph. (Tenn.) 568;
Doe ex d. Higginbotham v. Barton, 11 Ad. & E. 307; s.c. 39 Eng. C. L. 181;
Rogers v. Humphreys, 4 Ad. & E. 299; s.c. 31 Eng. C. L. 144;
Pope v. Biggs, 9 Barn. & C. 245; s.c. 17 Eng. C. L. 116;
Doe d. Whitaker v. Hales, 7 Bing. 322; s.c. 20 Eng. C. L. 148;
Weaver v. Belcher, 3 East 449.
² Coffey v. Hunt, 75 Ala. 236;
Falkner v. Campbell Printing Press, etc., Co., 74 Ala. 359;
Johnston v. Riddle, 70 Ala. 219;
Scott v. Ware, 65 Ala. 174;
Lehman v. Tallahassee Mfg. Co., 64 Ala. 567;
Lovelace v. Webb, 62 Ala. 271;
Wooten v. Billinger, 17 Fla. 289;
Mississippi V., etc., R. Co. v. United States Express Co., 81 Ill. 584;
Woolley v. Holt, 14 Bush (Ky.) 788;
Graves v. Sayre, 5 B. Mon. (Ky.) 390;
Long v. Wade, 70 Me. 358;
Chelton v. Green, 65 Md. 272; s.c. 4 Atl. Rep. 271;
McKim v. Mason, 3 Md. Ch. 186;
Mayo v. Fletcher, 31 Mass. (14 Pick.) 525, 531;

is because of the well-established principle that whoever is rightfully in the actual possession of the mortgaged property is entitled to receive the rents and profits issuing therefrom; and this is true even in those cases where the mortgaged estate is not sufficient to pay the mortgage debt,¹ unless the mortgagee has a receiver appointed to take charge of the rents and profits and apply the same towards the discharge of the mortgage.² To entitle the mortgagee to a receiver of rents and profits there must be special equitable grounds, such as the insufficiency of the estate to pay the debt, and the insolvency of the mortgagor; because if the mortgagee can otherwise protect himself, a receiver will not be appointed of the rents and profits of the mortgaged premises.³

Boston Bank v. Reed, 25 Mass. (8 Pick.) 459;

Wathen v. Glass, 54 Miss. 382;

Morse v. Witcher, 64 N. H. 591; s.c. 15 Atl. Rep. 207;

Leeds v. Gifford, 41 N. J. Eq. (14 Stew.) 464; s.c. 5 Atl. Rep. 795;

Syracuse City Bank v. Tallman, 31 Barb. (N. Y.) 201;

McKircher v. Hawley, 16 John. (N. Y.) 289;

Bank of Ogdensburgh v. Arnold, 5 Paige Ch. (N. Y.) 38;

Reeder v. Dargan, 15 S. C. 175;

Frierson v. Blanton, 1 Baxt. (Tenn.) 272;

Clark v. Curtis, 1 Gratt. (Va.) 289;

Teal v. Walker, 111 U. S. 242; bk. 28 L. ed. 415;

Omaha Hotel Co. v. Kountze, 107 U. S. 378; bk. 27 L. ed. 609;

Keyser v. Hitz, 4 Mackey (D. C.) 473, 479;

Young v. Northern Illinois Coal & Iron Co., 9 Biss. C. C. 300; s.c. 13 Fed. Rep. 806; 9 Bost. Rep. 269;

Central Trust Co. v. Wabash, St. L. & P. R. Co., 30 Fed. Rep. 332;

Chinnary v. Blackman, 3 Doug. 391.

¹ *Noyes v. Rich*, 52 Me. 115;

Mayo v. Fletcher, 31 Mass. (14 Pick.) 525;

Boston Bk. v. Reed, 25 Mass. (3 Pick.) 459;

Wilder v. Houghton, 18 Mass. (1 Pick.) 87;

Mitchell v. Bartlett, 52 Barb. (N. Y.) 319;

Gelston v. Burr, 11 John. (N. Y.) 482;

Astor v. Turner, 11 Paige Ch. (N. Y.) 436; s.c. 43 Am. Dec. 766;

Clason v. Corley, 5 Sandf. (N. Y.) 447;

Kunkle v. Wolfersberger, 6 Watts (Pa.) 126, 131;

Gilman v. Illinois & M. Tel. Co., 91 U. S. 603; bk. 23 L. ed. 405;

Pullan v. Cincinnati & C. Air-Line R. R., 5 Biss. C. C. 237; s.c. Fed. Cas. No. 11462;

Johnson v. Miller, 1 Wills. 416.

² *Douglass v. Cline*, 12 Bush (Ky.) 608;

Myers v. Estell, 48 Miss. 373;

Mitchell v. Bartlett, 51 N. Y. 447;

Post v. Dorr, 4 Edw. Ch. (N. Y.) 412;

Astor v. Turner, 11 Paige Ch. (N. Y.) 436; s.c. 43 Am. Dec. 766;

Clason v. Corley, 5 Sandf. Ch. (N. Y.) 447;

Lofsky v. Maujer, 3 Sandf. Ch. (N. Y.) 69.

³ *Williams v. Robinson*, 16 Conn. 517;

First Nat. Bk. of Sioux City v. Gage, 79 Ill. 206;

Callanan v. Shaw, 19 Iowa 183;

Cortleyeu v. Hathaway, 11 N. J. Eq. (11 Stock.) 39;

SEC. 2082. **Same—Same—Right to emblements.**—Not only is a mortgagor entitled to the rents and profits until entry for breach of condition, or the appointment of a receiver, but he is also entitled to the emblements until the mortgage is foreclosed for breach of condition, or entry is made thereunder by the mortgagee.¹

SEC. 2083. **Same—Same—Right to improve.**—A mortgagor in possession has a right to make such improvements upon the mortgaged premises as he sees fit;² but such improvements, when made, inure to the benefit of the security,³ except in those cases where there is a covenant in the mortgage that allowances shall be made for improvements.⁴ This rule applies equally where the improvements are made by the mortgagor, a purchaser from the mortgagor with notice of the mortgage,⁵ or by a third person having notice of the mortgage, with the consent of the owner.⁶

Syracuse Bk. v. Tallman, 31 Barb. (N. Y.) 201;

Shotwell v. Smith, 3 Edw. Ch. (N. Y.) 588;

Bank of Ogdensburgh v. Arnold, 5 Paige Ch. (N. Y.) 40;

Quincy v. Cheeseman, 4 Sandf. Ch. (N. Y.) 381, 405;

Morrison v. Buckner, 1 Hempst. C. C. 442; s.c. Fed. Cas. No. 9844;

Oliver v. Decatur, 4 Cr. C. C. 458; s.c. Fed. Cas. No. 10494;

Williamson v. New Albany R. Co., 1 Biss. C. C. 35; s.c. 2 Redf. Am. Ry. Cas. 682; Fed. Cas. No. 17753.

¹ *Toby v. Reed*, 9 Conn. 216;

Rankin v. Kinsey, 7 Ill. App. 215;

Perley v. Chase, 79 Me. 519; s.c. 11 Atl. Rep. 418;

Brown v. Thurston, 56 Mc. 126; s.c. 96 Am. Dec. 438;

Woodward v. Pickett, 74 Mass. (8 Gray) 617;

Page v. Robinson, 64 Mass. (10 Cush.) 99;

Gillett v. Balcom, 6 Barb. (N. Y.) 370;

Cooper v. Cole, 38 Vt. 185;

Gregory v. Rosenkranz, 72 Wis. 220; s.c. 39 N. W. Rep. 373;

Allen v. Elderkin, 62 Wis. 627; s. c. 22 N. W. Rep. 842;

Welp v. Gunther, 48 Wis. 543; s.c. 4 N. W. Rep. 647;

Coleman v. Duke of St. Albans, 9 Ves. 25.

² *Heath v. Williams*, 25 Me. 209; s.c. 43 Am. Dec. 265.

³ *Baird v. Jackson*, 98 Ill. 78;

Asher v. Mitchell, 9 Ill. App. 335;

Childs v. Dolan, 87 Mass. (5 Allen) 319;

Taylor v. Townsend, 8 Mass. 411; s.c. 5 Am. Dec. 107;

Corliss v. McLagin, 29 Me. 115;

Wharton v. Moore, 84 N. C. 479; s.c. 37 Am. Rep. 627;

Pettingill v. Evans, 5 N. H. 54.

⁴ *Phillips v. Holmes*, 78 N. C. 191.

⁵ *Booraem v. Wood*, 27 N. J. Eq. (12 C. E. Gr.) 371;

⁶ *Ala. G. S. R. Co. v. South & North Ala. R. Co.*, 84 Ala. 570; s.c. 3 So. Rep. 286;

Catterlin v. Armstrong, 79 Ind. 514;

Coleman v. Witherspoon, 76 Ind. 285;

Frierson v. Blanton, 1 Baxt. (Tenn.) 272.

SEC. 2084. **Same—Same—Right to convey—Subject to mortgage.**—The mortgagor being the owner of the title to the land, may convey the same, without prejudice to the security, at any time before entry for breach of covenant, or decree in an action for foreclosure : and where the deed of conveyance states that it is made subject to the payment of the mortgage, this will not obligate the grantee to pay the mortgage debt. A personal obligation on the part of the grantee to pay the mortgage can only be raised by words clearly importing that he knowingly assumes such burden.¹ Taking a conveyance subject to a mortgage merely carries with it the equity of redemption ;² that

¹ *Dean v. Walker*, 107 Ill. 540 ; s.c. 47 Am. Rep. 467 ;

Locke v. Homer, 181 Mass. 93 ; s.c. 41 Am. Rep. 199 ;

Bowen v. Beck, 94 N. Y. 86 ; s.c. 46 Am. Rep. 24.

See : *Hall v. Mobile, etc., R. Co.*, 58 Ala. 10 ;

Patton v. Adkins, 42 Ark. 197 ;

Foster v. Atwater, 42 Conn. 244 ;

Daub v. Englebach, 109 Ill. 267 ;

Rapp v. Stoner, 104 Ill. 618 ;

Fowler v. Fay, 62 Ill. 375 ;

Wright v. Briggs, 99 Ind. 563 ;

State v. Davis, 96 Ind. 539 ;

Ritchie v. McDuffie, 62 Iowa 46 ; s.c. 17 N. W. Rep. 167 ;

Lewis v. Day, 53 Iowa 575 ; s.c. 5 N. W. Rep. 753 ;

Fuller v. Hunt, 48 Iowa 163 ;

Green v. Turner, 38 Iowa 112 ;

Johnson v. Monell, 13 Iowa 300 ;

Fenton v. Lord, 128 Mass. 466 ;

Fiske v. Tolman, 124 Mass. 254 ; s.c. 26 Am. Rep. 659 ;

Weed Sewing Machine Co. v. Emerson, 115 Mass. 554 ;

Drury v. Tremont Imp. Co., 95 Mass. (13 Allen) 168 ;

Strong v. Converse, 91 Mass. (8 Allen) 557 ; s.c. 85 Am. Dec. 732 ;

Jewett v. Draper, 88 Mass. (6 Allen) 434 ;

Braman v. Dowes, 66 Mass. (12 Cush.) 227 ;

Pike v. Brown, 61 Mass. (7 Cush.) 133 ;

Winans v. Wilkie, 41 Mich. 264 ; s.c. 1 N. W. Rep. 1049 ;

Crawford v. Ellis, 33 Mich. 354 ;

Fitzgerald v. Barker, 70 Mo. 685 ;

Cooper v. Foss, 15 Neb. 515 ; s.c. 19 N. W. Rep. 506 ;

Woodbury v. Swan, 58 N. H. 380 ;

Sparkman v. Gove, 44 N. J. L. (15 Vr.) 252 ;

Vreeland v. Van Blarcom, 35 N. J. Eq. (8 Stew.) 530 ;

Pinnell v. Boyd, 33 N. J. Eq. (6 Stew.) 190 ;

Lee v. Stiger, 30 N. J. Eq. (3 Stew.) 610 ;

Hoy v. Bramhalt, 19 N. J. Eq. (4 C. E. Gr.) 563 ; s.c. 97 Am. Dec. 687 ;

Engle v. Haines, 5 N. J. Eq. (1 Halst.) 186 ; s.c. 43 Am. Dec. 624 ;

Wickoff v. Davis, 4 N. J. Eq. (3 H. W. Gr.) 224 ;

Schley v. Fryer, 100 N. Y. 71 ; s.c. 2 N. E. Rep. 280 ;

Wadsworth v. Lyon, 93 N. Y. 201 ; s.c. 45 Am. Rep. 190 ;

Hand v. Kennedy, 83 N. Y. 150 ;

Atlantic Dock Co. v. Leavitt, 54 N. Y. 35 ; s.c. 13 Am. Rep. 556 ;

Throp v. Keokuk Coal Co., 48 N. Y. 255 ;

Belmont v. Coman, 22 N. Y. 438 ; s.c. 78 Am. Dec. 213 ;

Trotter v. Hughes, 12 N. Y. 74 ; s.c. 62 Am. Dec. 137 ;

Tillotson v. Boyd, 4 Sandf. Ch. (N. Y.) 516 ;

Blyer v. Monholland, 2 Sandf. Ch. (N. Y.) 478 ;

Merriman v. Moore, 90 Pa. St. 78 ;

Moore's Appeal, 88 Pa. St. 450 ;

Insurance Co. v. Addicks, 12 Phila. (Pa.) 490 ;

Guernsey v. Kendall, 55 Vt. 201 ;

Tanguay v. Felthousen, 45 Wis. 30 ;

Elliott v. Sackett, 108 U. S. 132 ; bk. 27 L. ed. 678.

² *Fiske v. Tolman*, 124 Mass. 254 ; s.c. 26 Am. Rep. 659 ;

is, the grantee takes the land charged with the payment of the mortgage debt.¹

SEC. 2085. **Same—Same—Same—Assumption of mortgage.**—

In those cases where the deed transferring mortgaged property especially recites that the grantee assumes and agrees to pay the mortgage debt, the acceptance of the deed imposes upon him a personal obligation which the law implies to be a promise to perform.² The grantee thereby undertakes to discharge the mortgagee's lien upon the land, and not simply to cancel the mortgage

- Drury v. Tremont Improvement Co., 95 Mass. (13 Allen) 168 ;
 Strong v. Conners, 90 Mass. (8 Allen) 557 ; s.c. 85 Am. Dec. 732 ;
 Knickerbocker Life Ins. Co. v. Nelson, 78 N. Y. 151 ; s.c. 7 Abb. (N. Y.) N. C. 182.
 See : Fowler v. Fay, 62 Ill. 375 ;
 Johnson v. Monell, 13 Iowa 300 ;
 Drury v. Tremont Imp. Co., 95 Mass. (13 Allen) 168 ;
 Lawrence v. Towle, 59 N. H. 28 ;
 Hoy v. Bramhall, 19 N. J. Eq. (4 C. E. Gr.) 563 ; s.c. 97 Am. Dec. 687 ;
 Smith v. Truslow, 84 N. Y. 660 ;
 Belmont v. Coman, 22 N. Y. 438 ; s.c. 78 Am. Dec. 213 ;
 Merriman v. Moore, 90 Pa. St. 78 ;
 Guernsey v. Kendall, 55 Vt. 201 ;
 Shepherd v. May, 115 U. S. 505 ; bk. 29 L. ed. 456 ;
 Elliott v. Sackett, 108 U. S. 132 ; bk. 27 L. ed. 678.
¹ Cobb v. Dyer, 69 Me. 494 ;
 Manwaring v. Powell, 40 Mich. 371 ;
 Berry v. Whitney, 40 Mich. 65 ;
 Chadwick v. Island Beach Co., 43 N. J. Eq. 616 ; s.c. 12 Atl. Rep. 380 ;
 Guernsey v. Kendall, 55 Vt. 201 ;
 Sweetzer v. Jones, 35 Vt. 317 ; s.c. 82 Am. Dec. 639.
Respecting priority of mortgage under such conveyance.
 See : Lewis v. Day, 53 Iowa 575 ; s.c. 5 N. W. Rep. 753 ;
 Fuller v. Hunt, 48 Iowa 163 ;
 Green v. Turner, 38 Iowa 112 ;
 Johnson v. Monell, 13 Iowa 300 ;
 Perry v. Karnes, 13 Iowa 174 ;
 Winans v. Wilkie, 41 Mich. 264 ; s.c. 1 N. W. Rep. 1049 ;
 Woodbury v. Swan, 58 N. H. 380 ;
 Pinnell v. Boyd, 33 N. J. Eq. (6 Stew.) 190 ;
 Lee v. Stiger, 30 N. J. Eq. (3 Stew.) 610 ;
 Conover v. Hobart, 24 N. J. Eq. (9 C. E. Gr.) 120 ;
 Dolman v. Cook, 14 N. J. Eq. (1 McCar.) 56 ;
 Waring v. Somborn, 82 N. Y. 604 ;
 Manhattan Life Ins. Co. v. Crawford, 9 Abb. (N. Y.) N. C. 365 ;
 Bundy v. Iron Co., 38 Ohio St. 300 ;
 Shepherd v. May, 115 U. S. 505 ; bk. 29 L. ed. 456.
² Dean v. Walker, 107 Ill. 540 ; s.c. 47 Am. Rep. 467 ;
 Locke v. Homer, 131 Mass. 93 ; s.c. 41 Am. Rep. 199 ;
 Furnas v. Durgin, 119 Mass. 500 ; s.c. 20 Am. Rep. 341 ;
 Jewett v. Draper, 88 Mass. (6 Allen) 434 ;
 Hancock v. Carlton, 72 Mass. (6 Gray) 39 ;
 Braman v. Dowse, 66 Mass. (12 Cush.) 227 ;
 Taylor v. Whitmore, 35 Mich. 97 ;
 Sparkman v. Cove, 44 N. J. L. 252 ; s.c. 27 Alb. L. J. 33 ;
 Thorp v. Keokuk Coal Co., 48 N. Y. 255 ;
 Belmont v. Coman, 22 N. Y. 438 ; s.c. 78 Am. Dec. 213 ;
 Trotter v. Hughes, 12 N. Y. 74 ; s.c. 62 Am. Dec. 137 ;
 Marsh v. Pike, 10 Paige Ch. (N. Y.) 595, 598, aff'd 1 Sandf. Ch. (N. Y.) 210 ;
 Halsey v. Reede, 9 Paige Ch. (N. Y.) 446 ;
 Russell v. Pistor, 7 N. Y. 171 ; s.c. 57 Am. Dec. 509 ;
 Taylor v. Preston, 79 Pa. St. 436 ;
 Bishop v. Douglass, 25 Wis. 693.

debt so far as it is a claim against individuals; and his failure to do so will render him liable to at least nominal damages.¹ Where there are several mortgages which the grantee assumes and agrees to pay, and he fails to pay the first one when it falls due, but permits it to be foreclosed and the property sold for its payment, he will be liable in damages to his grantor for the latter's loss of security against liability upon subsequent mortgages, up to the amount of debts secured by them, even though they are not yet due.² The same is true where the deed recites the amount of the mortgage and the fact that it should be a part of the purchase-money;³ and it is thought that a mere agreement that the grantee shall pay an existing mortgage as a part of the consideration money will amount to an assumption of and an agreement to pay the mortgage on the part of the grantee.⁴ The usual practice, however, is to recite in the deed the fact that the purchaser assumes, and agrees to pay, the mortgage as a part of the consideration, and this is thought to be the better practice;⁵ yet a mere verbal agreement or promise by the purchaser to pay the mortgage debt is binding upon him, and the personal obligation may be enforced either by the grantor or the owner

¹ *Rice v. Sanders*, 152 Mass. 108; s.c. 24 N. E. Rep. 1079; 8 L. R. A. 315.

² *Rice v. Sanders*, 152 Mass. 108; s.c. 24 N. E. Rep. 1079; 8 L. R. A. 315.

³ *Kennedy v. Brown*, 61 Ala. 296; *Townsend v. Ward*, 27 Conn. 610; *Lilly v. Palmer*, 51 Ill. 331; *Comstock v. Hitt*, 37 Ill. 542; *Rardin v. Walpole*, 38 Ind. 148; *McMahan v. Stewart*, 23 Ind. 590; *Jewett v. Draper*, 88 Mass. (6 Allen) 434; *Smith v. Trustow*, 84 N. Y. 660; *Garnsey v. Rogers*, 47 N. Y. 237; *Bentley v. Vanderheyden*, 35 N. Y. 680; *Hartley v. Harrison*, 24 N. Y. 171; *Russell v. Pistor*, 7 N. Y. 171; s.c. 57 Am. Dec. 509; *Fish v. Dodge*, 4 Den. (N. Y.) 311; s.c. 47 Am. Dec. 254;

Ferris v. Crawford, 2 Den. (N. Y.) 595;

Thompson v. Thompson, 4 Ohio St. 333;

Girard Life Ins. & Trust Co. v. Stewart, 86 Pa. St. 89.

⁴ *Ely v. McKnight*, 30 How. (N. Y.) Pr. 97.

See: *Equitable Life Assn. v. Bostwick*, 100 N. Y. 638; s.c. 3 N. E. Rep. 296.

⁵ *Schmucker v. Sibert*, 18 Kan. 104; s.c. 26 Am. Rep. 765;

Weed Sewing Machine Co. v. Emerson, 115 Mass. 554;

Huyler v. Atwood, 26 N. J. Eq. (11 C. E. Gr.) 504;

Burr v. Beers, 24 N. Y. 178; s.c. 80 Am. Dec. 327;

Adams v. Wadham, 40 Barb. (N. Y.) 227;

Stephens v. Cornell, 32 Hun (N. Y.) 415;

Mallory v. West Shore R. Co., 3 J. & S. (N. Y.) 178.

of the mortgage.¹ A purchaser who assumes and agrees to pay a mortgage existing upon the land at the time of the conveyance is estopped to deny the validity of the mortgage;² also to deny that the debt is different from that set out,³ or is not due;⁴ to allege that the mortgage was defectively executed;⁵ to set up usury;⁶ to show that the mortgagee has other security for the same debt,⁷ or to set up any other reasons for escaping the liability he has assumed. A person accepting a conveyance of property subject to a mortgage, which he assumes and agrees to pay, becomes primarily liable for the debt, and his grantor a surety;⁸ but in the absence of mutual

¹ *Burr v. Beers*, 24 N. Y. 178; s.c. 80 Am. Dec. 237.

See: *Bolles v. Beach*, 22 N. J. L. (2 Zab.) 680; s.c. 53 Am. Dec. 263;

Thayer v. Marsh, 75 N. Y. 342;
Thomas v. Dickinson, 12 N. Y. 365, rev'g 14 Barb. (N. Y.) 90;
Merriman v. Moore, 90 Pa. St. 78;
Putnam v. Farnham, 27 Wis. 187;
s.c. 9 Am. Rep. 459.

² *Johnston v. Crowley*, 25 Ga. 316;
s.c. 71 Am. Dec. 173;

Hancock v. Fleming, 103 Ind. 533; s.c. 3 N. E. Rep. 254;

Green v. Turner, 38 Iowa 112;
Johnson v. Thompson, 129 Mass. 398;

Canfield v. Shear, 49 Mich. 313;
s.c. 13 N. W. Rep. 605;

Miller v. Thompson, 34 Mich. 10;
Forge v. Merryman, 14 Neb. 513;
s.c. 16 N. W. Rep. 836;

Conover v. Hobart, 24 N. J. Eq. (9 C. E. Gr.) 120;

Whittemore v. Farrington, 76 N. Y. 452.

³ *Klein v. Isaacs*, 8 Mo. App. 568.

⁴ *Kennedy v. Brown*, 61 Ala. 296;

Scarry v. Eldridge, 63 Ind. 44;

Green v. Houston, 22 Kan. 35;

Ritter v. Phillips, 53 N. Y. 586.

⁵ *Goodman v. Randall*, 44 Conn. 321;

Pidgeon v. Trustees of Schools, 44 Ill. 501;

Greither v. Alexander, 15 Iowa 470.

⁶ *Frost v. Shaw*, 10 Iowa 491;

Wales v. Webb, 5 Conn. 161;

Richardson v. Field, 6 Me. 39;

Bearce v. Barstow, 9 Mass. 45;
s.c. 6 Am. Dec. 25;

State Bank of Elizabeth v. Ayers, 7 N. J. L. (2 Halst.) 134;

Ritter v. Phillips, 53 N. Y. 586;

Cope v. Wheeler, 41 N. Y. 303;

Hartley v. Harrison, 24 N. Y. 170;

Post v. Dart, 8 Paige Ch. (N. Y.) 639, 641;

Tait v. Hannum, 2 Yerg. (Tenn.) 355;

McArthur v. Schenck, 31 Wis. 680;

De Wolf v. Johnson, 23 U. S. (10 Wheat.) 367; bk. 6 L. ed. 343.

⁷ *Ferris v. Crawford*, 2 Den. (N. Y.) 598.

⁸ *Unger v. Smith*, 44 Mich. 22; s.c. 5 N. W. Rep. 1069.

See: *Boardman v. Larrabee*, 51 Conn. 39;

Dean v. Walker, 107 Ill. 540;

Flagg v. Geltnacker, 98 Ill. 293;

Ellis v. Johnson, 96 Ind. 377;

Figart v. Halderman, 75 Ind. 564;

George v. Andrews, 60 Md. 26, 28; s.c. 45 Am. Rep. 706;

Lappen v. Gill, 129 Mass. 349;

Marshall v. Davies, 78 N. Y. 414;

Ayers v. Dixon, 78 N. Y. 318;

Calvo v. Davies, 73 N. Y. 211;
s.c. 29 Am. Rep. 130;

Comstock v. Drohan, 71 N. Y. 9;
Atlantic Dock Co. v. Leavitt, 54 N. Y. 35;

Colgrove v. Tallman, 67 N. Y. 95; s.c. 23 Am. Rep. 90;

Millerd v. Thorn, 56 N. Y. 402;

Thorp v. Keokuk Coal Co., 48 N. Y. 253, aff'g 47 Barb. (N. Y.) 437;

Burr v. Beers, 24 N. Y. 178; s.c. 80 Am. Dec. 327;

agreement, or the assent of the holder of the incumbrance, he will not be bound thereby.¹ Yet the mortgagee may, if he chooses, so regard the purchaser and enforce the contract; and where the mortgagee does so regard the purchaser, the mortgagor cannot release him from his assumption and agreement to pay the mortgage debt, without the assent of the mortgagee being first obtained.²

SEC. 2086. **Same—Same—Right to redeem.**—Where the mortgage debt is not paid at the time when it falls due, the mortgagor has the right to redeem by paying the money with interest and costs at any time before actual foreclosure, or entry for condition broken. The length of time in which redemption may be made is governed

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| Howard Ins. Co. v. Halsey, 8 N. Y. 271; | Pardee v. Treat, 82 N. Y. 385; |
| Tice v. Annin, 2 John. Ch. (N. Y.) 125; | Calvo v. Davies, 73 N. Y. 211; |
| Stevens v. Cooper, 1 John. Ch. (N. Y.) 425; | Meyer v. Lathrop, 10 Hun (N. Y.) 66. |
| Halsey v. Reed, 9 Paige Ch. (N. Y.) 466; | ² Gilbert v. Sanderson, 56 Iowa 349; |
| Marsh v. Pike, 10 Paige Ch. (N. Y.) 595, aff'g 1 Sandf. Ch. (N. Y.) 210; | s.c. 9 N. W. Rep. 293; |
| Crenshaw v. Thackston, 14 S. C. 437; | Garnsey v. Rogers, 47 N. Y. 233; |
| Willson v. Burton, 52 Vt. 394; | s.c. 7 Am. Rep. 440. |
| Willard v. Worsham, 76 Va. 392. | See: Durham v. Bishcoff, 47 Ind. 211; |
| <i>Compare: Corbett v. Waterman,</i> | Ross v. Kennison, 38 Iowa 396; |
| 11 Iowa 86. | Laing v. Byrne, 34 N. J. Eq. (7 Stew.) 52; |
| ¹ Shepherd v. May, 115 U. S. 505; | Youngs v. Trustees Public Schools, 31 N. J. Eq. (4 Stew.) 290; |
| bk. 29 L. ed. 456. | Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. (12 C. E. Gr.) 650; |
| See: Boardman v. Larrabee, 51 Conn. 39; | Judson v. Dada, 79 N. Y. 373; |
| Waters v. Hubbard, 44 Conn. 340; | Campbell v. Smith, 71 N. Y. 26; |
| Dean v. Walker, 107 Ill. 540; | s.c. 27 Am. Rep. 5; |
| Corbet v. Waterman, 11 Iowa 86; | Thorp v. Keokuk Coal Co., 48 N. Y. 253, aff'g 47 Barb. (N. Y.) 437; |
| Mickle v. Maxfield, 42 Mich. 304; | Kelly v. Roberts, 40 N. Y. 432; |
| s.c. 3 N. W. Rep. 961; | Hartley v. Harrison, 24 N. Y. 170; |
| Manwaring v. Powell, 40 Mich. 371; | Lawrence v. Fox, 20 N. Y. 268; |
| Howe v. Lemon, 37 Mich. 164; | Green v. Burke, 23 Wend. (N. Y.) 490. |
| Taylor v. Whitmore, 35 Mich. 97; | Mortgagor can release before acceptance by the mortgagee. |
| Crawford v. Edwards, 33 Mich. 354; | Gilbert v. Sanderson, 56 Iowa 349; |
| Conn. Mut. Life Ins. Co. v. Mayer, 8 Mo. App. 18; | s.c. 9 N. W. Rep. 293; |
| Huyler v. Atwood, 26 N. J. Eq. (11 C. E. Gr.) 504; | Durham v. Bishcoff, 47 Ind. 211; |
| Bowen v. Beck, 94 N. Y. 86; | Simpson v. Brown, 68 N. Y. 355; |
| | Kelly v. Roberts, 40 N. Y. 432. |

by statute in the various states. The right of redemption is not confined to the mortgagor alone, but any one in interest may pay the mortgage and extinguish the mortgagee's rights thereunder.¹ Thus a redemption may be made by an assignee of the mortgaged premises,² an assignee of a term of years,³ an attaching creditor,⁴ a devisee,⁵ an heir of the mortgagor,⁶ the

¹ *Wiley v. Ewing*, 47 Ala. 418;
Scott v. Henry, 13 Ark. 112, 113;
Randall v. Duff, 79 Cal. 123; s.c.
 21 Pac. Rep. 610; 19 Id. 532; 3
 L. R. A. 754;
Bridgeport v. Blinn, 43 Conn.
 274;
Goodman v. White, 26 Conn. 317;
Young v. Williams, 17 Conn. 393;
Kingsbury v. Buckner, 70 Ill.
 517;
Rogers v. Meyers, 68 Ill. 92;
Dunlap v. Wilson, 32 Ill. 517;
Robertson v. Van Cleave, 129
 Ind. 217, 231; s.c. 29 N. E. Rep.
 781; 26 Id. 899; 15 L. R. A. 68;
Horn v. Indianapolis Nat. Bk.,
 125 Ind. 381; s.c. 25 N. E. Rep.
 558; 9 L. R. A. 676;
Manning v. Markel, 19 Iowa 103,
 104;
Hitt v. Holliday, 2 Litt. (Ky.) 332;
Thompson v. Chandler, 7 Me. (7
 Greenl.) 377;
Newhall v. Lynn F. C. Savings
Bank, 101 Mass. 428, 431; s.c.
 3 Am. Rep. 387;
Bacon v. Bowdoin, 39 Mass. (22
 Pick.) 401;
Saunders v. Frost, 22 Mass. (5
 Pick.) 259; s.c. 16 Am. Dec. 394;
Kimmell v. Willard, 1 Dougl.
 (Mich.) 217;
Atwater v. Manchester Sav. Bk.,
 45 Minn. 341; s.c. 48 N. W.
 Rep. 187; 12 L. R. A. 741;
Boarman v. Catlett, 21 Miss. (13
 Smed. & M.) 149;
Renard v. Brown, 7 Neb. 455;
Moore v. Beasom, 44 N. H. 215;
Hamilton v. Dobbs, 19 N. J. Eq.
 (4 C. E. Gr.) 227;
Brainard v. Cooper, 10 N. Y. 356;
Averill v. Taylor, 44 N. Y. 44;
Rosevelt v. Bank of Niagara, 1
 Hopk. Ch. (N. Y.) 579; s.c. 9
 Cow. (N. Y.) 409;
Jenkins v. Continental Ins. Co.,
 12 How. (N. Y.) Pr. 67;
Grant v. Duane, 9 John. (N. Y.)
 591;

Burnett v. Denniston, 5 John. Ch.
 (N. Y.) 35;
Van Buren v. Olmstead, 5 Paige
 Ch. (N. Y.) 9;
Ex parte Willard, 5 Wend. (N.
 Y.) 94;
Stainback v. Geddy, 1 Dev. & B.
 (N. C.) Eq. 479;
McArthur v. Franklin, 16 Ohio
 St. 193;
Chandler v. Dyer, 37 Vt. 345;
Mellish v. Robertson, 25 Vt. 603;
Merriam v. Barton, 14 Vt. 501;
McLaughlin v. Curtis, 27 Wis.
 644;
Stonehewer v. Thompson, 2 Atk.
 440;
Fell v. Brown, 2 Bro. Ch. 278;
Knight v. Knight, 3 Pr. Wms.
 331;
 4 Kent Com. (13th ed.) 162;
 2 Story Eq. Jur. (13th ed.), § 1023.
² *Randall v. Duff*, 79 Cal. 123; s.c.
 19 Pac. Rep. 532; 21 Id. 610;
 3 L. R. A. 754;
White v. Bond, 16 Mass. 400.
Conveyance without consideration,
 though purporting to be for a
 valuable consideration, under
 a power of attorney to sell
 and convey, and the grantee
 mortgages it, will not prevent
 parties succeeding to the right
 of the original owner to redeem.
Randall v. Duff, 79 Cal. 123; s.c.
 19 Pac. Rep. 532; 21 Id. 610;
 3 L. R. A. 754.
³ *Averill v. Taylor*, 8 N. Y. 44.
 See: *Bacon v. Bowdoin*, 39 Mass.
 (22 Pick.) 401, 404.
⁴ *Bridgeport v. Blinn*, 43 Conn. 274;
Atwater v. Manchester Savings
Bank, 45 Minn. 341; s.c. 48 N.
 W. Rep. 187; 12 L. R. A. 741.
 The court say in *Atwater v. Man-*
chester Savings Bank, *supra*,
 that this is true even though
 the attaching creditor has not
 secured judgment.
⁵ *Lewis v. Naugh*, 2 Ves. Sr. 431.
⁶ *Pryor v. Bowryman*, 3 Swanst. 241.

holder of a sheriff's certificate given on an execution sale,¹ a junior mortgagee,² a judgment creditor of the mortgagor,³ the owner of a homestead interest,⁴ the owner of a leasehold interest,⁵ a part owner of an equity of redemption,⁶ a tenant for life,⁷ a tenant for years,⁸ a tenant in common,⁹ a subsequent incumbrancer,¹⁰ a widow, either before or after the assignment of her dower,¹¹ and a wife, who has an inchoate right of dower.¹² In making redemption the whole amount of the debt, with interest and costs, must be paid, and not merely the proportionate share of the party seeking to redeem, the creditor not being compellable to accept anything less than the full amount of his claim.¹³

¹ *Robertson v. Van Cleave*, 129 Ind.

217, 231; s.c. 29 N. E. Rep.

781; 26 Id. 899; 15 L. R. A. 68.

² *Horn v. Indianapolis Nat. Bk.*,
125 Ind. 381; s.c. 25 N. E.
Rep. 558; 9 L. R. A. 676.

³ *White v. Bond*, 16 Mass. 400;
Brainard v. Cooper, 10 N. Y. 356.
See: *Schuck v. Gerlach*, 101 Ill.
338;

McGregor v. Williams, 64 Mass.
(10 Cush.) 526, 528.

⁴ *Butts v. Broughton*, 74 Ala. 294;
Stone v. Godfrey, 18 Jur. 162.

⁵ *Bacon v. Bowdoin*, 39 Mass. (22
Pick.) 401, 404;
Averill v. Taylor, 8 N. Y. 44.
See: *Hamilton v. Dobbs*, 19 N. J.
Eq. (4 C. E. Gr.) 227.

⁶ *Taylor v. Porter*, 7 Mass. 355.

⁷ *Lamson v. Drake*, 105 Mass. 564.

⁸ *Hamilton v. Dobbs*, 19 N. J. Eq.
(4 C. E. Gr.) 227.

See: *Bacon v. Bowdoin*, 39 Mass.
(22 Pick.) 401, 404;

Averill v. Taylor, 8 N. Y. 44;

Keech v. Hall, 1 Doug. 21.

⁹ *Wyne v. Styant*, 2 Phil. (N. C.) Eq.
306.

¹⁰ *Horn v. Indianapolis Nat. Bk.*,
125 Ind. 381; s.c. 25 N. E.
Rep. 558; 9 L. R. A. 676;

Johnson v. Hosford, 110 Ind. 572;
s.c. 10 N. E. Rep. 407;

Bunce v. West, 62 Iowa 80; s.c.
17 N. W. Rep. 179;

Spurgin v. Adamson, 62 Iowa
661; s.c. 18 N. W. Rep. 293;

Harnes v. Palmer, 61 Iowa 483;
s.c. 16 N. W. Rep. 574;

Ellsworth v. Lockwood, 42 N. Y.

89, 96;

Burnett v. Dennison, 5 John.
Ch. (N. Y.) 35;

Haines v. Beach, 3 John. Ch. (N.
Y.) 460;

McCormick v. Knox, 105 U. S.
122; bk. 26 L. ed. 940;

4 Kent Com. (13th ed.) 162;

2 Story Eq. Jur. (13th ed.), § 1024.

¹¹ *Gibson v. Crehore*, 22 Mass. (5
Pick.) 146.

See: *Fish v. Fish*, 1 Conn. 559;

Carl v. Butman, 7 Me. (7 Greenl.)
102;

Walker v. Griswold, 23 Mass. (6
Pick.) 416;

Southerin v. Mendum, 5 N. H.
431, 432;

Jackson v. Dewitt, 6 Cow. (N. Y.)
315.

¹² *Lamb v. Montague*, 112 Mass. 352,
353;

*Newhall v. Lynn Five Cent Sav.
Bk.*, 101 Mass. 428, 431; s.c. 3

Am. Rep. 387, 389;

Davis v. Wetherell, 95 Mass. (13
Allen) 60.

¹³ *Street v. Bell*, 16 Iowa 68; s.c. 85
Am. Dec. 504;

Smith v. Kelley, 27 Me. 237; s.c.
46 Am. Dec. 595;

Johnson v. Candage, 31 Me. 28;

McCabe v. Bellows, 73 Mass. (7
Gray) 148; s.c. 66 Am. Dec. 467.

See: *Giddon v. Andrew*, 14 Ala.

733;

Seymour v. Davis, 35 Conn. 264;

Franklin v. Gorham, 2 Day
(Conn.) 142; s.c. 2 Am. Dec. 86;

Spurgin v. Adamson, 62 Iowa
661; s.c. 18 N. W. Rep. 293;

SEC. 2087. **Same—Same—Same—Loss of.**—The right to redeem secured by common law, and under the statutes of the various states, may be lost or barred by the lapse of time, and a grant to the mortgagee may be inferred from continued possession and enjoyment for a period of twenty years,¹ or such other period as by statute bars foreclosure.² But the presumption arising from such possession may be rebutted, either by the mortgagee commencing proceedings to foreclose,³ or by an assignment of the mortgage as security for a debt, or for value, by a mortgagee in possession,⁴ or by any other act which amounts to an acknowledgment of the mortgagor's right to redeem.⁵ The presumption may also be rebutted by showing that the possession of the mortgagee was friendly and not adverse to the mortgagor's interest,⁶ mere possession not being sufficient to set in operation the statute of limitations.⁷ The reason for this is the fact that the equity of redemption is a legal estate, and so continues, notwithstanding the lapse of the day of payment, and although the mortgagee is in possession, until it is cut off by foreclosure or otherwise.⁸

SEC. 2088. **Same—Same—Same—Contribution on redemption.**—Where two or more persons have an interest in mortgaged premises, and any of them, to protect his interest, pays off the mortgaged debt and discharges the lien,⁹ he will be entitled to a contribution from the

Lamb v. Montague, 112 Mass. 352;

Mullanphy v. Simpson, 4 Mo. 318;

Norris v. Moulton, 34 N. H. 392;

Bell v. Mayor of N. Y., 10 Paige Ch. (N. Y.) 49;

Downer v. Wilson, 33 Vt. 1;

Chittenden v. Berney, 5 Vt. 28; s.c. 18 Am. Dec. 672.

¹ Thomas on Mortg. (2d ed.), § 415.

² See: Montgomery v. Chadwick, 7 Iowa 113, 114;

Bailey v. Casten, 7 Ind. (N. C.) Eq. 282.

³ Calkins v. Isbell, 20 N. Y. 147. See: Cutts v. N. Y. Mfg. Co., 18 Me. 190;

Jackson ex d. Mackay v. Slater,

5 Wend. (N. Y.) 294.

⁴ Borst v. Boyd, 3 Sandf. Ch. (N. Y.) 501.

⁵ Calkins v. Isbell, 20 N. Y. 147; Miner v. Beekman, 11 Abb. (N. Y.) Pr. N. S. 161; s.c. 42 How. (N. Y.) Pr. 46; 1 Jones & S. (N. Y.) 86.

⁶ Green v. Turner, 38 Iowa 112; Bird v. Kellow, 73 Me. 270; Waldo v. Rice, 14 Wis. 286.

⁷ See: Chalmers v. Wright, 5 Robt. (N. Y.) 718;

Borst v. Boyd, 3 Sandf. Ch. (N. Y.) 501, 502.

⁸ Borst v. Boyd, 3 Sandf. Ch. (N. Y.) 501, 502;

⁹ Lyon v. Robbins, 45 Conn. 513; Johnson v. Candage, 31 Me. 28;

others interested in the mortgaged premises of their respective portions of the amount of debt, interest, and costs paid,¹ and may retain possession until reimbursed, or enforce contribution in equity.² In computing the amount that each should contribute, there should be ascertained the proportion each interest bears to the whole sum paid; and where the parties are in possession of separate parcels of the mortgaged premises, the proportionate value of the respective part of each as of the date of the mortgage, exclusive of improvements since added by the party.³

SEC. 2089. **Same—Same—Right to possession.**—In the absence of an agreement between the parties that the mortgagor shall remain in possession, at common law the mortgagee was entitled to enter at once upon the execution of the mortgage, and hold the lands until the performance of the condition,⁴ but the general rule in this country is that, in the absence of an express stipulation to that effect, the mortgagee is not entitled to possession of the mortgaged premises before condition broken.⁵ In those states, however, where the common-

Palk v. Lord Clinton, 12 Ves. 48 ;
s.c. 8 Rev. Rep. 283.

¹ See : *Sawyer v. Lyon*, 10 John.
(N. Y.) 32 ;

Stevens v. Cooper, 1 John. Ch.
(N. Y.) 425.

² *Chase v. Woodbury*, 60 Mass. (6
Cush.) 143.

See : *Allen v. Clark*, 34 Mass. (17
Pick.) 47 ;

Clowes v. Dickenson, 5 John. Ch.
(N. Y.) 235.

³ *Stevens v. Cooper*, 1 John. Ch.
(N. Y.) 425.

⁴ *Jamieson v. Bruce*, 6 Gill & J.
(Md.) 72 ; s.c. 26 Am. Dec.
557 ;

Patterson v. Carneal, 3 A. K.
Marsh. (Ky.) 618 ; s.c. 13 Am.
Dec. 208 ;

Vole v. Handy, 2 Me. (2 Greenl.)
322 ; s.c. 11 Am. Dec. 101.

See : *Terry v. Rosell*, 32 Ark.
478 ;

Jackson v. Warren, 32 Ill. 331 ;

Stewart v. Barrow, 7 Bush (Ky.)

368 ;

Johnson v. Leonards, 68 Me. 237,
238 ;

Smith v. Kelley, 27 Me. 237 ; s.c.
46 Am. Dec. 595 ;

Bank of Commerce v. Lanahan,
45 Md. 417 ;

Annapolis & E. R. Co. v. Gantt,
39 Md. 115 ;

McQuire v. Benoit, 33 Md. 186 ;

Tryon v. Munson, 77 Pa. St.
250 ;

Vance v. Johnson, 10 Humph.
(Tenn.) 214 ;

Gray v. Jenks, 3 Mas. C. C. 520,
531 ; s.c. Fed. Cas. No. 5720.

⁵ *Skinner v. Buck*, 29 Cal. 253 ;

Drake v. Root, 2 Colo. 685 ;

Morton v. Noble, 22 Ind. 160 ;

Courtney v. Carr, 6 Iowa 238,
239 ;

Chick v. Willetts, 2 Kan. 384 ;

Wagar v. Stone, 36 Mich. 364 ;

Berthold v. Fox, 13 Minn. 501 ;

s.c. 97 Am. Dec. 243 ;

Waring v. Smyth, 2 Barb. Ch.

law doctrine of mortgages prevails, the mortgagee may enter upon the possession of the mortgaged premises at any time after the delivery of the mortgage, and exercise all the rights of ownership over the land, even to the ejectment of the mortgagor, should he resist,¹ and may maintain trespass for waste, or an action for resisting entry.² In the majority of the states the common law has been so modified that the mortgagor is entitled to the possession until after condition broken, at which time, in many states, the mortgagee has the right to enter and take possession, the same as at common law.³

(N. Y.) 119, 135; s.c. 47 Am. Dec. 299;

Besser v. Hawthorne, 3 Oreg. 129;

Nixon v. Bynum, 1 Bailey (S. C.) L. 148.

See: *Ante*, § 2079.

¹ Knox v. Easton, 38 Ala. 345;

Duval v. McLoskey, 1 Ala. 708;

Middletown Sav. Bk. v. Bates, 11 Conn. 519;

Chamberlain v. Thompson, 10 Conn. 243; s.c. 26 Am. Dec. 390;

Clark v. Beach, 6 Conn. 142;

Karnes v. Lloyd, 52 Ill. 113;

Harper v. Ely, 10 Ill. (5 Gilm.) 581;

Delahay v. Clement, 4 Ill. (3 Scam.) 202;

Shute v. Grimes, 7 Blackf. (Ind.) 1;

Stewart v. Barrow, 7 Bush (Ky.) 368;

Redman v. Sanders, 2 Dana (Ky.) 70;

Howard v. Houghton, 64 Me. 445;

Treat v. Pierce, 53 Me. 71, 77;

Blaney v. Bearce, 2 Maine (2 Greenl.) 132;

Annapolis & E. R. Co. v. Gault, 39 Md. 115;

Sumwalt v. Tucker, 34 Md. 89;

Brown v. Stewart, 1 Md. Ch. 87;

Wales v. Mellen, 67 Mass. (1 Gray) 512;

Page v. Robinson, 64 Mass. (10 Cush.) 99;

Bradley v. Fuller, 40 Mass. (23 Pick.) 1;

Mayo v. Fletcher, 31 Mass. (14 Pick.) 525;

Goodwin v. Richardson, 11 Mass. 469, 473;

Erskine v. Townshend, 2 Mass. 493; s.c. 3 Am. Dec. 71;

Tripe v. Marcy, 39 N. H. 439;

Furbush v. Goodwin, 29 N. H. 321;

Chellis v. Stearns, 22 N. H. 312;

Den v. Stockton, 12 N. J. L. (7 Halst.) 322;

Jackson v. Hull, 10 John. (N. Y.) 481;

Jackson v. Dubois, 4 John. (N. Y.) 216;

Ellis v. Hussey, 66 N. C. 501;

Hemphill v. Ross, 66 N. C. 477;

Ely v. McGuire, 2 Ohio 223;

Tryon v. Munson, 77 Pa. St. 250;

Youngman v. Elmira R. Co., 65 Pa. St. 278;

Carpenter v. Carpenter, 6 R. I. 542;

Waterman v. Matteson, 4 R. I. 539;

Vance v. Johnson, 10 Humph. (Tenn.) 214;

Henshaw v. Wells, 9 Humph. (Tenn.) 568;

Faulkner v. Brockenbrough, 4 Rand. (Va.) 245;

Trustees v. Dickson, 1 Freem. Ch. 474.

² Clark v. Beach, 6 Conn. 142;

Smith v. Johns, 69 Mass. (3 Gray) 517;

Page v. Robinson, 64 Mass. (10 Cush.) 99;

Northampton Paper Mills v. Ames, 49 Mass. (8 Met.) 1;

Newall v. Wright, 3 Mass. 138;

Furbush v. Goodwin, 29 N. H. 321.

³ Reynolds v. Canal & Banking Co. of N. O., 30 Ark. 520;

Newbold v. Newbold, 1 Del. Ch. 310;

In all those states where the mortgage is regarded as a mere lien, the title to the estate remaining in the mortgagor until condition broken, the mortgagee will not be entitled to possession until the foreclosure of the mortgage.¹

SEC. 2090. **Same—Same—Same—Agreement respecting.**—Any agreement the parties may enter into respecting the possession of the mortgaged premises will be binding, even though such agreement stipulates for the possession by one other than the person whom the law designates shall hold the land until condition broken; but in the absence of circumstances raising by implication an agreement giving the possession to a person other than that designated by the law, such right of possession can be changed only by express agreement.² Such an agree-

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| <p>Hall v. Tunnell, 1 Houst. (Del.) 320 ;
 Hill v. Robertson, 24 Miss. 368 ;
 Watson v. Dicke's, 20 Miss. (12 Smed. & M.) 608 ;
 Reddick v. Grossman, 49 Mo. 389 ;
 Pease v. Pilot Knob Iron Co., 49 Mo. 124 ;
 Johnson v. Houston, 47 Mo. 227 ;
 Sutton v. Mason, 38 Mo. 120 ;
 Walcop v. McKinney, 10 Mo. 229 ;
 Shields v. Lozeau, 34 N. J. L. (5 Vr.) 496 ; s.c. 3 Am. Rep. 256 ;
 Sanderson v. Price, 21 N. J. L. (1 Zab.) 637, 646 ;
 Allen v. Everly, 24 Ohio St. 97 ;
 Frische v. Kramer's Lessee, 16 Ohio 125 ; s.c. 47 Am. Dec. 368 ;
 Rands v. Kendall, 15 Ohio 671 ;
 Walker v. King, 44 Vt. 601 ;
 Hagar v. Brainerd, 44 Vt. 294 ;
 Cheever v. Rutland & B. R. R., 39 Vt. 653 ;
 Wilson v. Hooper, 12 Vt. 653 ; s.c. 36 Am. Dec. 366.
 ¹ Grattan v. Wiggins, 23 Cal. 26 ;
 Dutton v. Warschauer, 21 Cal. 609 ; s.c. 82 Am. Dec. 765 ;
 Nagle v. Macy, 9 Cal. 426 ;
 Drake v. Root, 2 Colo. 685 ;
 Bush. Dig. of Stat. (Fla.) 1872, p. 611 ;
 Vason v. Ball, 56 Ga. 268 ;
 Elfe v. Cole, 26 Ga. 197 ;
 Davis v. Anderson, 1 Ga. 176 ;
 Smith v. Parks, 23 Ind. 59, 61 ;</p> | <p>2 G. & H. Stat. (Ind.) 335 ;
 Chase v. Abbott, 20 Iowa 154, 158 ;
 Iowa Code (1873) 357 ;
 Dassler's Stat. Kans. (1876), c. 68, § 1 ;
 Ducland v. Rosseau, 2 La. An. 168 ;
 Gorham v. Arnold, 22 Mich. 247 ;
 Berthold v. Fox, 13 Minn. 501 ; s.c. 97 Am. Dec. 243 ;
 Adams v. Corrison, 7 Minn. (Gil. 365) 456 ;
 Webb v. Hoselton, 4 Neb. 308 ; s.c. 19 Am. Rep. 638 ;
 Kyger v. Ryley, 2 Neb. 20 ;
 Trimm v. Marsh, 54 N. Y. 599, 604 ; s.c. 13 Am. Rep. 623 ;
 Murray v. Walker, 31 N. Y. 399 ;
 2 Rev. Stat. N. Y., p. 312, § 57 ;
 Besser v. Howthorne, 3 Oreg. 129 ;
 Nixon v. Bynum, 1 Bail. (S. C.) L. 148 ;
 Thayer v. Crammer, 1 McC. (S. C.) Eq. 395 ;
 Durand v. Isaacks, 4 McC. (S. C.) L. 54 ;
 Walker v. Johnson, 37 Tex. 127 ;
 Wright v. Henderson, 12 Tex. 43 ;
 Word v. Trask, 7 Wis. 566 ;
 Hughes v. Edwards, 22 U. S. (9 Wheat.) 489 ; bk. 6 L. ed. 142.
 ² Knox v. Easton, 38 Ala. 345 ;
 Duval v. McLoskey, 1 Ala. 708 ;
 Fogarty v. Sawyer, 17 Cal. 589 ;</p> |
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ment will not be implied merely from silent acquiescence, or inferred from a provision that the mortgagee shall take possession upon default.¹

SEC. 2091. **Same—Duties of—To pay taxes.**—The taxes assessed against mortgaged premises are a lien on the land, and must be paid by a mortgagor in possession ;² and he will not be permitted to undermine the security of the mortgage by allowing the property to go to sale for taxes and buying in the title.³ Any one purchasing from the mortgagor and holding possession of the land before foreclosure is under a like obligation to protect the land from sale for taxes.⁴ But where the mortgagee

Carroll v. Ballance, 26 Ill. 9 ; s.c.

79 Am. Dec. 354 ;

Smith v. Parks, 22 Ind. 61 ;

Chase v. Abbott, 20 Iowa 158 ;

Chicks v. Willetts, 2 Kan. 384 ;

Stewart v. Barrow, 7 Bush (Ky.) 368 ;

Redman v. Sanders, 2 Dana (Ky.) 70 ;

Norton v. Webb, 35 Me. 270 ; s.c. 58 Am. Dec. 745 ;

Brown v. Leach, 35 Me. 39 ;

Clay v. Wren, 34 Me. 187 ;

George's Creek Coal & Iron Co. v. Detmold, 1 Md. 235, 237 ;

Brown v. Stewart, 1 Md. Ch. 87 ;

Leighton v. Preston, 9 Gill (Md.) 201 ;

Wales v. Mellen, 67 Mass. (1 Gray) 612 ;

Flagg v. Flagg, 28 Mass. (11 Pick.) 475 ;

Dearborn v. Dearborn, 9 N. H. 117 ;

Hartshorn v. Hubbard, 2 N. H. 453 ;

Brown v. Cram, 1 N. H. 169.

In *Flagg v. Flagg*, *supra*, where the condition of a mortgage by deed poll was, that if the mortgagor should occupy and cultivate the mortgaged premises and cause to be delivered annually to the mortgagee during his life one-half of the produce, in the following manner, viz. : the hay, etc., to be deposited in the barn, etc., standing on the land mortgaged, the deed should be void, it was held that such condition operated either by estoppel or by way of reservation, to vest the exclusive

right of occupation and possession in the mortgagor, so that if before condition broken the mortgagee should enter and disturb the mortgagor's possession, except for the purpose of taking away his own share of the produce, he would be liable to an action of trespass.

¹ *Stowell v. Pike*, 2 Me. (2 Greenl.) 387 ;

Brown v. Cram, 1 N. H. 169 ;

Rogers v. Grazebrook, 8 Ad. & E. N. S. (8 Q. B.) 895 ; s.c. 55 Eng. C. L. 893.

See : *Jackson ex d. Barclay v. Hopkins*, 18 John. (N. Y.) 487.

² *Kilpatrick v. Henson*, 81 Ala. 464 ; s.c. 1 So. Rep. 188.

See : *Marrow v. Turney*, 35 Ala. 131 ;

Dayton v. Rice, 47 Iowa 429 ;

Dolman v. Cook, 14 N. J. Eq. (McCart.) 56 ;

2 Jones *Mortg.* (5th ed.) 1180, 1134.

³ *McAlpine v. Zitzer*, 119 Ill. 273 ; s.c. 10 N. E. Rep. 901 ;

Cooper v. Jackson, 99 Ind. 566 ;

Fair v. Brown, 40 Iowa 209 ;

Fuller v. Hodgdon, 25 Me. 243 ;

Allison v. Armstrong, 28 Minn. 276 ; s.c. 41 Am. Rep. 281 ; 9 N. W. Rep. 806 ;

McLaughlin v. Green, 48 Miss. 175 ;

Kezer v. Clifford, 59 N. H. 208 ;

Boyd v. Allen, 15 Lea (Tenn.) 81 ;

Newton v. Marshall, 62 Wis. 8.

⁴ See : *Knox v. Easton*, 38 Ala. 345 ;

is in possession of the mortgaged premises and receiving the rents and profits, the burden of the duty to pay the taxes on the premises shifts to the mortgagee, and should he permit them to be sold at tax sale and buy them in, this sale will not cut off the mortgagor's interest, he will hold as trustee.¹

SEC. 2092. **Same—Same—To protect title.**—It is one of the duties of the mortgagor in possession to protect the title to the premises ; and where the mortgage contains covenants of warranty, any after-acquired title by the mortgagor inures to the benefit of the mortgagee,² not only as against the mortgagor himself, but also as against his heirs.³

SEC. 2093. **Same—Same—To preserve premises.**—It is also the duty of the mortgagor in possession to preserve the premises, and not to do or permit any injury which will in any way impair the security. Any threatened act which, if done, will tend to impair the security, such as the removal of a building or other fixture,⁴ will be restrained by injunction.⁵ A threatened impairment of

Boyd v. Allen, 15 Lea (Tenn.) 81 ;

Avery v. Judd, 21 Wis. 262 ;

Smith v. Lewis, 20 Wis. 350.

¹ Ten Eyck v. Craig, 62 N. Y. 406.
See : Moore v. Titman, 44 Ill. 367 ;

King v. Insurance Co., 61 Mass. (7 Cush.) 7 ;

Equitable Life Ins. Soc. v. Von Glahn, 107 N. Y. 637 ; s.c. 13 N. E. Rep. 793 ;

Post, § 2099.

² Parker v. Jones, 57 Ga. 204 ;

Pratt v. Pratt, 96 Ill. 184 ;

Levy v. Lane, 38 La. An. 252 ;

Toms v. Boyes, 50 Mich. 352 ; s.c. 15 N. W. Rep. 506 ;

Flynt v. Hubbard, 57 Miss. 471 ;

Massey v. Papin, 65 U. S. (24 How.) 362 ; bk. 16 L. ed. 734 ;

Wright v. Shumway, 1 Biss. C. C. 23 ; s.c. 2 Am. L. Reg. 20 ; Fed. Cas. No. 18093.

³ Somes v. Skinner, 20 Mass. (3 Pick.) 51, 52 ;

Wark v. Willard, 13 N. H. 389.

⁴ State Sav. Bank v. Kirchenall,

65 Mo. 682 ; s.c. 27 Am. Rep. 310, 311.

See : Ottumwa Woollen Mills v. Hawley, 44 Iowa 57 ; s.c. 24 Am. Rep. 719 ;

Arnold v. Crowder, 81 Ill. 56 ; s.c. 25 Am. Rep. 260 ;

McConnell v. Blood, 123 Mass. 47 ; s.c. 25 Am. Rep. 12 ;

Hutchins v. Masterson, 46 Tex. 551 ; s.c. 26 Am. Rep. 286.

⁵ Coker v. Whitlock, 54 Ala. 180 ;

Cooper v. Davis, 15 Conn. 556 ;

Salmon v. Claggett, 3 Bland (Md.) 105, 126 ;

Adams v. Corrison, 7 Minn. (Gil. 365) 456 ;

Smith v. Moore, 11 N. H. 55 ;

Peterson v. Clark, 15 John. (N. Y.) 205 ;

Fairbank v. Cudworth, 33 Wis. 358 ;

Hutchins v. King, 68 U. S. (1 Wall.) 53 ; bk. 17 L. ed. 544 ;

Farrant v. Lovell, 3 Atk. 723 ;

Bagnall v. Villar, L. R. 12 Ch. D. 812 ; s.c. 48 L. J. Ch. 695 ; 28 W. R. 242.

the security is all that is required in any case,¹ it not being necessary that it should be made to appear that the injury done or threatened is irreparable.² The injunction will not only be granted upon the application of the mortgagee, but also upon that of any party collaterally liable for the mortgage debt;³ and also by the mortgagor and a subsequent lienor against a mortgagee in possession.⁴ And such right exists not only against the mortgagor himself but all persons claiming under him.⁵ That the debt is not due is no objection to granting relief, but rather a reason for it,⁶ and it may be granted after decree of foreclosure.⁷

SEC. 2094. **Same—Liability of—To action at law.**—In addition to an action to foreclose the mortgage, the mortgagee may also bring a suit on the note or bond which

¹ *Dorr v. Dudderar*, 88 Ill. 107 ;
Nelson v. Pinegar, 30 Ill. 473 ;
Harris v. Bannon, 78 Ky. 568 ;
Scott v. Webster, 50 Wis. 53 ; s.c.
 6 N. W. Rep. 363 ;

Fairbanks v. Codworth, 33 Wis.
 358 ;

1 High on Inj. (3d ed.), §§ 462–
 468.

See : *Robinson v. Russell*, 24 Cal.
 467.

² *Kerr on Inj.* (2d ed.) 16.

³ *Knarr v. Conway*, 42 Ind. 257, 260 ;
Johnson v. White, 11 Barb. (N.
 Y.) 194.

See : *Brumley v. Fanning*, 1
 John. Ch. (N. Y.) 501.

⁴ See : *Brady v. Waldron*, 2 John.
 Ch. (N. Y.) 148.

⁵ *McCaslin v. State*, 44 Ind. 151.

⁶ *Salmon v. Claggett*, 3 Bland (Md.)
 105, 180.

⁷ *Mutual Life Ins. Co. v. Bigler*, 79
 N. Y. 568 :

Mocher v. Reeves, 1 Ball & B. 318 ;
Goodman v. Kine, 8 Beav. 379 ;
Wedderburn v. Wedderburn, 2
 Beav. 208 ;

Walton v. Johnson, 15 Sim. 352 ;
Casamayor v. Strode, 1 Sim. & S.
 381 ;

Paxton v. Douglass, 3 Ves. 519.

The court in *Mutual Life Insurance Co. v. Bigler*, *supra*, say that “ though a bill does not pray for an injunction, and one may not be moved for

under the prayer for general relief, yet after a decree of foreclosure, if the mortgagor attempt to cut timber, the court will enjoin him ; after a decree for a sale, it will not permit any one to cut timber in the mean time (*Wright v. Atkins*, 1 Ves. & B. 313). So where after decree the mortgagor who was in possession began to pull down the house (*Goodman v. Kine*, 8 Beav. 379). And it seems that the court may be moved thereto, by a defendant in the suit, upon petition and notice (*Barlow v. Gaines*, 8 Beav. 329 ; and see *Mocher v. Reed*, 1 Ball & B. 318 ; *Wedderburn v. Wedderburn*, 2 Beav. 208 ; *Paxton v. Douglass*, 3 Ves. 519). So where a purchaser was doing waste, not having paid the purchase-money, though not a party to the suit, he was restrained on motion of the plaintiff made in the suit (*Casamayor v. Strode*, 1 Sim. & S. 381). So a tenant of a receiver of the court, not a party, was by summary order restrained from removing farm products from the premises, for the reason that so to do was contrary to the custom of the country (*Walton v. Johnson*, 15 Sim. 352). ”

the mortgage was given to secure, and which is the primary instrument of the indebtedness. He may elect to proceed on the note or bond or bring an action to foreclose the mortgage, but he cannot maintain both at the same time ; and the commencement of an action to foreclose prevents a subsequent suit on the bond, except by express permission of the court.¹ The reason for this is the fact that the giving of the mortgage does not prevent the creditor from pursuing his remedy at law, which he already has for the collection of the debt.² In those cases, however, where there is no written obligation, aside from the mortgage, in which there is a recital of the indebtedness, there will be no personal liability, and action at law cannot be maintained.³ Should an action to foreclose be brought after a suit on the note or bond, the suit on the note or bond cannot be maintained unless the special permission of the court is granted to proceed therewith.⁴

SEC. 2095. **Same—Same—To sale of equity of redemption.**—Statutes provide in many of the states that the equity of redemption in mortgaged lands may be sold on execution, and is liable on attachment⁵ by the mortgagee, or another, for a debt not secured

¹ *Marx v. Davis*, 56 Miss. 745 ;
Nichols v. Smith, 42 Barb. (N. Y.) 381 ;

Suydam v. Bartle, 9 Paige Ch. (N. Y.) 294 ;

Williamson v. Champlin, 8 Paige Ch. (N. Y.) 70 ; s.c. 1 Clarke Ch. (N. Y.) 9.

² *Shaw v. Burton*, 5 Mo. 478
Philadelphia R. Co. v. Johnson, 54 Pa. St. 127.

³ *Van Brunt v. Mismar*, 8 Minn. 232 ;
Coleman v. Rensselaer, 44 How. (N. Y.) Pr. 368 ;

Severance v. Griffith, 2 Lans. (N. Y.) 38 ;

Henry v. Bell, 5 Vt. 393 ;
Howell v. Price, 1 Pr. Wms. 292.

⁴ *Engle v. Underhill*, 3 Edw. Ch. (N. Y.) 249 ;

Suydan v. Bartle, 9 Paige Ch. (N. Y.) 294 ;

Shufelt v. Shufelt, 9 Paige Ch. (N. Y.) 137 ; s.c. 37 Am. Dec. 381 ;

Williamson v. Champlin, 8 Paige Ch. (N. Y.) 70 ; s.c. 1 Clarke

Ch. (N. Y.) 9 ;

Pattison v. Powers, 4 Paige Ch. (N. Y.) 549.

⁵ *Wiggin v. Heywood*, 118 Mass. 514.
See : *Gilbert v. Merrill*, 8 Me. (8 Greenl.) 295 ;

Western Union Tel. Co. v. Caldwell, 141 Mass. 489, 492 ;

Carver v. Peck, 131 Mass. 291, 293 ;
Farr v. Dudley, 21 N. H. (1 Foster) 372.

Where land subject to a mortgage is attached on mesne process, and before the attaching creditor recovers judgment is sold by the mortgagee, under a power of sale contained in his mortgage, for more than enough to pay the mortgage debt and expenses of sale, the attaching creditor can, by a bill in equity, enforce his lien against the surplus proceeds of the sale remaining in the hands of the first mortgagee. The sale and conveyance of the

by the mortgage.¹ In other states equity has jurisdiction to subject the equity of redemption of mortgaged lands of a judgment debtor to the satisfaction of the judgment.² Where the mortgagee has taken possession under the mortgage, the sale of the equity of redemption in proceedings against the mortgagor will not disturb the rights of the mortgagee. The only effect of

land under the power contained in the previous mortgage passed an indefeasible title to the purchaser at that sale, cut off all right of redemption of the mortgagor or any one claiming under him, and prevented any levy of execution upon the land by virtue of an attachment subsequent to the mortgage. *Gardner v. Barnes*, and *Eldridge v. Kingsbury*, 106 Mass. 505. By the sale under the power in the mortgage, the land was turned into money, which was to be applied in the first instance to the payment of the debt and expenses of the mortgagee, and any surplus of which belonged to the same persons as the land before the sale; and their respective rights in the fund were not affected, except so far as relinquished by their own act. *Newhall v. Lynn Five Cent Savings Bank*, 101 Mass. 428; s.c. 3 Am. Rep. 387; *Varnum v. Meserve*, 90 Mass. (8 Allen) 158.

In *Carver v. Peck*, 131 Mass. 291, 293, the court say: "The plaintiff in such a case cannot maintain his bill under the general jurisdiction of this court in equity, because he does not show that he has recovered judgment upon his debt; for in order to charge property in equity with the payment of a legal debt, the plaintiff must show that he has taken all the steps which would be prerequisite to obtaining an execution at law."

Citing: *Wiggin v. Heywood*, 118 Mass. 514;

McDermutt v. Strong, 4 John. Ch. (N. Y.) 687;

Reubens v. Joel, 13 N. Y. 488, 490, 492;

Smith v. Hurst, 10 Hare 30;

2 Story Eq. Jur. (13th ed.), § 1216b.

¹ *Crookier v. Frazier*, 52 Me. 405; *Cushing v. Hurd*, 21 Mass. (4 Pick.) 253; s.c. 16 Am. Dec. 335;

Warden v. Adams, 15 Mass. 233.

See: *Bernstein v. Humes*, 71 Ala.

582; s.c. 31 Am. Rep. 52;

Turner v. Watkins, 31 Ark. 429;

State v. Lawson, 6 Ark. 269;

Finley v. Thayer, 42 Ill. 350;

Watkins v. Gregory, 6 Blackf.

(Ind.) 113;

Clinton National Bank v. Manwarring, 39 Iowa 281;

Jenkins v. Green, 22 Kan. 562;

Lord v. Crowell, 75 Me. 399;

Andrews v. Fiske, 101 Mass. 422;

Delano v. Wilde, 77 Mass. (11

Gray) 17; s.c. 71 Am. Dec.

687;

Cushing v. Hurd, 21 Mass. (4 Pick.) 253.

² *Stark v. Cheatham*, 2 Tenn. Ch. 300.

See: *Watson v. Bane*, 7 Md. 117.

No means being provided by the common law or by statute for the attaching creditor to enforce his right in this fund, a case is presented in which a court of chancery, according to its well-settled practice, will afford a remedy, to the same effect or upon the same conditions, as nearly as may be, as in proceedings at law in like cases.

See: *Cone v. Hamilton*, 102 Mass. 56;

McDermutt v. Strong, 4 John. Ch. (N. Y.) 687;

Burton v. Smith, 38 U. S. (13 Pet.) 464; s.c. bk. 10 L. ed. 248;

Dillon v. Plaskett, 2 Bligh N. S. 239, 284; s.c. 1 Dow & Cl. 320;

Smith v. Hurst, 10 Hare 30;

Neate v. Marlborough, 3 Myl. & Cr. 407.

such a sale will be to transfer to the purchaser a right to redeem.¹

SEC. 2096. **Mortgagee—Interest and rights of—At common law.**—At common law the mortgagee is the owner of the freehold estate by virtue of the legal estate with which he is vested, both before and after the breach of condition ; but before condition broken he has a defeasible estate which becomes absolute after condition broken, and he may enter upon and take possession of the premises, or recover against the mortgagor in ejectment ;² and on his death his interest in the mortgaged premises, being a legal estate, will descend to his heirs.³ In those states where the common-law theory of mortgages prevails, a mortgage of lands passes with a general devise in terms of all lands, tenements, and hereditaments, in the absence of any evidence of a different intention.⁴

SEC. 2097. **Same—Same—Under statute.**—The common-law theory of mortgages has been altered or modified by statute in the various states, and the right of the mortgagee to enter upon and take possession of the premises being taken away,⁵ the equity rule now prevails throughout this country, and on the mortgagee's death the mortgage passes to his personal representatives.⁶

¹ See : *Doe d. Hall v. Tunnell*, 1 Houst. (Del.) 320.

² *McMillan v. Otis*, 74 Ala. 560 ;
Shute v. Grimes, 7 Blackf. (Ind.) 1 ;

Clark v. Reyburn, 1 Kan. 281 ;

Gilman v. Wills, 66 Me. 273 ;

Smith v. Johnson, 69 Mass. (3 Gray) 517 ;

Walcop v. McKenney, 10 Mo. 229 ;

Furbush v. Goodwin, 29 N. H. 321 ;

Den v. Stockton, 12 N. J. L. (7 Halst.) 322 ;

Jackson ex d. Tuthill v. Dubois, 4 John. (N. Y.) 216.

³ 2 Co. Litt. (19th ed.) 205a.

⁴ *Jackson ex d. Livingston v. Delancey*, 13 John. (N. Y.) 536, 553, 559 ; s.c. 11 John. (N. Y.) 365 ;

Moore v. Cornell, 68 Pa. St. 320 ;

Galliers v. Moss, 9 Barn. & C.

267 ; s.c. 17 Eng. C. L. 126 ;

Winn v. Littleton, 1 Vern. 4 ;

Braybroke v. Inskip, 8 Ves. 417n ;
s.c. 7 Rev. Rep. 106 ;

2 Co. Litt. (19th ed.) 205a.

See : *Wilkins v. French*, 20 Me. 111 ;

Casborne v. Scarfe, 1 Atk. 605 ;

Strode v. Russell, 2 Vern. 625 ;

Attorney-General v. Vigor, 8 Ves. 276.

⁵ See : *Ante*, § 2089.

⁶ *Norwich v. Hubbard*, 22 Conn. 587 ;

White v. Rittenmyer, 30 Iowa 268, 272 ;

Burton v. Hintrager, 18 Iowa 348, 351 ;

Barnes v. Lee, 1 Bibb (Ky.) 526 ;

Webster v. Calden, 55 Me. 165, 204 ;

Connor v. Whitmore, 52 Me. 185 ;

Douglass v. Darin, 51 Me. 121 ;

Wilkins v. French, 20 Me. 11 ;

SEC. 2098. **Same—Same—Rights to rents and profits.**—Where a mortgagee takes possession of the mortgaged premises for the purpose of protecting his security, he will be entitled to receive the rents and profits, which he must apply to the mortgage indebtedness.¹ If the mortgagee has taken possession he cannot be dispossessed, even by the mortgagor, except upon payment of the debt secured;² and upon such payment the mortgagor can only recover possession by an action in equity for a release or reconveyance.³ In some states the possession continues only while the relation of debtor and creditor lasts, and ceases with the payment of the debt.⁴ In no state can the mortgage be required to take a part of the security;⁵ in all he may sue for injury, trespass, or waste.⁶

- Chase v. Lockerman*, 11 Gill & J. (Md.) 185; s.c. 35 Am. Dec. 277;
Haskins v. Hawkes, 108 Mass. 379;
Burt v. Ricker, 88 Mass. (6 Allen) 77, 78;
George v. Baker, 85 Mass. (3 Allen) 326n;
Taft v. Stevens, 69 Mass. (3 Gray) 504;
Palmer v. Stevens, 65 Mass. (11 Cush.) 147;
Richardson v. Hildreth, 62 Mass. (8 Cush.) 225;
Dewey v. Van Deusen, 21 Mass. (4 Pick.) 19;
Smith v. Dyer, 16 Mass. 18;
Great Falls Co. v. Worster, 15 N. H. 412;
Kinna v. Smith, 3 N. J. Eq. (2 H. W. Green) Ch. 14;
Jackson ex d. Livingston v. Delancey, 11 John. (N. Y.) 365; s.c. 13 John. (N. Y.) 535;
Demarest v. Wynkoop, 3 John. Ch. (N. Y.) 129, 145; s.c. 8 Am. Dec. 467;
Collamer v. Langdon, 29 Vt. 32.
¹ *Harrison v. Wyse*, 24 Conn. 1; s.c. 63 Am. Dec. 151;
Breckenridge v. Brooks, 2 A. K. Marsh. (Ky.) 335; s.c. 12 Am. Dec. 401.
 See: *Daniel v. Coker*, 70 Ala. 260;
Downs v. Hopkins, 65 Ala. 508;
Greer v. Turner, 36 Ark. 17;
Kellogg v. Rockwell, 19 Conn. 446;
Wood v. Whelen, 93 Ill. 153;
Tharp v. Feltz, 6 B. Mon. (Ky.) 6;
Anthony v. Rogers, 20 Mo. 281;
Dawson v. Drake, 30 N. J. Eq. (3 Stew.) 601;
Onderdonk v. Gray, 19 N. J. Eq. (4 C. E. Gr.) 65;
Chapman v. Porter, 69 N. Y. 276;
Reitenbaugh v. Ludwick, 31 Pa. St. 131.
² *Cook v. Cooper*, 18 Oreg. 142; s.c. 22 Pac. Rep. 945; 7 L. R. A. 273.
 See: *Dickason v. Dawson*, 85 Ill. 53;
Martin v. Fridley, 23 Minn. 13;
Fee v. Swingly, 6 Mont. 596; s.c. 13 Pac. Rep. 375;
Hubbell v. Moulson, 53 N. Y. 225;
Brinkman v. Jones, 44 Wis. 498.
³ *Hubbell v. Moulson*, 53 N. Y. 225.
 See: *Doton v. Russell*, 17 Conn. 146;
Phelps v. Sage, 2 Day 151;
Stewart v. Crosby, 50 Mo. 130;
Smith v. Kelly, 27 Me. 237; s.c. 46 Am. Dec. 595;
Currier v. Gale, 91 Mass. (9 Allen) 522;
Crosby v. Leavitt, 86 Mass. (4 Allen) 410.
⁴ *Trimm v. Marsh*, 54 N. Y. 606;
Kortright v. Cady, 21 N. Y. 343, 365.
⁵ *Moore v. Little Rock*, 42 Ark. 66;
Spencer v. Waterman, 36 Conn. 342.
⁶ *Smith v. Rice*, 56 Ala. 417;

SEC. 2099. **Same—Duty of—To pay taxes.**—A mortgagee in possession, either before or after breach of condition, who is in receipt of the rents and profits, is under obligation to pay the taxes assessed upon the mortgaged premises. Should he fail to do so, and the premises are sold for taxes, he will be liable; and should he become the purchaser at such sale, he will hold as a trustee of the mortgagor or those claiming under him.¹

¹ SEC. 2100. **Same—Same—To make repairs.**—Where the mortgagee is in possession of the mortgaged premises under the mortgage, it is his duty to keep them in proper and ordinary repair, and he will be entitled to an allowance therefor in his accounting.² Where a mortgagee in possession makes needed repairs to the mortgaged premises, the cost thereof must be paid out of the rents and profits, and cannot be tacked on to the mortgage so as to be made a charge on the land.³ A mortgagee making needed repairs will be allowed a reasonable expense therefor. What repairs and expenses are reasonable will

Fay v. Brewer, 20 Mass. (3 Pick.) 203;

Atkinson v. Hewett, 63 Wis. 396; s.c. 23 N. W. Rep. 889.

¹ Moore v. Titman, 44 Ill. 367;

Ten Eyck v. Craig, 62 N. Y. 406. The general rule is that where the mortgagee is not in default he may buy in any outstanding title, and hold it as against the mortgagor.

Ten Eyck v. Craig, 62 N. Y. 406, 421;

Williams v. Townsend, 31 N. Y. 411, 415;

Cameron v. Irwin, 5 Hill (N. Y.) 272, 280;

Shaw v. Bunny, 13 Week. R. 374; s.c. 2 DeG. J. & S. 468.

Thus it is said in Ten Eyck v. Craig, *supra*, that "a mortgagee in possession may purchase from a prior mortgagee and get an irredeemable title (Kirkwood v. Thompson, 2 DeG. J. & S. 613, and cases cited; Parkinson v. Hanbury, 2 Drew. & S. 143; s.c. 2 DeG. & S. 450; see also, Shaw v. Bunny, 13 W. R. 374; s.c. 2 DeG. J. & S. 468;

Knight v. Majoribanks, 2 McN. & G. 10). Lord CRANWORTH, in Kirkwood v. Thompson, referring to the fact that the mortgagee at the time of the purchase was in possession, says: 'That makes no difference; being in possession could only make a difference if it created an obligation between the mortgagee and mortgagor, which would not have existed if he had not been in possession. Nothing of this sort is suggested; no duty arises on being in possession except to account in a way onerous to the mortgagee.'"

² Booth v. Baltimore Steam Packing Co., 63 Md. 39;

Strong v. Blanchard, 86 Mass. (4 Allen) 538;

Adkins v. Lewis, 5 Oreg. 292;

Harper's Appeal, 54 Pa. St. 315;

Landon v. Hooper, 6 Beav. 246;

Nusom v. Clarkson, 4 Hare 97.

³ Barthell v. Syverson, 54 Iowa 160; s.c. 6 N. W. Rep. 178;

1 Jones on Mortg. (4th ed.), §§ 360, 569.

Reasonable repairs are such as are necessary to the enjoyment of the estate or to prevent it deteriorating.¹

SEC. 2101. **Same—Liabilities of—To account for rents and profits.**—A mortgagee in possession is bound to account to the mortgagor and those claiming under him, for all issues, rents, and profits received by him, and all waste suffered.² But he will be entitled to have them applied towards the satisfaction of the mortgage debt in those cases where the mortgaged premises are insufficient to pay the same.³ The general rule of accounting is that whenever the net annual rents or the value of the occupation exceeds the interest due and necessary expenses for repairs, the accounting is taken with annual rests,⁴ and the balance remaining to be applied to the reduction of the principal.⁵ Where the mortgagee is in possession by

¹ *Blum v. Mitchell*, 59 Ala. 535 ;
Quin v. Brittain, 1 Hoffm. Ch.
353 ;

Moore v. Cable, 1 John. Ch. (N.
Y.) 385, 387.

² *Booth v. Baltimore Steam Packet*
Co., 63 Md. 39.

Matthews v. Memphis & C. R.
Co., 108 U. S. 368 ; bk. 27 L.
ed. 756.

See : *Farris v. Houston*, 78 Ala.
250 ;

Daniel v. Coker, 70 Ala. 260 ;

Downs v. Hopkins, 65 Ala. 508,
509 ;

Scott v. Ware, 65 Ala. 174 :

Shields v. Kinbrough, 64 Ala.
504 ;

Daily v. Abbott, 40 Ark. 275 ;

Murdock v. Clark, 59 Cal. 693 ;

Harrison v. Wyse, 24 Conn. 1 ;
s.c. 63 Am. Dec. 151 ;

Kellogg v. Rockwell, 19 Conn.
446 ;

Moshier v. Norton, 100 Ill. 63 ;

Ten Eyck v. Caspad, 15 Iowa 524 ;

Breckenridge v. Brooks, 2 A. K.
Marsh. (Ky.) 335 ; s.c. 12 Am.
Dec. 401 ;

Anthony v. Rogers, 20 Mo. 281 ;

Onderdonk v. Gray, 19 N. J. Eq.
(4 C. E. Gr.) 65 ;

Chapman v. Porter, 69 N. Y.
276 ;

Reitenbaugh v. Ludwick, 31 Pa.
St. 131 ;

Givens v. McCalmont, 4 Watts
(Pa.) 450 ;

Seaver v. Durant, 39 Vt. 103 ;

Brayton v. Jones, 5 Wis. 117 ;

Latimer v. Moore, 4 McL. C. C.
110 ; s.c. Fed. Cas. No. 8114 ;

Archdeacon v. Bowes, 13 Price
353.

³ *Williams v. Bartlett*, 4 Lea (Tenn.)
624.

⁴ *Blum v. Mitchell*, 59 Ala. 535 ;

Watford v. Oates, 57 Ala. 290 ;

Reed v. Reed, 27 Mass. (10 Pick.)
398 ;

Elmer v. Loper, 25 N. J. Eq. (10
C. E. Gr.) 475 ;

Shaeffer v. Chambers, 6 N. J. Eq.
(2 Halst.) 548 ;

Gladding v. Warner, 36 Vt. 54 ;

Green v. Westcott, 13 Wis. 606 ;

Gordon v. Lewis, 2 Sumn. C. C.
143, 147 ; s.c. Fed. Cas. No.
5613.

⁵ *Harrison v. Wyse*, 24 Conn. 1 ;
s.c. 63 Am. Dec. 151.

See : *Mahone v. Williams*, 39 Ala.
202 ;

Kellogg v. Rockwell, 19 Conn.
446 ;

McConnell v. Hollowbush, 11 Ill.
61 ;

Johnson v. Miller, 1 Wis. (Ind.)
416 ;

Tharp v. Feltz, 6 B. Mon. (Ky.)
6 ;

Anthony v. Rogers, 20 Mo. 281 ;

tenant, he is accountable for fair rents and profits,¹ but not required to go into speculations for owner's benefit.² A mortgagee in possession is held to reasonable care and prudence in obtaining rents and profits, and in case of fraud or neglect he will be required to account for such rents as he might have received.³

SEC. 2102. **Same—Allowance for improvements and disbursements.**—We have already seen⁴ that a mortgagee in possession making needed repairs to the mortgaged premises is entitled to an allowance therefor in his accounting; but a mortgagee in possession will not be entitled to an allowance for improvements made upon the premises, thereby increasing the amount that must be paid to redeem, unless such improvements are made with the knowledge and consent of the mortgagor or those entitled to the equity of redemption.⁵ But a mortgagee in possession of mortgaged premises, either before or

Walton v. Withington, 9 Mo. 545;
Elmer v. Loper, 25 N. J. Eq. (10
C. E. Gr.) 475;

Reitenbaugh v. Ludwick, 31 Pa.
St. 131;

Chapman v. Smith, 9 Vt. 153;

Gould v. Tancred, 2 Atk. 533;

Shepard v. Elliott, 4 Madd. 254.

¹ Matthews v. Memphis & C. R.
Co., 108 U. S. 368; bk. 27 L.
ed. 756.

See: Benham v. Rowe, 2 Cal.
387; s.c. 56 Am. Dec. 342;

Harrison v. Wyse, 24 Conn. 1;
s.c. 63 Am. Dec. 151;

Kellogg v. Rockwell, 19 Conn.
446;

Breckenridge v. Brooks, 2 A. K.
Marsh. (Ky.) 335; s.c. 12 Am.
Dec. 401;

Tharp v. Feltz, 6 B. Mon. (Ky.)
6;

Anthony v. Rogers, 20 Mo. 281;
Reitenbaugh v. Ludwick, 31 Pa.
St. 131.

² See: Booth v. Steam Packet Co.,
68 Md. 39;

Walsh v. Rutgers Fire Ins. Co.,
13 Abb. Pr. (N. Y.) 33.

³ Quinn v. Brittain, 3 Edw. Ch. (N.
Y.) 314.

See: Barron v. Paulling, 38 Ala.
392;

Murdock v. Clarke, 59 Cal. 604;

Harper v. Ely, 71 Ill. 581;

Milliken v. Bailey, 61 Me. 318;

Bell v. Mayor, etc., N. Y., 10 Paige
Ch. (N. Y.) 49;

Benedict v. Gilman, 4 Paige Ch.
(N. Y.) 58.

⁴ See: *Ante*, § 2100.

⁵ McCarron v. Cassidy, 18 Ark. 34;
Hidden v. Jordan, 32 Cal. 397;
s.c. 28 Cal. 301;

Cook v. Ottawa University, 14
Kan. 548;

Hopkins v. Stephenson, 1 J. J.
Marsh. (Ky.) 341;

Ruby v. Abyssinian Society of
Portland, 15 Me. 306;

Neale v. Hagthorp, 3 Bland Ch.
(Md.) 551, 590;

Dougherty v. McColgan, 6 Gill
& J. (Md.) 275;

Russell v. Blake, 19 Mass. (2
Pick.) 505;

Clark v. Smith, 1 N. J. Eq. (1
Saxt.) 121;

Mickles v. Dillaye, 17 N. Y. 80;

Moore v. Cable, 1 John. Ch. (N.
Y.) 385;

Bell v. Mayor of N. Y., 10 Paige
Ch. (N. Y.) 49;

Lowndes v. Chisolm, 2 McC. (S.
C.) Eq. 455; s.c. 16 Am. Dec.
667;

Adkins v. Lewis, 5 Oreg. 292;

Harper's Appeal, 64 Pa. St. 315.

after breach of condition, will be entitled to an allowance of monies paid for taxes which have been properly assessed against the property ;¹ for insurance premiums paid, where the mortgage requires that the premises be kept insured for the benefit of the mortgagee, and the mortgagor fails to do so ;² even though the insurance obtained by the mortgagee be payable to him in case of loss.³ But where the mortgagee without authority from or agreement with the mortgagor obtains insurance against fire, the mortgagor cannot be charged with any part of the premium paid, neither will he share in the amount of insurance recovered.⁴ The mortgagee will also be entitled to an allowance for monies paid to discharge prior incumbrances in order to protect his own mortgage ;⁵ and all disbursements for the discharge of

¹ See: *Ring's Exrs. v. Woodruff*, 43 Ark. 469 ;

Mix v. Hotchkiss, 14 Conn. 32 ;

Wright v. Langley, 36 Ill. 381 ;

Sharp v. Barker, 11 Kan. 218 ;

Williams v. Milton, 35 Me. 547 ;
s.c. 58 Am. Dec. 721 ;

Skilton v. Robert, 129 Mass. 309 ;

Davis v. Bean, 114 Mass. 360 ;

Walton v. Hollywood, 47 Mich. 385 ;

Southard v. Dorrington, 10 Neb. 122 ; 4 N. W. Rep. 935 ;

Sidenberg v. Ely, 90 N. Y. 257 ;
s.c. 43 Am. Rep. 163 ;

Marshall v. Davies, 78 N. Y. 414 ;

Eagle Fire Ins. Co. v. Pell, 2 Edw. Ch. (N. Y.) 631 ;

Faure v. Winans, 1 Hopk. Ch. (N. Y.) 283 ; s.c. 14 Am. Dec. 545 ;

Burr v. Veeder, 3 Wend. (N. Y.) 412.

² *Harper v. Ely*, 70 Ill. 58 ;

Carr v. Hodge, 130 Mass. 55, 58 ;
Montague v. Boston & A. R. Co.,
124 Mass. 242, 247 ;

Boston & W. R. Corp. v. Haven,
90 Mass. (8 Allen) 359, 362 ;

Fowley v. Palmer, 71 Mass. (5 Gray) 549.

³ *Fowley v. Palmer*, 71 Mass. (5 Gray) 549.

⁴ *Stinchfield v. Milliken*, 71 Me. 567 ;

Clark v. Wilson, 103 Mass. 219, 221 ;

Boston & W. R. Corp. v. Haven,

90 Mass. (8 Allen) 359 ;

Fowley v. Palmer, 71 Mass. (5 Gray) 549 ;

White v. Brown, 56 Mass. (2 Cush.) 412 ;

Saunders v. Frost, 22 Mass. 5) Pick.) 270 ; s.c. 16 Am. Dec. 394 ;

Russell v. Southard, 53 U. S. (12 How.) 139, 157 ; bk. 13 L. ed. 927, 934 ;

Insurable interest, however, rests in mortgagee who holds legal title, and he may cover the property to its full value for his own benefit.

See: *Strong v. Manuf. Ins. Co.*, 27 Mass. (10 Pick.) 40 ;

Stetson v. Massachusetts Ins. Co., 4 Mass. 330 ;

Travelers' Ins. Co. v. Robert, 9 Wend. (N. Y.) 474 ;

Williams v. Cincinnati Ins. Co.,
Wright (Ohio) 542 ;

Holbrook v. American Insurance Co., 1 Curt. C. C. 193 ; s.c. 1 Am. L. Reg. 18 ; Fed. Cas. No. 6590.

Irving v. Richardson, 2 Barn. & Ad. 193 ; s.c. 22 Eng. C. L. 88 ;

Carpenter v. Providence Washington Ins. Co., 41 U. S. (16 Pet.) 495, 501 ; bk. 10 L. ed. 1044, 1047.

⁵ *Harper v. Ely*, 70 Ill. 581 ;

Davis v. Bean, 114 Mass. 360 ;

Davis v. Winn, 84 Mass. (2 Allen) 111 ;

any liability which the law makes a prior lien upon mortgaged premises,¹ and all monies necessarily paid to protect the property from injury.² Thus a mortgagor compelled to pay water rates due, to prevent cutting off of water supply, may charge the sum in his accounting;³ and so may be a reasonable attorney's fee paid,⁴ or any other expenses actually incurred,⁵ in a proper endeavor to collect rents; as well as a reasonable sum for care and management, where the mortgage provides for it,⁶ but not otherwise.⁷ Where the mortgage provides that on default the mortgagee may take possession, and shall be entitled to receive proper compensation for labor and services in caring for the mortgaged property, the mortgagee will be entitled to an allowance for money expended for the superintendence and management of the property.⁸

SEC. 2103. **Tenure under mortgage.**—The tenure under a mortgage is such that the mortgagor cannot disseize the mortgagee, because, it is said, the mortgagor's possession is not properly his own, under the English idea

Sanders v. Hooper, 6 Beav. 248;
Pelley v. Wathen, 7 Hare 373.

¹ *Mix v. Hotchkiss*, 14 Conn. 32;
Williams v. Hilton, 35 Me. 547;
s.c. 58 Am. Dec. 729;

Skilton v. Roberts, 129 Mass. 306,
309.

See: *Morton v. Hall*, 118 Mass. 511;
Alden v. Wilkins, 117 Mass. 216;

Davis v. Bean, 114 Mass. 360;
O'Connell v. Kelly, 114 Mass. 97;

Ropeley v. Prince, 4 Hill (N. Y.)
119; s.c. 40 Am. Dec. 267;

Silver Lake Bank v. North, 4
John. Ch. (N. Y.) 370;

Brown v. Simons, 44 N. H. 475;
Dale v. McEvers, 2 Cow. (N. Y.)
118.

² *Rowan v. Sharp's Rifle Mfg. Co.*,
29 Conn. 232;

Donohue v. Chase, 139 Mass. 407;
Hubbard v. Shaw, 94 Mass. (12
Allen) 120;

Boston & W. R. Corp. v. Haven,
90 Mass. (8 Allen) 359.

³ *Donohue v. Chase*, 139 Mass. 407;
Saunders v. Frost, 22 Mass. (5
Pick.) 259, 270.

See: *Pawlins v. Stewart*, 1 Bland
(Md.) 22;

Reed v. Reed, 27 Mass. (10 Pick.)
398.

⁴ *Hubbard v. Shaw*, 94 Mass. (12
Allen) 120.

⁵ See: *Harper v. Ely*, 70 Ill. 581;
Scarborough v. Stinson, 15 La.
An. 665;

Lowndes v. Chisolm, 2 McCord
(S. C.) Ch. 455;

Davis v. Dendy, 3 Mod. 170.

⁶ *Boston & W. R. Corp. v. Haven*,
90 Mass. (8 Allen) 359.

⁷ See: *Benham v. Rowe*, 2 Cal. 387;
Clark v. Robins, 6 Dana (Ky.)
350;

Breckenridge v. Brooks, 2 A. K.
Marsh. (Ky.) 325;

Eaton v. Simonds, 31 Mass. (14
Pick.) 98;

Elmer v. Loper, 25 N. J. Eq. (10
C. E. Gr.) 475;

Clark v. Smith, 1 N. J. Eq. (1
Saxt.) 121;

Moore v. Cable, 1 John. Ch. 385.

⁸ *Boston & W. R. Corp. v. Haven*,
90 Mass. (8 Allen) 359, 361.

See: *Tucker v. Buffum*, 33 Mass.
(10 Pick.) 46;

Gibson v. Crehore, 22 Mass. (5
Pick.) 145, 146.

of a mortgage, but that of the mortgagee.¹ Under this theory of mortgages the seisin of the mortgagor, although his own for some purposes,² is the seisin of the mortgagee in what regards their reciprocal relations and rights; and as between them in their particular relation as mortgagor and mortgagee there is no room for a question of disseisin on either side.³ The mortgagee is estopped by his deed from denying the title of the mortgagor, and any title adverse to that of the mortgagor which he so procured will inure to the benefit of the mortgagor, upon his payment of the amount expended and the expenses incurred to secure the superior title;⁴ and should the mortgagor secure an outstanding superior title, the acquisition will inure to the benefit of the mortgagee.⁵ Until after condition broken the possession of either is the possession of the other, and the disseisin of one is the disseisin of the other,⁶

¹ *Ayers v. Waite*, 64 Mass. (10 Cush.) 72, 74;

Hunt v. Hunt, 31 Mass. (14 Pick.) 374; s.c. 25 Am. Dec. 400;

Cholmondely v. Clinton, 2 Meriv. 360.

² *Henry's Case*, 58 Mass. (4 Cush.) 257.

³ *Ayers v. Waite*, 64 Mass. (10 Cush.) 72, 74.

See: *Colton v. Smith*, 28 Mass. (11 Pick.) 311;

Hicks v. Bingham, 11 Mass. 300, 302;

Perkins v. Pitts, 11 Mass. 125, 130;

Gould v. Newman, 6 Mass. 239.

⁴ *Doe d. Hall v. Tunnell*, 1 Houst. (Del.) 320;

Connor v. Whitmore, 52 Me. 185;

Farmers & Mechanics' Bank v. Bronson, 14 Mich. 361, 369;

Brown v. Combs, 29 N. J. L. (5 Dutch.) 86.

See: *Walthall v. Rives*, 34 Ala. 91;

Wright v. Sperry, 25 Wis. 617.

⁵ *Clark v. Baker*, 14 Cal. 612, 632;

Fair v. Brown, 40 Iowa 200, 209;

Stears v. Hollenbeck, 38 Iowa 550;

Porter v. Lafferty, 33 Iowa 254, 257;

Conner v. Whitmore, 52 Me. 185;

Fuller v. Hodgson, 25 Me. 243;

Lincoln v. Emerson, 108 Mass. 87;

Tefft v. Munson, 57 N. Y. 97;

Miami Ex. Co. v. United States Bank, Wright (Ohio) 249;

Avery v. Judd, 21 Wis. 262;

Smith v. Lewis, 20 Wis. 350.

⁶ *Boston v. Richards*, 105 Mass. 351, 372;

Ayers v. Waite, 64 Mass. (10 Cush.) 72, 75;

Wheeler v. Stone, 55 Mass. (1 Cush.) 313, 317, 322;

Poignard v. Smith, 25 Mass. (8 Pick.) 272;

Hunt v. Hunt, 31 Mass. (14 Pick.) 374, 385; 25 Am. Dec. 400;

Brimmer v. Proprietors Long Wharf, 22 Mass. (5 Pick.) 131;

Proprietors Kennebeck Purchase v. Springer, 4 Mass. 416;

Watkins v. Holman, 41 U. S. (16 Pet.) 25, 55; bk. 10 L. ed. 873, 885.

See: *Boyd v. Beck*, 29 Ala. 703;

Herbert v. Hanrick, 16 Ala. 581;

Lincoln v. Emerson, 108 Mass. 87;

Currier v. Gale, 91 Mass. (9 Allen) 522;

Dedmun v. Lamson, 91 Mass. (9 Allen) 85;

Sheridan v. Welch, 90 Mass. (8 Allen) 166;

Hunt v. Hunt, 31 Mass. (14 Pick.) 374; s.c. 25 Am. Dec. 400;

and so long as the disseisor is in possession the mortgagee cannot make a valid assignment of his mortgage, because his deed will not pass his interest in the land.¹ It is extremely difficult to fix any rule as to what constitutes a disseisin; because in many cases a party, upon slight acts, may aver a disseisin,² but in general the acts of a disseisor, in respect to the lawful owner, are to be limited to an actual ouster and exclusive occupation by such disseisor.³

Root v. Bancroft, 10 Mass. 44;
Woods v. Hilderbrand, 46 Mo.
284; s.c. 2 Am. Rep. 513;

Sheafe v. Gerry, 18 N. H. 247;
Nichols v. Reynolds, 1 R. I. 30;
Newman v. Chapman, 2 Rand.
(Va.) 93;

Doe v. Barton, 11 A. & E. 307;
s.c. 39 Eng. C. L. 181;

Partridge v. Bere, 5 B. & Ald.
604; s.c. 7 Eng. C. L. 330.

A person without title, in *Poignard v. Smith*, 25 Mass. (8 Pick.) 272, took possession of land which was under mortgage, and built on parts of it a carpenter's shop and a blacksmith's shop, and the tenants of the carpenter's shop occasionally used parts of the lot adjacent to their shop, to spread their boards on, and the tenants of the blacksmith's shop used other parts of the lot to run carriages on and put tires on wheels. It was held that this was a disseisin of the mortgagee only for the part of the land covered by the shops.

Adverse possession—When jury may infer.—In *Boston v. Richardson*, 105 Mass. 357, 372, the court say: "This evidence as to the maintenance of a fish-house and engine-house of the demanded premises by or under authority of the town or city of Boston would have warranted a jury in inferring an open and adverse possession of that part by the city, sufficient to constitute a disseisin. If there were no other evidence upon this point, a disseisin so proved might indeed be confined to the part so occupied,

because a title of disseisin is limited by the actual occupation, and is not to be extended by construction."

Citing: *Wheeler v. Stone*, 55 Mass. (1 Cush.) 313, 317, 322;

Poignard v. Smith, 25 Mass. (8 Pick.) 272;

Brimmer v. Long Wharf, 22 Mass. (5 Pick.) 131;

Proprietors Kennebeck Purchase v. Springer, 4 Mass. 416;

Watkins v. Holman, 41 U. S. (16 Pet.) 25, 55; bk. 10 L. ed. 873, 885.

¹ *Rawson v. Putnam*, 128 Mass. 552;

Dadmun v. Lamson, 91 Mass. (9 Allen) 85, 88;

Poignard v. Smith, 25 Mass. (8 Pick.) 272.

It is said in *Dadmun v. Lamson*, "The doctrine that a disseisee, without the entry and delivery of the deed on the land, cannot convey any title which will be valid as against the disseisor, is too well settled and has been too often recognized by this court to be now called in question."

Citing: *Brinley v. Whiting*, 22 Mass. (5 Pick.) 348;

Boston & W. R. Corp. v. Sparhawk, 46 Mass. (5 Met.) 469;

Foster v. Abbot, 49 Mass. (8 Met.) 596;

Barry v. Adams, 85 Mass. (3 Allan) 493.

² See: *Higby v. Rice*, 5 Mass. 344.

³ *Monroe v. Luke*, 42 Mass. (1 Met.) 459, 470;

Poignard v. Smith, 25 Mass. (8 Pick.) 272;

Brimmer v. Proprietors of Long Wharf, 22 Mass. (5 Pick.) 131.

SEC. 2104. **Same—Adverse possession.**—We have already seen that the tenure under which the mortgagor and mortgagee hold is such that before condition broken neither the mortgagor nor the mortgagee can disseize the other; but after condition broken either party may, by acts of hostility, secure such adverse possession as will ripen into a bar under the statute of limitations. The statute of limitations will be set in operation by any act of hostility to the title of the other party which would be sufficient on the part of a stranger to create adverse possession, and when the statute is once set in operation, after the lapse of the statutory limitations the mortgagor will lose his right to enforce his equity of redemption, and the mortgagee his right to foreclose his mortgage. In such case the mortgagor or his grantee must commit some act which amounts to a refusal to recognize the mortgage, or there must be some other circumstances from which the jury may infer adverse possession,² because the general presumption is that the mortgagor and his grantees hold subordinate to the mortgagee, and until this presumption is overcome the bar of the statute of limitations will not begin to run in favor of the mortgagor.³ But uninterrupted possession by the mortgagor for twenty years after condition broken, without an entry or claim on the part of the mortgagee, will raise the presumption that the mortgage has been paid and bar the right of the mortgagee to foreclose.⁴ Wherever the presumption of adverse pos-

¹ See : *Ante*, § 2103.

² *Jones v. Williams*, 5 Ad. & E. 291; s.c. 31 Eng. C. L. 219; *Partridge v. Bere*, 5 Barn. & A. 604; s.c. 7 Eng. C. L. 330.

³ *Boyd v. Beck*, 29 Ala. 703; *Noyes v. Sturdivant*, 18 Me. 104; *Bacon v. McIntire*, 49 Mass. (8 Met.) 87;

Tripe v. Marcy, 39 N. H. 439; *Zeller's Lessee v. Eckert*, 45 U. S. (4 How.) 288, 295; bk. 11 L. ed. 979, 982;

Hall v. Doe d. Surtees, 5 Barn. & Ald. 687; s.c. 7 Eng. C. L. 374.

Haskell v. Bailey, 22 Conn. 569; *Elkins v. Edwards*, 8 Ga. 325, 326;

Harris v. Mills, 28 Ill. 44, 46; s.c. 81 Am. Dec. 259;

Chick v. Rollins, 44 Me. 104;

Blethen v. Dwinal, 35 Me. 556;

Boyd v. Harris, 2 Md. Ch. 210;

Bacon v. McIntire, 49 Mass. (8 Met.) 87;

Howland v. Shurtleff, 43 Mass. (2 Met.) 26; s.c. 35 Am. Dec. 384;

Thayer v. Mann, 36 Mass. (19 Pick.) 535;

Inches v. Leonard, 12 Mass. 379; *Nevitt v. Bacon*, 32 Miss. 212

226; s.c. 66 Am. Dec. 609;

Tripe v. Marcy, 39 N. H. 439;

Evans v. Huffman, 5 N. J. Lq. (1 Halst.) 354;

Belmont v. O'Brien, 13 N. Y. 394;

session is raised by the circumstances, after the lapse of the statutory period, the party in possession acquires an absolute title to the land.¹

SEC. 2105. **Same—Same—What constitutes.**—To be adverse and put in operation the statute of limitations, the possession of either party must be exclusive.² Any act on the part of the mortgagor in possession which recognizes the existence of the mortgage debt, and any act on the part of the mortgagee in possession which recognizes the right of the mortgagor, will rebut the presumption of adverse possession and prevent it from ripening into a title. Thus where the mortgagor acknowledges the existence of the mortgage debt by paying interest or a part of the principal, or the mortgagee in possession recognizes the title of the mortgagor by accounting to him for the rents and profits, such acts

- Jackson v. Shauber*, 7 Cow. (N. Y.) 187;
Jackson v. Wood, 12 John. (N. Y.) 345; s.c. 7 Am. Dec. 315;
Jackson ex d. Martin v. Pratt, 10 John. (N. Y.) 381;
Collins v. Torrey, 7 John. (N. Y.) 278; s.c. 5 Am. Dec. 273;
Giles v. Barremore, 5 John. Ch. (N. Y.) 545, 550;
Roberts v. Welch, 8 Ired. (N. C.) Eq. 287;
Richmond v. Aiken, 25 Vt. 324;
Hughes v. Edwards, 22 U. S. (9 Wheat.) 489; bk. 6 L. ed. 142;
Trash v. White, 3 Bro. Ch. 288, 291;
Hillary v. Waller, 12 Ves. 265.
¹ *Haskell v. Bailey*, 22 Conn. 569;
Elkins v. Edwards, 8 Ga. 326;
Rockwell v. Servant, 63 Ill. 424;
Harris v. Mills, 28 Ill. 44, 46; s.c. 81 Am. Dec. 259;
Crawford v. Taylor, 42 Iowa 260;
Green v. Turner, 38 Iowa 112;
Roberts v. Littlefield, 48 Me. 61;
Chick v. Rollins, 44 Me. 104;
Noyes v. Sturdivant, 18 Me. 104;
Bacon v. McIntire, 49 Mass. (8 Met.) 87;
Sheppard v. Pratt, 32 Mass. (15 Pick.) 32;
Hunt v. Hunt, 31 Mass. (14 Pick.) 374; s.c. 25 Am. Dec. 400;
Inches v. Leonard, 12 Mass. 379;
Humphrey v. Hurd, 29 Mich. 44;
Wilkinson v. Flowers, 37 Miss. 579;
Nevitt v. Bacon, 32 Miss. 212; s.c. 66 Am. Dec. 609;
Bollinger v. Chouteau, 20 Mo. 89;
Tripe v. Marcy, 39 N. H. 439;
Evans v. Huffman, 5 N. J. Eq. (1 Halst.) 354;
Belmont v. O'Brien, 12 N. Y. 394;
Giles v. Baremore, 5 John. Ch. (N. Y.) 545;
Moore v. Cable, 1 John. Ch. (N. Y.) 385;
Roberts v. Welch, 8 Ired. (N. C.) L. 287;
Richmond v. Aiken, 25 Vt. 324;
Waldo v. Rice, 14 Wis. 286;
Knowlton v. Walker, 13 Wis. 264;
Hughes v. Edwards, 22 U. S. (9 Wheat.) 489; bk. 6 L. ed. 142.
² *Burke v. Lynch*, 2 Ball & B. 426;
Archibald v. Scully, 9 H. L. Cas. 360;
Drummond v. Sent, L. R. 6 Q. B. 763;
Rakestraw v. Brewer, Seld. Cas. in Ch. 56.
 See: *Lake v. Thomas*, 3 Ves. Jr. 17.

will destroy any presumption of adverse possession and prevent the statute from running.¹

SEC. 2106. **Same — Merger of interests.** — Mergers are odious in equity, and should not be allowed where the estates will stand together ;² but the general rule is that where the equitable and legal estates are united in the same person, the equitable is merged in the legal estate, which descends according to the rules of law.³ Thus if

¹ As to facts and acts on the part of the mortgagee having right to fore-close,

See : *Cunningham v. Hawkins*, 24 Cal. 403, 409 ; s.c. 85 Am. Dec. 703 ;

Lord v. Morris, 18 Cal. 482 ;

Hough v. Bailey, 32 Conn. 288 ;

Harris v. Mills, 28 Ill. 44 ;

Noyes v. Sturdivant, 18 Me. 104 ;

Cheever v. Perley, 93 Mass. (11 Allen) 584 ;

Ayres v. Waite, 64 Mass. (10 Cush.) 72 ;

Houland v. Shurtleff, 43 Mass. (2 Met.) 26 ; s.c. 35 Am. Dec. 384 ;

Tripe v. Marcy, 39 N. H. 439 ;

Howard v. Hilbreth, 18 N. H. 105, 106 ;

Heyer v. Pruyn, 7 Paige Ch. (N. Y.) 465 ; s.c. 34 Am. Dec. 355 ;

Jackson ex d. Mackay v. Slater, 5 Wend. (N. Y.) 295 ;

Hughes v. Blackwell, 6 Jones (N. C.) Eq. 73 ;

Frear v. Drinker, 8 Pa. St. 520 ;

Drayton v. Marshall, Rice's (S. C.) Eq. 383 ; s.c. 33 Am. Dec. 84 ;

Wright v. Eaves, 10 Rich. (S. C.) Eq. 582 ;

Perkins v. Sterne, 22 Texas 561, 563 ; s.c. 76 Am. Dec. 72 ;

Zeller's Lessee v. Eckert, 45 U. S. (4 How.) 288, 295 ; bk. 11 L. ed. 979, 982 ;

Hughes v. Edwards, 22 U. S. (9 Wheat.) 489, 490 ; bk. 6 L. ed. 142 ;

Ward v. Carter, L. R. 1 Eq. 29 ;

Brocklehurst v. Jessop, 7 Sim. 438.

As to acts on the part of the mortgagor barring right to enforce his equity of redemption,

Sec : *Morgan v. Morgan*, 10 Ga. 297 ;

Roberts v. Littlefield, 48 Me. 61 ;
Quint v. Little, 4 Me. (4 Greenl.) 495 ;

McNair v. Lot, 34 Mo. 285 ; s.c. 84 Am. Dec. 78 ;

Calkins v. Isbell, 20 N. Y. 147 ;

Jackson ex d. Limerick v. Voorhis, 9 John. (N. Y.) 129 ;

Demarest v. Wynkoop, 3 John. Ch. (N. Y.) 129 ; s.c. 8 Am. Dec. 467 ;

Marks v. Pell, 1 John. Ch. (N. Y.) 594 ;

Knowlton v. Walker, 13 Wis. 264 ;

Dexter v. Arnold, 3 Sumn. C. C. 152 ; s.c. 7 Fed. Cas. 606 ;

Stanfield v. Hobson, 16 Beav. 236 ;

Pendleton v. Rooth, 1 Giff. 35 ; s.c. 29 L. J. Ch. 265 ; 5 Jur. N. S. 840 ;

Richardson v. Young, L. R. 10 Eq. 275, 297 ; s.c. 39 L. J. Ch. 475 ; 18 W. R. 800 ;

Barron v. Martin, 19 Ves. 327 ;

Hansard v. Hardy, 18 Ves. 455 ;

Edsell v. Buchanan, 2 Ves. Jr. 83.

² *Gibson v. Crehore*, 20 Mass. (3 Pick.) 475 ;

Hunt v. Hunt, 31 Mass. (14 Pick.) 374, 384 ; s.c. 25 Am. Dec. 400.

³ *Gardner v. Astor*, 3 John. Ch. (N. Y.) 53 ; s.c. 8 Am. Dec. 465.

See : *Jordan v. Cheney*, 74 Me. 359 ;

James v. Morey, 2 Cow. (N. Y.) 246 ; s.c. 14 Am. Dec. 475 ;

Milard v. McMullin, 5 Hun (N. Y.) 572, 579 ;

Nicholson v. Halsey, 1 John. Ch. (N. Y.) 417 ;

Patterson v. Lamson, 44 Ohio St. 487 ; s.c. 8 N. E. Rep. 869 ; 10 West. Rep. 440, 445 ;

Holland v. Citizens' Savings Bank, 16 R. I. 734 ; s.c. 19 Atl. Rep. 654 ; 8 L. R. A. 553 ;

the mortgagor conveys the mortgaged premises to the mortgagee and another, and the mortgagee afterwards conveys his interest to such other, the latter conveyance will extinguish the mortgage by uniting the whole interest in such other person.¹ And where the owner of the fee becomes absolutely entitled, in his own right, to a charge or incumbrance upon the land, there being no intervening interest or lien, the charge or incumbrance will be merged with the ownership and cease to exist.² Thus where the mortgagor sells to a person who assumes and agrees to pay the mortgage debt, and such person afterwards takes an assignment of the mortgage, he thereby extinguishes the lien, and the equitable becomes merged in the legal estate;³ but where there is a conveyance of the equity of redemption to a trustee of a mortgagor, or to the mortgagee as trustee for another, there will not be merger of the legal and equitable estates.⁴ In those cases where an injury would

- Shepard v. Taylor, 15 R. I. 204;
s.c. 3 Atl. Rep. 382; 4 New
Eng. Rep. 471;
McClure v. Melton, 34 S. C. 377;
s.c. 13 S. E. Rep. 615; 13 L. R.
A. 723;
Waite v. Paget, 3 Bro. Ch. 363;
Goodwright v. Wells, Doug. 771;
Selby v. Alston, 3 Ves. 339.
Lyman v. Gedney, 114 Ill. 388;
s.c. 55 Am. Rep. 871; 29 N. E.
Rep. 282;
Lime Rock Nat. Bk. v. Mowry,
66 N. H.; s.c. 22 Atl. Rep.
555; 13 L. R. A. 294.
See: Freer v. Lake, 115 Ill. 662;
s.c. 4 N. E. Rep. 512;
Dickason v. Williams, 129 Mass.
182; s.c. 37 Am. Rep. 316.
² James v. Morey, 2 Cow. (N. Y.)
246, 300; s.c. 14 Am. Dec. 475;
Miller v. Finn, 1 Neb. 254, 300;
Starr v. Ellis, 6 John. Ch. (N.
Y.) 393;
2 Pom. Eq. Jur. 248.
See: Gregory v. Savage, 32 Conn.
250, 264;
Bassett v. Mason, 18 Conn. 13;
Wilhelmi v. Leonard, 13 Iowa
331;
Gibson v. Crehore, 20 Mass. (3
Pick.) 475;
James v. Johnson, 6 John. Ch.
(N. Y.) 417;
Millsbaugh v. McBride, 7 Paige
Ch. (N. Y.) 509; s.c. 34 Am.
Dec. 360.
³ Winans v. Wilkie, 41 Mich. 264;
s.c. 1 N. W. Rep. 1049.
⁴ Gregory v. Savage, 32 Conn. 264;
Lockwood v. Sturdevant, 6 Conn.
373, 387;
Shinn v. Fredericks, 56 Ill. 439,
443;
Edgerton v. Young, 43 Ill. 464;
Wilhelmi v. Leonard, 13 Iowa
331;
White v. Hampton, 13 Iowa 259;
Burhans v. Hutcheson, 25 Kan.
625; s.c. 37 Am. Rep. 274;
Bean v. Boothby, 57 Me. 295;
Dickason v. Williams, 129 Mass.
182; s.c. 37 Am. Rep. 316;
Model Lodging House Assoc. v.
City of Boston, 114 Mass. 133;
Barker v. Flood, 103 Mass. 474;
Clary v. Owen, 81 Mass. (15 Gray)
521, 525;
Sherman v. Abbot, 35 Mass. (18
Pick.) 448;
Hunt v. Hunt, 51 Mass. (14 Pick.)
374, 384; s.c. 35 Am. Dec. 400;
Stantons v. Thompson, 49 N. H.
272;
Purdy v. Huntington, 42 N. Y.
334; s.c. 1 Am. Rep. 532;

result from union of the estates in one person, merger will not take place, and equity will keep alive a mortgage in the hands of the holder of the equity of redemption whenever the merger would do injustice to any one interested therein. But in all such cases the intention of the parties to the transaction is to govern. Where the plain intention of the parties is that merger should result, equity will not interfere in their behalf.¹ We have already seen that the doctrine of merger is not favored, and the estates will be kept separate where such is the intention of the parties, and justice requires it. The intention of the parties to the transaction may be gathered not only from acts and declarations, but from a view of the situation as affecting the interests of either of the parties.² Where the holder of an equitable

- Champney v. Coope*, 32 N. Y. 543;
James v. Morey, 2 Cow. (N. Y.) 246; s.c. 14 Am. Dec. 475;
Burnet v. Denniston, 5 John. Ch. (N. Y.) 35;
Gardner v. Astor, 3 John. Ch. (N. Y.) 53; s.c. 8 Am. Dec. 465;
Warren v. Warren, 30 Vt. 530;
Pratt v. Bank of Bennington, 10 Vt. 293; s.c. 33 Am. Dec. 201;
Bailey v. Richardson, 15 Eng. L. & Eq. 218.
¹ *Mallory v. Hitchcock*, 29 Conn. 127;
Edgerton v. Young, 43 Ill. 464;
White v. Hampton, 13 Iowa 259;
Simonton v. Gray, 34 Me. 50;
Holden v. Pike, 24 Me. 427;
Hatch v. Kimball, 14 Me. 9;
Thompson v. Chandler, 7 Me. (7 Greenl.) 377;
Savage v. Hall, 78 Mass. (12 Gray) 363, 364;
Grover v. Thatcher, 70 Mass. (4 Gray) 526;
Brown v. Lapham, 57 Mass. (3 Cush.) 551;
Hunt v. Hunt, 31 Mass. (14 Pick.) 374; s.c. 25 Am. Dec. 400;
Eaton v. Simonds, 31 Mass. (14 Pick.) 98;
Gibson v. Crehore, 20 Mass. (3 Pick.) 475;
Snyder v. Snyder, 6 Mich. 470;
Dutton v. Ives, 5 Mich. 515;
Davis v. Pierce, 10 Minn. 376;
Hinds v. Ballou, 44 N. H. 619, 620, 622;
Moore v. Beasom, 44 N. H. 215;
Bell v. Woodward, 34 N. H. 90;
Fletcher v. Chase, 16 N. H. 38, 42;
Robinson v. Leavitt, 7 N. H. 73;
Duncan v. Smith, 31 N. J. L. (2 Vr.) 325;
Van Wagener v. Brown, 26 N. J. L. (2 Dutch.) 196;
Judd v. Seekins, 62 N. Y. 266;
Bascon v. Smith, 34 N. Y. 320;
James v. Morey, 2 Cow. (N. Y.) 246, 285; s.c. 14 Am. Dec. 475;
Vanderkemp v. Shelton, 11 Paige Ch. (N. Y.) 28;
Millsbaugh v. McBride, 7 Paige Ch. (N. Y.) 509; s.c. 34 Am. Dec. 360;
Loomer v. Wheelwright, 3 Sandf. Ch. (N. Y.) 157;
Duncan v. Drury, 9 Pa. St. 332; s.c. 49 Am. Dec. 565;
Wallace v. Blair, 1 Grant Cas. (Pa.) 75;
Carter v. Taylor, 3 Head (Tenn.) 30;
Bullard v. Leach, 27 Vt. 491;
Walker v. Baxter, 26 Vt. 710;
Marshall v. Wood, 5 Vt. 254;
Forbes v. Moffatt, 18 Ves. 384; s.c. 11 Rev. Rep. 222;
St. Paul v. Dudley, 15 Ves. 167; s.c. 10 Rev. Rep. 57.
² *Gardiner v. Astor*, 3 John. Ch. (N. Y.) 53; s.c. 8 Am. Dec. 465.
 See: *Smith v. Roberts*, 91 N. Y. 475;

estate acquires the legal estate he may elect to keep the two separate ; or if he does nothing showing an election, the question as to whether the estates are merged is to be determined upon the presumption of law under the circumstances. If it be for his interest to keep the two estates separate and distinct, it will be presumed to have been his intention to do so.¹

SECTION IV.—RIGHTS AND LIABILITIES UNDER—(*continued*).

- SEC. 2107. Assignment of mortgagee's interest—How made.
 SEC. 2108. Same—Parties to assignment.
 SEC. 2109. Same—Under common-law theory.
 SEC. 2110. Same—Under lien theory.
 SEC. 2111. Same—Equitable assignment.
 SEC. 2112. Same—Consideration.
 SEC. 2113. Same—Notice and record.
 SEC. 2114. Same—Construction of.
 SEC. 2115. Assignment of mortgagor's interest.
 SEC. 2116. Same—Notice to mortgagee.
 SEC. 2117. Insurance of property—By mortgagor.
 SEC. 2118. Same—Same—Misrepresentations in application.
 SEC. 2119. Same—Same—Violation of condition against alienation.
 SEC. 2120. Same—By mortgagee.
 SEC. 2121. Same—Same—Effect of provision in mortgage requiring.
 SEC. 2122. Registry and priority.
 SEC. 2123. Same—Index to record.
 SEC. 2124. Same—Priority of registry.

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| Sheldon <i>v.</i> Edwards, 35 N. Y. 279 ; | Purdy <i>v.</i> Huntington, 42 N. Y. 334 ; s.c. 1 Am. Rep. 532 ; |
| Champney <i>v.</i> Coope, 32 N. Y. 543 ; | Hancock <i>v.</i> Hancock, 22 N. Y. 568 ; |
| Clift <i>v.</i> White, 15 Barb. (N. Y.) 70, 76 ; | Campbell <i>v.</i> Vedder, 1 Abb. App. Dec. (N. Y.) 295 ; s.c. 3 Keyes (N. Y.) 174 ; |
| Mills <i>v.</i> Comstock, 5 John. Ch. (N. Y.) 214 ; | Knowles <i>v.</i> Carpenter, 8 R. I. 548 ; |
| Parry <i>v.</i> Wright, 1 Sim. & S. 369 ; | Hill <i>v.</i> Smith, 2 McL. C. C. 449 ; s.c. Fed. Cas. No. 6499 ; |
| Moffatt <i>v.</i> Hammond, 18 Ves. Jr. 384, 385 ; s.c. 11 Rev. Rep. 222 ; | Tyrwhitt <i>v.</i> Tyrwhitt, 32 Beav. 244 ; |
| Compton <i>v.</i> Oxenden, 2 Ves. Jr. 261 ; s.c. 4 Bro. Ch. 403. | Swinfen <i>v.</i> Swinfen, 29 Beav. 199 ; |
| ¹ Gardiner <i>v.</i> Astor, 3 John. Ch. (N. Y.) 53 ; s.c. 8 Am. Dec. 465 ; | Davis <i>v.</i> Barrett, 14 Beav. 542 ; |
| Mallory <i>v.</i> Hitchcock, 29 Conn. 127 ; | Adams <i>v.</i> Angell, L. R. 5 Ch. Div. 634, 645 ; |
| Lockwood <i>v.</i> Sturdevant, 6 Conn. 373 ; | Grice <i>v.</i> Shaw, 10 Hare 76 ; |
| Stantons <i>v.</i> Thompson, 49 N. H. 278 ; | Bailey <i>v.</i> Richardson, 9 Hare 734, 736 ; |
| | Swabey <i>v.</i> Swabey, 15 Sim. 106 ; 2 Pom. Eq. Jur. 249 ; |

- SEC. 2125. Payment—By mortgagor.
 SEC. 2126. Same—Same—Before maturity.
 SEC. 2127. Same—Same—At maturity.
 SEC. 2128. Same—Same—After condition broken.
 SEC. 2129. Same—Same—After decree of foreclosure.
 SEC. 2130. Same—Same—Directing application.
 SEC. 2131. Same—By third party—Effect.
 SEC. 2132. Tender of payment—On law day.
 SEC. 2133. Same—After default.
 SEC. 2134. Same—After foreclosure.
 SEC. 2135. Release and discharge.
 SEC. 2136. Same—What acts amount to.
 SEC. 2137. Same—Effect of.

SECTION 2107. Assignment of mortgagee's interest—How made.—In those states in which a mortgage is regarded as the mere incident of the debt secured,¹ whatever is sufficient to transfer the title to the debt will also transfer the interest in the mortgage. Thus the assignment and transfer of the debt carries the interest in the mortgage, whether the mortgage is assigned or not;² and an assignment of a part of a mortgage debt will carry a proportionable interest in the mortgage securing the debt;³ but an assignment of the mortgage, without an assignment of the debt the mortgage secures, is con-

¹ See: *Herring v. Woodhull*, 29 Ill. 92;
Lucas v. Harris, 20 Ill. 165;
Cooper v. Newland, 17 Abb. (N. Y.) Pr. 342;
Jackson ex d. Barclay v. Blodgett, 5 Cow. (N. Y.) 202;
Wilson v. Troup, 2 Cow. (N. Y.) 195, 231;
Green v. Hurt, 1 John. (N. Y.) 580.

² See: *Willis v. Farley*, 24 Cal. 497;
Lawrence v. Knap, 1 Root (Conn.) 248; s.c. 1 Am. Dec. 42;
Harris v. Mills, 28 Ill. 46;
Perry v. Roberts, 30 Ind. 244;
Guy v. Butler, 6 Bush (Ky.) 508;
Perot v. Levasseur, 21 La. An. 529;
Ladue v. Railroad Co., 13 Mich. 396;
Savings Bk. v. Grewe, 84 Mo. 477;
Northy v. Northy, 45 N. H. 144;
Bolen v. Crosby, 49 N. Y. 183;
Craig v. Parkis, 40 N. Y. 181;
Kortright v. Cody, 21 N. Y. 343;

Pattison v. Hull, 9 Cow. (N. Y.) 747;
Jackson ex d. Barclay v. Blodgett, 5 Cow. (N. Y.) 202;
Jackson v. Mersereau, 11 John. (N. Y.) 534;
Langdon v. Buel, 9 Wend. (N. Y.) 80;
Miller v. Hoyle, 6 Ind. (N. C.) Eq. 269;
Donley v. Hays, 17 Serg. & R. (Pa.) 400;
Perkins v. Stone, 23 Tex. 563.

Foreclosure proceedings must be brought by the assignee in the name of the mortgagee in some states.

See: *Burland v. Kipp*, 55 Ill. 376.
³ *Pattison v. Hull*, 9 Cow. (N. Y.) 747.
 See: *Hurt v. Wilson*, 38 Cal. 263;
Perry v. Roberts, 30 Ind. 244;
Waller v. Toto, 4 B. Mon. (Ky.) 529;
Lindsey v. Bates, 42 Miss. 397;
Cathcart's Appeal, 13 Pa. St. 416.

sidered in law a nullity.¹ In all those states in which the common-law doctrine respecting mortgages prevails, a mortgage can be assigned only by an instrument in writing and under seal.² This instrument in writing may be executed on the back of the mortgage itself, or upon a separate and independent piece of paper, as by quit-claim deed.³ An assignment, made by a separate deed, without the delivery over of the original mortgage deed, conveys all the interest of the mortgagee, and makes the grantee the assignee of the mortgage,⁴ where the instrument⁵ and the note or bond⁶ are properly delivered. Should the instrument be delivered unaccompanied by the bond, no title will pass by the transaction, as against a subsequent assignee.⁷ The reason for this rule is the fact that the debt is the principal thing and the mortgage a mere incident; the debt is represented by the bond or note which the mortgage secures, and a

¹ *Jackson ex d. Curtis v. Bronson*, 19 John. (N. Y.) 325.

² *Sanders v. Cassady*, 86 Ala. 246; s.c. 5 So. Rep. 503;

Union Mut. Life Ins. Co. v. Slee, 123 Ill. 57; s.c. 12 N. E. Rep. 543,

Burton v. Baxter, 7 Blackf. (Ind.) 297;

Johnson v. Leonards, 68 Me. 239;

Douglass v. Durin, 51 Me. 121;

Smith v. Kelley, 27 Me. 237; s.c. 46 Am. Dec. 595;

Vose v. Handy, 2 Me. (2 Greenl.) 322; s.c. 11 Am. Dec. 101;

Barnes v. Boardman, 149 Mass. 106; s.c. 21 N. E. Rep. 308; 3

L. R. A. 785;

Phelps v. Townsley, 92 Mass. (10 Allen) 554;

Morrison v. Mendenhall, 18 Minn. 232;

Kamena v. Huelbig, 23 N. J. Eq. (8 C. E. Gr.) 78.

See: *Mulford v. Peterson*, 35 N. J. L. (6 Vr.) 127;

Williams v. Teachey, 85 N. C. 402;

Cook v. Cooper, 18 Oreg. 142; s.c. 22 Pac. Rep. 945; 7 L. R. A. 273;

Henderson v. Pilgrim, 22 Tex. 464;

Torrey v. Deavitt, 53 Vt. 331.

³ See: *Taylor v. Agricultural*

Assoc., 68 Ala. 229;

Douglass v. Durin, 51 Me. 121;

Dixfield v. Newton, 41 Me. 221;

Smith v. Hitchcock, 130 Mass. 570;

Thompson v. Kenyon, 100 Mass. 108;

Welch v. Priest, 90 Mass. (8 Allen) 165;

Hines v. Ballou, 44 N. H. 619, 621;

Weeks v. Eaton, 15 N. H. 145;

Wilson v. Troup, 2 Cow. (N. Y.) 195.

⁴ *Warden v. Adams*, 15 Mass. 232, 236.

⁵ See: *Rankin v. Mayor*, 9 Iowa 297;

Fletcher v. Carpenter, 37 Mich. 412;

Ruckman v. Ruckman, 33 N. J. Eq. (6 Stew.) 354;

Pringle v. Pringle, 59 Pa. St. 281;

Croft v. Bunster, 9 Wis. 503.

⁶ *Merritt v. Bartholick*, 36 N. Y. 44.

See: *Pratt v. Skofield*, 45 Me. 386;

Pease v. Warren, 29 Mich. 9;

Warden v. Adams, 15 Mass. 233;

Thorndike v. Norris, 24 N. H. 454.

⁷ *Merritt v. Bartholick*, 36 N. Y. 44.

transfer of the mortgage, by whatever means, without the debt, is a mere nullity,¹ for the reason that the incident cannot be separated from the principal, for the latter always draws with it the former.²

SEC. 2108. **Same—Who may make.**—An assignment of a mortgage may be made by the mortgagee,³ although dis-seized;⁴ an assignment may also be made by an administrator or executor;⁵ an attorney;⁶ a corporation through its officers,⁷ or an unincorporated society through its trustees;⁸ an heir of the mort-

¹ *Bennett v. Austin*, 81 N. Y. 321; *Merritt v. Bartholick*, 36 N. Y. 44, 51.

See: *Aymar v. Bill*, 5 John. Ch. (N. Y.) 570;

Cooper v. Newland, 17 Abb. (N. Y.) Pr. 342;

Jackson ex d. Bayard v. Blodget, 5 Cow. (N. Y.) 202;

Wilson v. Troup, 2 Cow. (N. Y.) 195, 231;

Jackson ex d. Curtis v. Bronson, 19 John. (N. Y.) 325;

Jackson ex d. Norton v. Willard, 4 John. (N. Y.) 41;

Green v. Hart, 1 John. (N. Y.) 580;

Langdon v. Buell, 9 Wend. (N. Y.) 80.

² *Aymar v. Bill*, 5 John. Ch. (N. Y.) 570.

See: *Brandt v. Clark*, 27 N. J. Eq. (12 C. E. Gr.) 235;

Gansen v. Tomlinson, 23 N. J. Eq. (8 C. E. Gr.) 405;

Cooper v. Newland, 17 Abb. (N. Y.) Pr. 334;

Power v. Lester, 17 How. (N. Y.) Pr. 417.

³ Where to secure the payment of money, but not where it is merely an indemnity against loss.

See: *Jones v. Whinnipeack Bank*, 29 Conn. 25;

Camp v. Smith, 5 Conn. 80;

Bonham v. Galloway, 13 Ill. 68;

Carper v. Munger, 62 Ind. 481;

Murray v. Catlett, 4 G. Greene (Iowa) 108.

Where for support a mortgage can be assigned and the conditions performed by the assignee, unless such support is required, by the terms of the mortgage, to be furnished by one personally.

Ottaquechee Sav. Bk. v. Holt, 58 Vt. 166; s.c. 1 Atl. Rep. 485;

Joslyn v. Parlin, 54 Vt. 670.

⁴ *Nichols v. Reynolds*, 1 R. I. 30; s.c. 36 Am. Dec. 238.

See: *Dadmum v. Lamson*, 91 Mass. (9 Allen) 85;

Sheridan v. Welsh, 90 Mass. (8 Allen) 166;

Poignard v. Smith, 25 Mass. (8 Pick.) 272;

Converse v. Searles, 10 Vt. 578.

Murrell v. Jones, 40 Miss. 565;

Hoyt v. Thompson, 19 N. Y. 207;

Dundas v. Bowler, 3 Mas. C. C. 397; s.c. 2 West. L. J. 27; 7 Law Rep. 343; 9 Fed. Cas. No. 4141.

⁵ *Baldwin v. Hatchett*, 56 Ala. 461;

Crocker v. Jewell, 31 Me. 306;

George v. Baker, 85 Mass. (3 Allen) 326n;

Cronin v. Hazeltine, 85 Mass. (3 Allen) 324;

Baldwin v. Timmins, 69 Mass. (3 Gray) 302;

Ladd v. Wiggins, 35 N. H. 421;

Bogert v. Hertell, 4 Hill (N. Y.) 492; s.c. 9 Paige Ch. (N. Y.) 52;

Williams v. Teachey, 85 N. C. 402;

Hitchcock v. Merrick, 16 Wis. 522.

⁶ *Morrison v. Mendenhall*, 18 Minn. 232;

Atkinson v. Patterson, 46 Vt. 750.

⁷ *Jackson ex d. Ballou v. Campbell*, 5 Wend. (N. Y.) 572.

⁸ *Austin v. Shaw*, 92 Mass. (10 Allen) 552;

Peabody v. Lynn Methodist Soc., 87 Mass. (5 Allen) 540;

Chapin v. Chicopee University Soc., 74 Mass. (8 Gray) 580;

gagee ;¹ a joint tenant ;² a legatee of the mortgagee ;³ a married woman ;⁴ or a partner.⁵

SEC. 2109. **Same—Under common-law theory.**—Under the common-law theory of a mortgage, and the prevailing theory of this country, a mortgage can be assigned only by a deed in writing under seal,⁶ except in New Jersey, where a seal is not required.⁷ Where an assignment is made by deed the instrument need not in express words be an assignment of the mortgage, a quit-claim in the ordinary form or an ordinary deed purporting to convey an absolute estate in fee-simple being sufficient to carry whatever legal interest the mortgagee may have in the mortgaged premises. In equity, a deed of general warranty affects not only the security but the debt as well, and will work an assignment of both where the grantee paid a valuable consideration.⁸ In those cases where the

Webster v. Vanderverter, 72 Mass. (6 Gray) 428 ;

Appleton v. Boyd, 7 Mass. 131.

See : *Manahan v. Varnum*, 77 Mass. (11 Gray) 405 ;

Holland v. Cruft, 69 Mass. (3 Gray) 162.

Cook v. Parham, 63 Ala. 456 ;

Welsh v. Phillips, 54 Ala. 309 ;

Douglas v. Durin, 51 Me. 121 ;

Taft v. Stevens, 69 Mass. (3 Gray) 504 ;

Johnson v. Bartlett, 34 Mass. (17 Pick.) 477 ;

Smith v. Dyer, 16 Mass. 18 ;

Boylston v. Carver, 4 Mass. 598 ;

Albright v. Cobb, 30 Mich. 355.

¹ *Herring v. Woodhull*, 29 Ill. 92 ;

Gilson v. Gilson, 84 Mass. (2 Allen) 115 ;

Bruce v. Booney, 78 Mass. (12 Gray) 107 ; s.c. 71 Am. Dec. 739 ;

Burnett v. Pratt, 39 Mass. (22 Pick.) 556.

³ *Sutphen v. Ellis*, 35 Mich. 446 ;

Proctor v. Robinson, 35 Mich. 284.

⁴ *Baker v. Armstrong*, 57 Ind. 189 ;

Moreau v. Branson, 37 Ind. 195.

⁵ *Dillon v. Brown*, 77 Mass. (11 Gray) 179 ; s.c. 71 Am. Dec. 700 ;

Everet v. Strong, 5 Hill (N. Y.) 163 ;

Dubois' Appeal, 38 Pa. St. 231 ; s.c. 80 Am. Dec. 478.

⁶ *Graham v. Newton*, 21 Ala. 497 ; *Burton v. Baxter*, 7 Blackf. (Ind.) 297, 298 ;

Douglass v. Durin, 51 Me. 121 ;

Mitchell v. Burnham, 44 Me. 286 ;

Warren v. Homestead, 33 Me. 256 ;

Prescott v. Ellingwood, 23 Me. 345 ;

Ruggles v. Barton, 79 Mass. (13 Gray) 506 ;

Adams v. Parker, 78 Mass. (12 Gray) 53 ;

Parsons v. Welles, 17 Mass. 419 ;

Warden v. Adams, 15 Mass. 233 ;

Gould v. Newman, 6 Mass. 239 ;

Kinn v. Smith, 3 N. J. Eq. (2 H. W. Gr.) 14 ;

Twitchell v. McMurtie, 77 Pa. St. 383 ;

McChandles v. Engle, 51 Pa. St. 309 ;

Henderson v. Pilgrim, 22 Texas 464 ;

Cottrell v. Adams, 2 Biss. C. C. 351 ; s.c. 2 Chi. Leg. News 373 ; 2 Leg. Gaz. 275 ; 6 Fed. Cas. 624.

⁷ *Mulford v. Peterson*, 35 N. J. L. (6 Vt.) 127.

⁸ *Hunt v. Hunt*, 31 Mass. (14 Pick.) 374 ; s.c. 25 Am. Dec. 400.

mortgagee holds both the legal and equitable estate, an assignment of the instrument secured by the mortgage will carry the mortgage debt, yet will not operate as an assignment of the mortgage;¹ but the assignment of the mortgage will not carry the mortgage debt; consequently where the mortgage is assigned to one person and the mortgage debt to another, the former will hold the legal estate in trust for the latter,² and retain no title which he can assert in any action or proceeding, and payment to the assignee revests all title in the mortgagor.³ Under the common-law theory of mortgages, separating the two estates, on the death of the mortgagee, the debt vests in his personal representatives and the mortgage descended to his heirs in trust for such representatives.⁴ In many of those states where the common-

See: *Welsh v. Phillips*, 54 Ala. 309; s.c. 25 Am. Rep. 679;

Givan v. Tout, 7 Blackf. (Ind.) 210;

Conner v. Whitmore, 52 Me. 185;

Dixfield v. Newton, 41 Me. 221;

Hill v. More, 40 Me. 515, 525;

Crooker v. Jewell, 31 Me. 306;

Dockrey v. Noble, 8 Me. 278;

Thompson v. Kenyon, 100 Mass. 108;

Welch v. Priest, 90 Mass. (8 Allen) 165;

Ruggles v. Barton, 79 Mass. (13 Gray) 500;

Savage v. Hall, 78 Mass. (12 Gray) 364;

Lawrence v. Stratton, 60 Mass. (6 Cush.) 163;

Hinds v. Ballou, 44 N. H. 621;

Furbush v. Goodwin, 25 N. H. 425;

Hobson v. Roles, 20 N. H. 41;

Dearborn v. Taylor, 18 N. H. 41;

Weeks v. Eaton, 15 N. H. 145;

Severance v. Griffith, 2 Lans. (N. Y.) 38;

Olmstead v. Elder, 2 Sandf. Ch. (N. Y.) 325;

Collamer v. Langdon, 29 Vt. 32.

¹ *Stanford v. Kempton*, 59 Me. 472;

Adams v. Parker, 78 Mass. (12 Gray) 53;

Young v. Miller, 72 Mass. (6 Gray) 152.

² *Center v. P. & M. Bank*, 22 Ala. 143;

Carter v. Bennett, 4 Fla. 283;

Peters v. Jamestown Bridge Co., 5 Cal. 334;

Johnson v. Cornet, 29 Ind. 59;

Swan v. Yapple, 35 Iowa 248;

Sangster v. Love, 11 Iowa 580;

Patton v. Pearson, 57 Me. 434;

Moore v. Ware, 38 Me. 496;

Warren v. Homestead, 33 Me. 256;

Johnson v. Caudage, 31 Me. 28;

Barnes v. Boardman, 149 Mass.

106; s.c. 21 N. E. Rep. 308; 3 L. R. A. 785;

Parsons v. Welles, 17 Mass. 419;

Bailey v. Gould, 1 Walk. (Mich.) 478;

Thayer v. Campbell, 9 Mo. 280;

Hutchins v. Carleton, 19 N. H. 487;

Bell v. Morse, 6 N. H. 205;

Merritt v. Bartholick, 36 N. Y. 44;

Jackson v. Willard, 4 John. (N. Y.) 41;

Aymer v. Bill, 5 John. Ch. (N. Y.) 570;

Keyes v. Wood, 21 Vt. 331;

3 Story Eq. Jur. (19th ed.) 1023n.

³ *Barnes v. Boardman*, 149 Mass. 106; s.c. 21 N. E. Rep. 308; 3 L. R. A. 785.

⁴ *White v. Rittenmyer*, 30 Iowa 268, 272;

Wilkins v. French, 20 Me. 111;

Chase v. Lockerman, 11 Gill & J. (Md.) 185; s.c. 35 Am. Dec.

277;

Taft v. Stevens, 69 Mass. (3 Gray) 504;

law theory of mortgages prevails, the rule governing the assignment of mortgages has been so modified that an assignment of the mortgage without the mortgage debt is a nullity, where the mortgagee is out of possession.¹ But where he is in possession it will be sufficient to pass title to the assignee, who will have a right to possession of the mortgaged premises thereunder.²

SEC. 2110. **Same—Under the lien theory.**—In those states where the debt is regarded as the principal thing and the mortgage merely as a security or lien, an assignment of the mortgage debt will carry with it the mortgage,³ and be binding upon all persons having notice of the transaction, and will confer upon the assignee all the rights and powers of the mortgagee.⁴ While the assignee of a

- Dewey v. Van Deusen, 21 Mass. (4 Pick.) 19 ;
 Smith v. Dyer, 16 Mass. 18, 23 ;
 Kinna v. Smith, 3 N. J. Eq. (2 H. W. Gr.) 14 ;
 Jackson ex d. Livingston v. De Lancey, 11 John. (N. Y.) 365 ;
 Demarest v. Wynkoop, 3 John. Ch. (N. Y.) 129, 145 ; s.c. 8 Am. Dec. 467 ;
 Dexter v. Arnold, 1 Sumn. C. C. 109 ; s.c. 7 Fed. Cas. 594.
¹ Doe v. McLoskey, 1 Ala. 708 ;
 Nagle v. Macy, 9 Cal. 426, 428 ;
 Peters v. Jamestown Bridge Co., 5 Cal. 335 ;
 Huntington v. Smith, 4 Conn. 235 ;
 Blair v. Bass, 4 Blackf. (Ind.) 539 ;
 Rankin v. Major, 9 Iowa 297 ;
 Burdett v. Clay, 8 B. Mon. (Ky.) 287 ;
 Willis v. Valette, 4 Met. (Ky.) 186, 195 ;
 Ladue v. Detroit & M. R. Co., 13 Mich. 380, 396 ; s.c. 87 Am. Dec. 759 ;
 Martin v. McReynolds, 6 Mich. 73 ;
 Greve v. Coffin, 14 Minn. 345 ;
 Hill v. Edwards, 11 Minn. 22, 29 ;
 Dick v. Mawry, 17 Miss. (9 Smed. & M.) 443 ;
 Bayley v. Gould, 1 Miss. (Walk.) 478 ;
 Thayer v. Campbell, 9 Mo. 280 ;
 Furbush v. Goodwin, 25 N. H. 425 ;
 Ellison v. Daniels, 11 N. H. 274 ;
 Purdy v. Huntington, 42 N. Y. 346 ; s.c. 1 Am. Rep. 532 ;
 Merritt v. Bartholick, 36 N. Y. 44 ;
 Jackson v. Willard, 4 John. (N. Y.) 43 ;
 Wilson v. Troup, 2 Cow. (N. Y.) 195 ; s.c. 14 Am. Dec. 458 ;
 McGan v. Marshall, 7 Humph. (Tenn.) 121 ;
 Perkins v. Sterne, 23 Tex. 561, 563 ; s.c. 76 Am. Dec. 72 ;
 Hays v. Lewis, 17 Wis. 212.
² Hinds v. Ballou, 44 N. H. 619 ;
 Lamprey v. Nudd, 29 N. H. 299 ;
 Wallace v. Goodall, 18 N. H. 439 ;
 Smith v. Smith, 15 N. H. 55 ;
 Pickett v. Jones, 63 Mo. 195.
³ See : *Post*, § 2111.
⁴ Graham v. Newman, 21 Ala. 497 ;
 Emanuel v. Hunt, 2 Ala. 190 ;
 Willis v. Farley, 24 Cal. 297 ;
 Ord v. McKee, 5 Cal. 575 ;
 Dudley v. Cadwell, 19 Conn. 218 ;
 Lawrence v. Knapp, 1 Root (Conn.) 248 ; s.c. 1 Am. Dec. 42 ;
 Wilson v. Hayward, 2 Fla. 27 ; s.c. 6 Fla. 171 ;
 Lucas v. Harris, 20 Ill. 165 ;
 Mapps v. Sharpes, 32 Ill. 13 ;
 French v. Turner, 15 Ind. 59 ;
 Burton v. Baxter, 7 Blackf. (Ind.) 297 ;
 Bank of Indiana v. Anderson, 14 Iowa 544 ; s.c. 83 Am. Dec. 390 ;
 Crow v. Vance, 4 Iowa 434 ;

debt acquires the equitable interest in the mortgage, yet he secures no legal interest, and can exercise none of the rights of a legal owner, such as maintaining actions for ejectment, or writ of entry, and the like,¹ except in those states where all actions are instituted in the name of the party beneficially interested, in which he may enforce the mortgage in his own name.²

SEC. 2111. **Same—Equitable assignment.**—In those states where it is held that a mortgage is but an incident, in the absence of an agreement to the contrary, mere assign-

- Kurtz v. Sponable, 6 Kan. 395 ;
 Burdett v. Clay, 8 B. Mon. (Ky.) 287 ;
 Miles v. Gray, 4 B. Mon. (Ky.) 417 ;
 Scott v. Turner, 15 La. An. 346 ;
 Vose v. Handy, 2 Me. (2 Greenl.) 322 ; s.c. 11 Am. Dec. 101 ;
 Wolcott v. Winchester, 81 Mass. (15 Gray) 461 ;
 Ladue v. Detroit & M. R. Co., 13 Mich. 396 ; s.c. 87 Am. Dec. 759 ;
 Martin v. McReynolds, 6 Mich. 70 ;
 Holmes v. McGinty, 44 Miss. 94 ;
 Dick v. Mawry, 17 Miss. (9 Smed. & M.) 443, 448 ;
 Potter v. Stevens, 40 Mo. 229 ;
 Anderson v. Baumgartner, 27 Mo. 80 ;
 Laberge v. Chauvin, 2 Mo. 179 ;
 Northy v. Northy, 45 N. H. 141, 144 ;
 Blake v. Williams, 36 N. H. 39 ;
 Southerin v. Mendum, 5 N. H. 420 ;
 Kortright v. Cady, 21 N. Y. 343 ; s.c. 78 Am. Dec. 145 ;
 Parmelee v. Dann, 23 Barb. (N. Y.) 461 ;
 Wilson v. Troup, 2 Cow. (N. Y.) 242 ; s.c. 14 Am. Dec. 458 ;
 Evertson v. Booth, 19 John. (N. Y.) 486, 491 ;
 Neilson v. Blight, 1 John. Cas. (N. Y.) 205 ;
 Hyman v. Devereux, 63 N. C. 624 ;
 Partridge v. Partridge, 38 Pa. St. 78 ;
 Craft v. Webster, 4 Rawle (Pa.) 242 ;
 Donley v. Hays, 17 Serg. & R. (Pa.) 400 ;
 United States Bank v. Covert, 13 Ohio 240 ;
 Paine v. French, 4 Ohio 318 ;
 Muller v. Waglington, 5 S. C. 342 ;
 Wright v. Evans, 10 Rich. (S. C.) Eq. 582, 585 ;
 Keyes v. Wood, 21 Vt. 331 ;
 Langdon v. Keith, 9 Vt. 299 ;
 Andrews v. Hart, 17 Wis. 297 ;
 Fisher v. Otis, 3 Chand. (Wis.) 83.
¹ Graham v. Newman, 21 Ala. 497 ;
 Edgerton v. Young, 43 Ill. 464 ;
 Dwinel v. Perley, 32 Me. 197 ;
 Young v. Miller, 72 Mass. (6 Gray) 152 ;
 Warden v. Adams, 15 Mass. 233 ;
 Partridge v. Partridge, 38 Pa. St. 78 ;
 Cottrell v. Adams, 2 Biss. C. C. 351 ; s.c. 6 Fed. Cas. 624.
² Gower v. Howe, 20 Ind. 396 ;
 Clearwater v. Rose, 1 Blackf. (Ind.) 137, 138 ;
 Sangston v. Love, 11 Iowa 580 ;
 Rankin v. Mayor, 9 Iowa 297 ;
 Kurtz v. Sponable, 6 Kan. 396 ;
 Paine v. French, 4 Ohio 318, 320 ;
 Garland v. Richeson, 4 Rand. (Va.) 266.
 See: Austin v. Burbank, 2 Day (Conn.) 474 ; s.c. 2 Am. Dec. 119 ;
 Williams v. Morancy, 3 La. An. 227 ;
 Rigney v. Lovejoy, 13 N. H. 247 ;
 Southerin v. Mendum, 5 N. H. 420 ;
 Kinna v. Smith, 3 N. J. Eq. (2 H. W. Gr.) 14 ;
 Runyan v. Mersereau, 11 John. (N. Y.) 534 ; s.c. 6 Am. Dec. 393 ;
 Clarksons v. Doddridge, 14 Gratt. (Va.) 42, 44.

ment of the debt, which is the principal thing, carries with it the equitable interest in the mortgage, which is the mere incident,¹ unless there is an agreement to the

- ¹ *Bennett v. Solomon*, 6 Cal. 135 ;
Miller v. Larned, 103 Ill. 562, 563 ;
Sangster v. Love, 11 Iowa 580 ;
Crow v. Vance, 4 Iowa 434, 440 ;
Henderson v. Herrod, 18 Miss.
 (10 Smed. & M.) 631 ;
Dick v. Mawry, 17 Miss. (9 Smed.
 & M.) 488 ;
Parmelee v. Dann, 23 Barb. (N.
 Y.) 461 ;
Nash v. Kelly, 50 Vt. 425 ;
Keyes v. Wood, 21 Vt. 331 ;
Batesville Institute v. Kauff-
mann, 85 U. S. (18 Wall.) 151 ;
 bk. 21 L. ed. 775 ;
Myers v. Hazzard, 4 McC. C.
 ('. 94 ;
Wiston v. Mowlin, 2 Burr. 979.
 See : *O'Neal v. Seixas*, 85 Ala.
 80 ; s.c. 4 So. Rep. 475 ;
Prout v. Hoge, 57 Ala. 28 ;
Center v. P. & M. Bank, 22 Ala.
 743 ;
Graham v. Newman, 21 Ala. 497 ;
Conner v. Banks, 18 Ala. 42 ; s.c.
 52 Am. Dec. 209 ;
Cullom v. Erwin, 4 Ala. 452 ;
Emanuel v. Hunt, 2 Ala. 190 ;
Bennett v. Solomon, 6 Cal. 135 ;
Ord v. McKee, 5 Cal. 575 ;
Lawrence v. Knapp, 1 Root
 (Conn.) 248 ; s.c. 1 Am. Dec.
 42 ;
Fassett v. Mulock, 5 Colo. 466 ;
Planters' Bank v. Prater, 64 Ga.
 609 ;
Roberts v. Mansfield, 38 Ga. 452 ;
Barrett v. Hinckley, 124 Ill. 32 ;
 s.c. 14 N. E. Rep. 863 ;
Union Mutual Life Ins. Co. v.
Slee, 123 Ill. 57 ; s.c. 12 N. E.
 Rep. 543 ;
Towner v. McClelland, 110 Ill.
 542 ;
Worcester National Bank v.
Cheaney, 87 Ill. 602 ;
White v. Sutherland, 64 Ill. 181 ;
Kleeman v. Frisbie, 63 Ill. 482 ;
Hamilton v. Lubukee, 51 Ill. 415 ;
 s.c. 99 Am. Dec. 562 ;
Edgerton v. Young, 43 Ill. 464 ;
Waymon v. Cochrane, 35 Ill. 152 ;
Mapps v. Sharpe, 32 Ill. 13 ;
Fortier v. Darst, 31 Ill. 212 ;
Olds v. Cummings, 31 Ill. 188 ;
Pardee v. Lindley, 31 Ill. 174 ;
Vansant v. Allman, 23 Ill. 30 ;
Sargent v. Howe, 21 Ill. 148 ;
Lucas v. Harris, 20 Ill. 166 ;
Reavis v. Fielden, 18 Ill. 77 ;
Ryan v. Dunlap, 17 Ill. 40 ; s.c.
 63 Am. Dec. 334 ;
Grassly v. Reinback, 4 Ill. App.
 341 ;
Parkhurst v. Watertown Steam-
Engine Co., 107 Ind. 594 ; s.c.
 8 N. E. Rep. 635 ;
Thompson v. Madison B. & A.
Assoc., 103 Ind. 279 ; s.c. 2 N.
 E. Rep. 785 ;
Reeves v. Hayes, 95 Ind. 521 ;
Bayless v. Glenn, 72 Ind. 5 ;
Gabbert v. Schwartz, 69 Ind. 450,
Hubbard v. Harrison, 38 Ind.
 323 ;
Fletcher v. Holmes, 32 Ind. 497 ;
Sample v. Rowe, 24 Ind. 208 ;
Gower v. Howe, 20 Ind. 396 ;
Garrett v. Puckett, 15 Ind. 485 ;
French v. Turner, 15 Ind. 59 ;
Hough v. Osborne, 7 Ind. 140 ;
McCormick v. Digby, 8 Blackf.
 (Ind.) 99 ;
Burton v. Baxter, 7 Blackf. (Ind.)
 297 ;
Blair v. Bass, 4 Blackf. (Ind.) 539 ;
Slaughter v. Foust, 4 Blackf.
 (Ind.) 379 ;
Clearwater v. Rose, 1 Blackf.
 (Ind.) 137 ;
Vandercook v. Baker, 48 Iowa
 199 ;
Walker v. Schreiber, 47 Iowa
 529 ;
Updegraff v. Edwards, 45 Iowa
 513 ;
Bank of Indiana v. Anderson,
 14 Iowa 544 ; s.c. 83 Am. Dec.
 390 ;
Pope v. Jacobus, 10 Iowa 265 ;
Rankin v. Major, 9 Iowa 297 ;
Grapengether v. Fejevary, 9 Iowa
 163 ; s.c. 74 Am. Dec. 336 ;
Wood v. Sands, 4 G. Greene (Iowa)
 214, 217 ;
Perkins v. Matteson, 40 Kan. 165 ;
 s.c. 19 Pac. Rep. 733 ;
Kurtz v. Sponable, 6 Kan. 395 ;
Burdett v. Clay, 8 B. Mon. (Ky.)
 287 ;
Miles v. Gray, 4 B. Mon. (Ky.)
 417 ;
Miller v. Cappel, 36 La. An. 264 ;
Scott v. Turner, 15 La. An. 346 ;

contrary.¹ If the mortgage debt secured is evidenced by various notes, the assignment of one of these notes

- Succession of Forstall, 39 La. An. 10, 52; s.c. 3 So. Rep. 277;
 Vose v. Handy, 2 Me. (2 Greenl.) 322; s.c. 11 Am. Dec. 101;
Morris v. Bacon, 123 Mass. 58; s.c. 25 Am. Rep. 17;
Belcher v. Costello, 123 Mass. 189;
Andrews v. Fiske, 101 Mass. 422;
Wolcott v. Winchester, 81 Mass. (15 Gray) 461;
Young v. Miller, 72 Mass. (6 Gray) 152;
Crane v. March, 21 Mass. (4 Pick.) 131; s.c. 16 Am. Dec. 329;
Parsons v. Welles, 17 Mass. 419;
Martin v. McReynolds, 6 Mich. 70;
Holmes v. McGinty, 44 Miss. 94;
Dick v. Mawry, 17 Miss. (9 Smed. & M.) 443, 448;
Hagerman v. Sutton, 91 Mo. 519; s.c. 4 S. W. Rep. 73;
Boalman's Savings Bank v. Grewe, 84 Mo. 477;
Bell v. Simpson, 75 Mo. 485;
Logan v. Smith, 62 Mo. 455;
Potter v. Stevens, 40 Mo. 229;
Chappell v. Allen, 38 Mo. 213;
De Laoreal v. Kempner, 9 Mo. App. 77;
Kuhns v. Bankes, 15 Neb. 92; s.c. 17 N. W. Rep. 356;
Studebaker Bros. Manuf'g Co. v. McCargur, 20 Neb. 500; s.c. 30 N. W. Rep. 686;
Blake v. Williams, 36 N. H. 39;
Page v. Pierce, 26 N. H. 317;
Downer v. Button, 26 N. H. 338;
Rigney v. Lovejoy, 13 N. H. 247;
Southerin v. Mendum, 5 N. H. 420;
Mulford v. Peterson, 35 N. J. L. (6 Vr.) 129;
Ferry v. Meckert, 32 N. J. Eq. (5 Stew.) 38;
Denton v. Cole, 30 N. J. Eq. (3 Stew.) 244;
Harris v. Cook, 28 N. J. Eq. (1 Stew.) 345;
Galway v. Fullerton, 17 N. J. Eq. (2 C. E. Gr.) 389;
Andrews v. Townshend, 56 N. Y. Super. Ct. 140;
Parmelee v. Dann, 23 Barb. (N. Y.) 461;
Rose v. Baker, 13 Barb. (N. Y.) 230;
Pattison v. Hull, 9 Cow. (N. Y.) 747;
Jackson v. Blodget, 5 Cow. (N. Y.) 202;
Gould v. Marsh, 1 Hun (N. Y.) 566;
Evertson v. Booth, 19 John. (N. Y.) 486;
Prescott v. Hull, 17 John. (N. Y.) 284;
Jackson v. Willard, 4 John. (N. Y.) 41, 42;
Green v. Hart, 1 John. (N. Y.) 580;
Johnson v. Hart, 3 John. Cas. (N. Y.) 322;
Neilson v. Blight, 1 John. Cas. (N. Y.) 205;
Langdon v. Buel, 9 Wend. (N. Y.) 80;
Hyman v. Devereux, 63 N. C. 624;
Paine v. French, 4 Ohio 318;
Watson v. Dundee M. & T. I. Co., 12 Oreg. 474; s.c. 8 Pac. Rep. 548;
Partridge v. Partridge, 38 Pa. St. 78;
Donley v. Hays, 17 Serg. & R. (Pa.) 400;
Walker v. Kee, 14 S. C. 142;
Cleveland v. Cohrs, 10 S. C. 224;
Muller v. Wadlington, 5 S. C. 342;
Perkins v. Sterne, 23 Tex. 561; s.c. 76 Am. Dec. 72;
Blair v. White, 61 Vt. 110; s.c. 17 Atl. Rep. 49;
Pratt v. Bank of Bennington, 10 Vt. 293; s.c. 33 Am. Dec. 201;
Langdon v. Keith, 9 Vt. 299;
Stimpson v. Bishop, 82 Va. 190;
Woodruff v. King, 47 Wis. 261; s.c. 2 N. E. Rep. 452;
Bange v. Flint, 25 Wis. 544;
Andrews v. Hart, 17 Wis. 297;
Rice v. Cribb, 12 Wis. 179;
Blunt v. Walker, 11 Wis. 334; s.c. 78 Am. Dec. 709;
Croft v. Bumster, 9 Wis. 503;
Martineau v. McCallum, 4 Chand. (Wis.) 153;

¹ *Holmes v. Gardner*, 50 Ohio St. ; s.c. 33 N. E. Rep. 644; 20

L. R. A. 329.

will work an equitable assignment, *pro tanto*, of the mortgage. If the mortgagee retains possession of the mortgage, he will hold it as trustee for the assignee of the whole, or that portion of the debt secured which has been transferred; and this is true whether the assignee did not know at the time of the assignment of the existence of the mortgage.¹

SEC. 2112. **Same—Consideration.**—It is not essential to the validity of the assignment of a mortgage that there should be any consideration pass between the parties, the owner of the mortgage being at liberty to deal with his property as he may desire, in the absence of any special restraints by reason of indebtedness or otherwise. Any consideration that may pass between the parties does not in any way affect the mortgage; but want of consideration will enable the mortgagor, or his assignee, to set up as against the assignee any defense he could have set up against the mortgagee.² The fact that a mortgage was assigned without consideration will afford no ground of defense to a suit to foreclose;³ consequently where a mortgage is purchased for a sum less than the amount due thereon, this will not entitle the mortgagor or his assignee to redeem without paying the full amount that is due upon said mortgage.⁴ Although the assignor of a bond and mortgage can give no better title thereto than he holds himself, and the assignee takes it subject to all the equities existing be-

Fisher v. Otis, 3 Chand. (Wis.) 83; ² Adair v. Adair, 5 Mich. 204; s.c. 71 Am. Dec. 779.

Carpenter v. Longan, 83 U. S. (16 Wall.) 271; bk. 21 L. ed. 313; See: Warner v. Gouverneur, 1 Barb. (N. Y.) 36;

Winstead v. Bingham, 4 Woods C. C. 510; s.c. 14 Fed. Rep. 1. Knox v. Galligan, 21 Wis. 476.

¹ Jordan v. Cheney, 74 Me. 359; As to what is sufficient consideration to cut off defense of mortgagor on suit by assignee to foreclose,

Mayo v. Merrick, 127 Mass. 511; See: Worcester National Bank v. Cheeney, 87 Ill. 602;

Strong v. Jackson, 123 Mass. 60; s.c. 25 Am. Rep. 19; Clare v. Appleby, 87 N. Y. 114;

Morris v. Bacon, 123 Mass. 58; s.c. 25 Am. Rep. 17; Viele v. Judson, 82 N. Y. 33;

Wolcott v. Winchester, 81 Mass. 461; Davis v. Bechstein, 69 N. Y. 440;

Young v. Miller, 73 Mass. (6 Gray) 152; Schafer v. Reilly, 50 N. Y. 61;

Crane v. March, 21 Mass. (4 Pick.) 131; s.c. 16 Am. Dec. 329; Croft v. Bunster, 9 Wis. 503.

Keyes v. Wood, 21 Vt. 321. ³ Adair v. Adair, 5 Mich. 204; s.c. 71 Am. Dec. 779.

⁴ Pease v. Benson, 28 Me. 336.

tween the original parties ;¹ yet he does not take it subject to the equities existing between the mortgagor and a prior assignee of the mortgage.² The reason for this rule is said to be found in the fact that the assignee can always go to the mortgagor for the purpose of ascertaining what offsets he may have against the mortgage.³ This is on the principle that he who takes an instrument not by the terms of it assignable, must take it principally upon the credit of the party from whom he receives it ; for it is always liable to be defeated by equitable circumstances subsisting between the original contracting parties.⁴

SEC. 2113. **Same—Notice and record.**—While notice of the assignment to the mortgagor is not necessary to the validity of the assignment,⁵ yet an assignee who wishes to protect himself against a *bona fide* payment by the mortgagor or his assignee, and to cut off equities subsequently arising between the original parties thereto in favor of the mortgagor, must give notice of the assignment of the mortgage.⁶ The recording of an assign-

¹ Davis v. Bechstein, 69 N. Y. 440.
See : Seymour v. McKinstry, 106

N. Y. 230, 242 ; s.c. 12 N. E.
Rep. 348 ; 14 N. E. Rep. 94 ;

Bennett v. Bates, 94 N. Y. 354,
363 ;

Decker v. Boice, 83 N. Y. 215 ;

De Lancey v. Stearns, 66 N. Y. 157 ;

Schafer v. Reilly, 50 N. Y. 61 ;

Bush v. Lathrop, 22 N. Y. 535.

² Reineman v. Robb, 98 Pa. St. 474.

³ Wiltzie Mortg. Forec. (2d ed.)
426, § 355.

See : Westfall v. Jones, 23 Barb.
(N. Y.) 9, 13 ;

Corning v. Murray, 3 Barb. (N.
Y.) 652, 654 ;

Murray v. Lylburn, 2 John. Ch.
(N. Y.) 441 ;

Hovey v. Hill, 3 Lans. (N. Y.)
167, 172 ;

L'Amoureux v. Vandenburg, 7
Paige Ch. (N. Y.) 316 ; s.c. 32
Am. Dec. 635.

⁴ Willis v. Twombly, 13 Mass. 204.

⁵ Jones v. Gibbons, 9 Ves. 407 ; s.c.
7 Rev. Rep. 247.

⁶ Townner v. McClelland, 110 Ill.
542 ;

Lehman v. McQueen, 65 Ill. 570 ;

Reeves v. Hayes, 95 Ind. 521 ;

Swan v. Yaple, 35 Iowa 248 ;

Bank v. Anderson, 14 Iowa 544 ;

Perkins v. Mallerson, 40 Kan.
165 ; s.c. 19 Pac. Rep. 633 ;

Mitchell v. Burnham, 44 Me.
302 ;

Johnson v. Carpenter, 7 Minn.
176 ;

Brewster v. Carnes, 103 N. Y.
556 ; s.c. 9 N. E. Rep. 223 ;

Viele v. Judson, 82 N. Y. 32 ;

Van Keuren v. Corkins, 66 N. Y.
77 ;

Huron College v. Wheeler, 61
N. Y. 88 ;

Belden v. Meeker, 47 N. Y.
307 ;

Ely v. Scofield, 35 Barb. (N. Y.)
330 ;

New York L. Ins. & T. Co. v.
Smith, 2 Barb. Ch. (N. Y.) 82 ;

James v. Morey, 2 Cow. (N. Y.)
246, 258 ; s.c. 14 Am. Dec. 475 ;

James v. Johnson, 6 John. Ch.
(N. Y.) 417 ;

Wardell v. Eden, 2 John. Ch. (N.
Y.) 121, 260 ;

ment of a mortgage under the registry acts is not constructive notice to the mortgagor, but only to subsequent purchasers and incumbrancers from the mortgagor, and subsequent assignees from the mortgagee.¹

Where the assignee neglects to give notice to the mortgagor himself, in order to avoid the effect of a payment to the assignor, he must show that the mortgagor, before making the payment, had actual knowledge of the fact of assignment.² This is on the principle that an innocent purchaser of a mortgage for a valuable consideration cannot be protected as a *bona fide* purchaser, but takes it subject to all the infirmities which it possesses in the hands of his assignor.³

SEC. 2114. **Same—Construction of.**—The general doctrine is that a transfer of the mortgage debt is essential to the effectual assignment of the mortgage;⁴ yet a presump-

Walcott v. Sullivan, 1 Edw. Ch. (N. Y.) 399;

Reed v. Marble, 10 Paige Ch. (N. Y.) 409;

Horstman v. Gerker, 49 Pa. St. 282;

Philips v. Bank of Lewiston, 18 Pa. St. 394;

Northampton Bank v. Balliet, 8 Watts & S. (Pa.) 311;

Torrey v. Deavitt, 53 Vt. 331, 335;

Wheeler v. Hughes, 1 U. S. (1 Dall.) 23; bk. 1 L. ed. 20;

Jones v. Gibbons, 9 Ves. 410; s.c. 7 Rev. Rep. 247;

In re Richards, 45 Ch. Div. 539; s.c. 59 L. J. Ch. 728; 63 L. T. 451.

The priorities inter se of successive assignees of a mortgage of real estate are regulated by the dates of their respective assignments, and are independent of any question of notice to the mortgagor.

Jones v. Gibbons, 9 Ves. 407; s.c. 7 Rev. Rep. 247.

¹ Crane v. Turner, 67 N. Y. 437;

Van Keuren v. Corkins, 66 N. Y. 77;

Purdy v. Huntington, 42 N. Y. 334; s.c. 1 Am. Rep. 537;

Ely v. Scofield, 35 Barb. (N. Y.) 330;

New York L. Ins. & T. Co. v. Smith, 2 Barb. Ch. (N. Y.) 82;

James v. Johnson, 6 John. Ch. (N. Y.) 417;

Campbell v. Vedder, 3 Keyes (N. Y.) 174; s.c. 1 Abb. App. Dec. 295;

Reed v. Marble, 10 Paige Ch. (N. Y.) 408.

The rule where the mortgage secures negotiable instrument is different.

See: Burhaus v. Hutcheson, 25 Kan. 625; s.c. 37 Am. Rep. 274;

Jones v. Smith, 22 Mich. 360;

Baxter v. Gilbert, 12 Abb. (N. Y.) Pr. 97;

James v. Morey, 2 Cow. (N. Y.) 246; s.c. 14 Am. Dec. 475;

Post, § 2122.

² Foster v. Beals, 21 N. Y. 252;

Reed v. Marble, 10 Paige Ch. (N. Y.) 408.

³ Patterson v. Rabb, 38 S. C. 138; s.c. 17 S. E. Rep. 463; 19 L. R. A. 831.

⁴ Duval v. McLoskey, 1 Ala. 708;

Peters v. Jamestown Bridge Co., 5 Cal. 334, 335; s.c. 63 Am. Dec. 134;

Carter v. Bennett, 4 Fla. 283;

Medley v. Elliott, 62 Ill. 532;

Hamilton v. Lubukee, 51 Ill. 415; s.c. 99 Am. Dec. 562;

tion may arise that it was the intention of the parties that the beneficial interest in the debt should pass with the assignment of the mortgage in those cases where an adequate consideration was paid and the mortgage debt has not already been transferred to another.¹ The presumption is otherwise where there is a delivery of the mortgage without consideration.² It has even been said that proof of an advance of money to a mortgagee, coupled with a showing that the party making the advance has possession of the mortgage, does not establish

- Hamilton v. Browning, 94 Ind. 242;
 Hubbard v. Harrison, 38 Ind. 323;
 Johnson v. Cornet, 29 Ind. 59;
 Hough v. Osborne, 7 Ind. 140;
 Burbank v. Warwick, 52 Iowa 493; s.c. 3 N. W. Rep. 519;
 Swan v. Yapple, 35 Iowa 248;
 Sangster v. Love, 11 Iowa 580;
 Pope v. Jacobus, 10 Iowa 265;
 Lunt v. Lunt, 71 Me. 377;
 Bailey v. Gould, Walk. (Mich.) 478;
 O'Mulcahy v. Holley, 28 Minn. 31; s.c. 8 N. W. Rep. 906;
 Thayer v. Campbell, 9 Mo. 280;
 Hutchins v. Carleton, 19 N. H. 487;
 Ellison v. Daniels, 11 N. H. 274;
 Bell v. Morse, 6 N. H. 205;
 Merritt v. Bartholick, 36 N. Y. 44;
 Cooper v. Newland, 17 Abb. (N. Y.) Pr. 342;
 Jackson v. Blodgett, 5 Cow. (N. Y.) 202;
 Wilson v. Troup, 2 Cow. (N. Y.) 195, 231; s.c. 14 Am. Dec. 458;
 Jackson ex d. Curtis v. Bronson, 19 John. (N. Y.) 325;
 Runyan v. Merserau, 11 John. (N. Y.) 534; s.c. 6 Am. Dec. 393;
 Jackson ex d. Norton v. Willard, 4 John. (N. Y.) 41;
 Aymar v. Bill, 5 John. Ch. (N. Y.) 570;
 Bloomingdale v. Bowman, 4 N. Y. Supp. 60; s.c. 51 Hun (N. Y.) 39; 21 N. Y. St. Rep. 247;
 Andrews v. Townshend, 1 N. Y. Supp. 421; s.c. 16 N. Y. St. Rep. 876;
 Donley v. Hays, 17 Serg. & R. (Pa.) 400;
 Cleveland v. Cohrs, 10 S. C. 224;
 Mowrey v. Wood, 12 Wis. 413; 429;
 Blunt v. Walker, 11 Wis. 334, 348; s.c. 78 Am. Dec. 709.
¹ Bulkley v. Chapman, 9 Conn. 5;
 Hewell v. Coulbourn, 54 Md. 59;
 Strong v. Jackson, 123 Mass. 60; s.c. 25 Am. Rep. 19;
 Halseig v. Brown, 34 Mich. 503;
 Cooper v. Newland, 17 Abb. (N. Y.) Pr. 342;
 Merritt v. Bartholick, 36 N. Y. 44;
 Phillips v. Bank of Lewistown, 18 Pa. St. 394;
 Northampton Bank v. Balliet, 8 Watts & S. (Pa.) 311.
² See: Warden v. Adams, 15 Mass. 233;
 Bowers v. Johnson, 49 N. Y. 432;
 Merritt v. Bartholick, 36 N. Y. 44.
 Thus in Warden v. Adams, *supra*, a mortgagee delivered his mortgage to a scrivener, for the purpose of having an assignment thereof made to a creditor. Before such assignment was prepared and executed, and while the mortgage deed was in the scrivener's hands, the mortgagee made an assignment of the mortgage, upon a separate paper, to a third party, who was also a creditor, which was acknowledged and recorded before the first assignment was completed, the latter creditor having knowledge that the mortgage deed had been so delivered to the scrivener. The court held that the title of the latter creditor prevailed.

the fact of a purchase of the mortgage, or of a pledge thereof as a security for the money advanced. In the absence of written evidence the presumption is against any transfer.¹

SEC. 2115. **Assignment of mortgagor's interest.**—Whatever theory of mortgages may prevail, the common-law or lien doctrines, the mortgagor has an interest in the property he may assign to a third person. Where the common-law theory prevails he may assign his equity of redemption, until his rights therein have been barred or foreclosed.² Where the lien theory obtains the mortgagor may assign the legal estate as against all the world except the mortgagee, and this assignment will carry with it the right of possession of the mortgaged premises until condition broken.³ But the assignee takes merely the rights the mortgagor had under the mortgage; the estate is still subject to the mortgage.⁴ If the grantee assumes and agrees to pay the debt as a part of the purchase-money, he becomes personally liable to the holder of the mortgage thereon.⁵

SEC. 2116. **Same—Notice to mortgagee.**—We have already seen that a mortgagor is entitled to assign and transfer whatever interest he may have in the mort-

¹ *Bowers v. Johnson*, 49 N. Y. 432.
See: *Rockwell v. Hobby*, 2 Sandf. Ch. (N. Y.) 9.

² *White v. Rittenmyer*, 30 Iowa 272;

White v. Whitney, 44 Mass. (3 Met.) 81;

Bigelow v. Willson, 18 Mass. (1 Pick.) 485;

Newall v. Wright, 3 Mass. 138; s.c. 3 Am. Dec. 98;

Buchanan v. Monroe, 22 Tex. 537;

Hudson v. Treat, 7 Wis. 263.

³ See: *Ante*, § 2079.

⁴ See: *Kruse v. Scripps*, 11 Ill. 98; *Frost v. Shaw*, 10 Iowa 491;

Andrews v. Fiske, 101 Mass. 422, 424;

Flanagan v. Westcott, 11 N. J. Eq. (3 Stock.) 264;

Hartley v. Harrison, 24 N. Y. 170;

Sands v. Church, 6 N. Y. 347;

Morris v. Floyd, 5 Barb. (N. Y.) 130;

Ferris v. Crawford, 2 Den. (N. Y.) 598;

Cole v. Savage, 10 Paige Ch. (N. Y.) 583, 591;

Shufelt v. Shufelt, 9 Paige Ch. (N. Y.) 137, 145; s.c. 37 Am. Dec. 381;

Post v. Dart, 8 Paige Ch. (N. Y.) 639, 641.

⁵ *Hartley v. Harrison*, 24 N. Y. 170.

See: *Russell v. Pistor*, 7 N. Y. 171, 173, 174; s.c. 57 Am. Dec. 509;

Cornell v. Prescott, 2 Barb. (N. Y.) 16;

Ferris v. Crawford, 2 Den. (N. Y.) 595;

Marsh v. Pike, 10 Paige Ch. (N. Y.) 595, 597;

Halsey v. Reed, 9 Paige Ch. (N. Y.) 446;

Ante, §§ 2084, 2085.

gaged property, no matter whether the common-law or lien theory of the nature of the mortgage prevails.¹ On such assignment actual notice thereof must be given to the mortgagee, in order that the rights of the assignee may be fully protected against the unlawful acts of the mortgagor.²

SEC. 2117. **Insurance of property—By mortgagor.**—Any one who would suffer pecuniary loss if the property were destroyed, having an insurable interest to the extent of his interest therein,³ it follows that a mortgagor has an insurable interest in the mortgaged⁴ property to its full value,⁵ even though the property is mortgaged to its full value;⁶ and this interest continues until the full title vests in the purchaser on foreclosure, without right of redemption on part of the mortgagor or his creditors.⁷

¹ See : *Ante*, § 2115.

² See : *Bell v. Fleming*, 12 N. J. Eq. (1 Beas.) 13, 16 ;

Blair v. Ward, 10 N. J. Eq. (2 Stock.) 119, 126 ;

Stuyvesant v. Hull, 2 Barb. Ch. (N. Y.) 151, 158.

³ *Wainer v. Milford Mut. F. Ins. Co.*, 153 Mass. 335 ; s.c. 26 N. E. Rep. 877 ; 11 L. R. A. 598.

See : *Hough v. City Fire Ins. Co.*, 29 Conn. 10 ;

Rockford Ins. Co. v. Nelson, 65 Ill. 415, 420 ;

Walsh v. Philadelphia F. Assoc., 127 Mass. 385 ;

Pelton v. Westchester F. Ins. Co., 77 N. Y. 605 ;

Woodward v. Cowdery, 41 Vt. 479.

⁴ *Essex Sav. Bk. v. Meriden F. Ins. Co.*, 57 Conn. 335 ; s.c. 18 Atl. Rep. 324 ; 17 Id. 930 ; 4 L. R. A. 759.

See : *Honore v. Lamar Ins. Co.*, 51 Ill. 409 ;

Fox v. Phoenix Ins. Co., 52 Me. 333 ;

Washington Ins. Co. v. Kelly, 32 Md. 421 ;

King v. State Mut. F. Ins. Co., 61 Mass. (7 Cush.) 1 ; s.c. 54 Am. Dec. 683 ;

Strong v. Manufacturers' Ins. Co., 27 Mass. (10 Pick.) 40 ; s.c. 20 Am. Dec. 507 ;

Curry v. Commonwealth Ins. Co., 27 Mass. (10 Pick.) 535 ; s.c. 20 Am. Dec. 547 ;

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Excelsior Ins. Co. v. Royal Ins. Co., 55 N. Y. 343 ; s.c. 14 Am. Dec. 271 ;

McDonald v. Black, 20 Ohio 185 ; s.c. 55 Am. Dec. 448 ;

Nichols v. Baxter, 5 R. I. 491 ;

Swift v. Mutual Ins. Co., 18 Vt. 305 ;

Manson v. Phoenix Ins. Co., 64 Wis. 26 ; s.c. 24 N. W. Rep. 407 ;

Columbian Ins. Co. v. Lawrence, 27 U. S. (2 Pet.) 25 ; bk. 7 L. ed. 335.

⁵ See : *Hough v. City F. Ins. Co.*, 29 Conn. 10 ;

Rockford F. Ins. Co. v. Nelson, 65 Ill. 415 ;

Clark v. New England Mut. F. Ins. Co., 60 Mass. (6 Cush.) 345 ;

Pelton v. Westchester Fire Ins. Co., 77 N. Y. 606 ;

Lorillard F. Ins. Co. v. McCulloch, 21 Ohio St. 176 ;

Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460 ; s.c. 12 Atl. Rep. 668 ; 10 Cent. Rep. 575 ;

Elliott v. Ashland Mut. F. Ins. Co., 117 Pa. St. 548 ; s.c. 12 Atl. Rep. 676 ; 10 Cent. Rep. 518 ;

Nassbaum v. Northern Ins. Co., 37 Fed. Rep. 524 ;

Carpenter v. Providence Wash- ington Ins. Co., 41 U. S. (16 Pet.) 501, 502 ; bk. 10 L. ed. 1044.

⁶ See : *Gordon v. Massachusetts Ins. Co.*, 19 Mass. (2 Pick.) 249 ;

Higginson v. Dall, 13 Mass. 96.

⁷ *Essex Sav. Bk. v. Meridian F.*

On insurance by mortgagor he will be entitled to the proceeds in case of loss,¹ if entitled at the time to redeem,² and the mortgagee being in possession at the time the loss occurs will not defeat this right to recover.³ In the absence of any provision in the mortgage requiring the mortgagor to keep the premises insured for the benefit of the mortgagee, the mortgagee has no interest in a policy of insurance taken out by the mortgagor, or one standing in a mortgagor's place for his own benefit,⁴ an insurance on a building not being convertible into an insurance of a debt by proof that the interest of the insured was limited by the mortgage upon the premises.⁵

SEC. 2118. Same—Same—Misrepresentations in application.—Misrepresentations in an application for insurance, made in answer to an inquiry as to the existence of a mortgage upon the premises, will invalidate the policy of insurance,⁶ although such misrepresentation is not fraudulent;⁷ but misrepresentations of the interests of

Ins. Co., 57 Conn. 335; s.c. 18 Atl. Rep. 324; 17 Id. 930; 4 L. R. A. 759;

Strong v. Manufrs. Ins. Co., 27 Mass. (10 Pick.) 40; s.c. 20 Am. Dec. 507;

Bragg v. Insurance Co., 25 N. H. 289;

Nassbaum v. Northern Ins. Co., 37 Fed. Rep. 524.

See: *Walsh v. Phila. Assoc.*, 127 Mass. 383;

Mechler v. Phoenix Ins. Co., 38 Wis. 665.

¹ *Strong v. Manufacturers' Ins. Co.*, 27 Mass. (10 Pick.) 40; s.c. 20 Am. Dec. 507.

² *Power v. Ocean Ins. Co.*, 19 La. 28; s.c. 36 Am. Dec. 665;

Walsh v. Philadelphia F. Assoc., 127 Mass. 383;

Mechler v. Phoenix Ins. Co., 38 Wis. 665.

³ *Illinois F. Ins. Co. v. Stanton*, 57 Ill. 354.

⁴ *Ryan v. Adamson*, 57 Iowa 30; s.c. 10 N. W. Rep. 287;

Carter v. Rocket, 8 Paige Ch. (N. Y.) 436;

McDonald v. Black, 20 Ohio 185; *Columbia Ins. Co. v. Laurence*,

35 U. S. (10 Pet.) 504; bk. 9 L. ed. 512.

See: *White v. Brown*, 56 Mass. (2 Cush.) 412;

Plimpton v. Farmers' Ins. Co., 43 Vt. 497; s.c. 5 Am. Rep. 297;

Carpenter v. The Providence Washington Ins. Co., 41 U. S. (16 Pet.) 504; bk. 10 L. ed. 1644.

⁵ *King v. State Mut. F. Ins. Co.*, 61 Mass. (7 Cush.) 1; s.c. 54 Am. Dec. 683;

Plimpton v. Farmers' Mut. Ins. Co., 43 Vt. 497; s.c. 5 Am. Rep. 295.

⁶ *Lycoming F. Ins. Co. v. Jackson*, 83 Ill. 302; s.c. 25 Am. Rep. 386;

Van Buren v. St. Joseph Co. Ins. Co., 28 Mich. 398;

Titus v. Glens Falls Ins. Co., 81 N. Y. 410;

Smith v. Columbia Ins. Co., 17 Pa. St. 253; s.c. 55 Am. Dec. 546.

⁷ *Burritt v. Saratoga M. F. Ins. Co.*, 5 Hill (N. Y.) 188; s.c. 40 Am. Dec. 345.

As to misrepresentations by the assured and their effect upon the policy of insurance,

the applicant for insurance is no defense if the parties understood each other, or enough was set out to put the insurer upon inquiry.¹ Where no inquiry is made as to the state of the applicant's title, the fact that he does not disclose that his property has been mortgaged and the equity of redemption taken under execution, will not vitiate the policy.²

SEC. 2119. Same—Same—Violation of condition against alienation.—The general rule is that where a policy stipulates against an alienation of the property insured, by sale or otherwise, any alienation within the common law,³

See: *Curell v. Miss. M. & F. Ins. Co.*, 9 La. 163; s.c. 29 Am. Dec. 439;

Curry v. Commonwealth Ins. Co. 27 Mass. (10 Pick.) 535; s.c. 20 Am. Dec. 547;

Strong v. Manufacturers' Ins. Co., 27 Mass. (10 Pick.) 40; s.c. 20 Am. Dec. 507;

Rafferty v. New Brunswick Ins. Co., 18 N. J. L. (3 Harr.) 480; s.c. 38 Am. Dec. 525;

Fowler v. Ætna F. Ins. Co., 6 Cow. (N. Y.) 673; s.c. 16 Am. Dec. 460;

Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; s.c. 30 Am. Dec. 90;

Farmers' Ins. Co. v. Snyder, 16 Wend. (N. Y.) 481; s.c. 30 Am. Dec. 118;

Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72; s.c. 22 Am. Dec. 567.

¹ *Bell v. Western M. Ins. Co.*, 5 Robt. (La.) 423; s.c. 39 Am. Dec. 542.

See: *Houghton v. Mfrs. Ins. Co.*, 49 Mass. (8 Met.) 114; s.c. 41 Am. Dec. 489;

Curry v. Commonwealth Ins. Co., 27 Mass. (10 Pick.) 535; s.c. 20 Am. Dec. 547;

Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; s.c. 30 Am. Dec. 90.

² *Strong v. Manufacturers' Ins. Co.*, 27 Mass. (10 Pick.) 40; s.c. 20 Am. Dec. 507.

³ **Alienation** — What constitutes. — Where a policy stipulates against alienation the term "alienation" as applied to real

estate has a technical significance, and does not cover any transfer short of a conveyance of the title (*Pollard v. Somerset Mut. F. Ins. Co.*, 42 Me. 221; *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. (N. Y.) 624); and consequently in order to constitute a breach of the condition the entire interest of the insured must be absolutely and permanently divested.

Cowan v. Iowa St. Ins. Co., 40 Iowa 551; s.c. 20 Am. Rep. 583;

Power v. Ocean Ins. Co., 19 La. 28; s.c. 36 Am. Dec. 665;

Jackson v. Massachusetts M. F. Ins. Co., 40 Mass. (23 Pick.) 418; s.c. 34 Am. Dec. 69.

To constitute an alienation with such a proviso, the right to the possession of the property must pass from the vendor to the vendee.

Washington Ins. Co. v. Kelly, 32 Md. 421.

A mortgage is not an alienation within the meaning of such a prohibition.

Smith v. Monmouth Ins. Co., 50 Me. 96;

Pollard v. Mut. F. Ins. Co., 42 Me. 221;

Jackson v. Massachusetts Mut. F. Ins. Co., 40 Mass. (23 Pick.) 418; s.c. 34 Am. Dec. 69;

Folsom v. Belknap Co. Mut. F. Ins. Co., 30 N. H. 231;

Rollins v. Columbian Ins. Co., 25 N. H. 200;

Conover v. Mut. Ins. Co., 3 Den. (N. Y.) 254; s.c. 1 N. Y. 290.

after insurance, avoids the contract of insurance, and no one can recover upon it unless the policy has been assigned to the person to whom the property has been transferred, and the company has accepted such assignee in the place and stead of the original insured.¹ Under a policy stipulating against conveyance, a mortgage of the insured premises by deed absolute in its form will be within the stipulation² and avoid the policy;³ but a simple mortgage which does not transfer the legal title is thought not to be violative of the stipulation in the policy⁴ until after foreclosure and transfer of the title.⁵ But where the condition in the policy is against alienation "in whole or in part,"⁶ or against an "alteration of ownership,"⁷ it will be violated by mortgage of

See : *Wilson v. Hill*, 44 Mass. (3 Met.) 66, 71.

¹ *Power v. Ocean Ins. Co.*, 19 La. 28 ; s.c. 36 Am. Dec. 665 ;

Lane v. Mutual F. Ins. Co., 12 Me. 44 ; s.c. 28 Am. Dec. 150 ;

Smith v. Union Ins. Co., 120 Mass. 90 ;

Wilson v. Hill, 44 Mass. (3 Met.) 66 ;

Jackson v. Massachusetts Mut. F. Ins. Co., 40 Mass. (23 Pick.) 418 ; s.c. 34 Am. Dec. 69 ;

Hitchcock v. North-Western Ins. Co., 26 N. Y. 68 ;

Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385 ; s.c. 30 Am. Dec. 90 ;

Wheeling Ins. Co. v. Morrison, 11 Leigh (Va.) 354 ; s.c. 36 Am. Dec. 385 ;

Bates v. Equitable F. & M. Ins. Co., 77 U. S. (10 Wall.) 33 ; bk. 19 L. ed. 882 ;

Carpenter v. Providence Wash- ington Ins. Co., 41 U. S. (16 Pet.) 495 ; bk. 10 L. ed. 1044.

² *Western Ins. Co. v. Riker*, 10 Mich. 279.

See : *Hoadges v. Tennessee M. & F. Ins. Co.*, 8 N. Y. 416 ;

Holbrook v. American Ins. Co., 1 Curt. C. C. 193 ; s.c. 1 Am. Law Reg. 18 ; Fed. Cas. No. 6589.

³ *Tomlinson v. Monmouth Ins. Co.*, 47 Me. 232 ;

Foote v. Hartford Ins. Co., 119 Mass. 259.

Separate defeasance recorded. — It is thought that it would be otherwise, however, where a

separate defeasance is executed and recorded at the same time, or within a reasonable time after the delivery of the mortgage.

Smith v. Monmouth Ins. Co., 50 Me. 96.

⁴ *Com. Ins. Co. v. Spanknebie*, 52 Ill. 53 ; s.c. 4 Am. Rep. 582 ;

Pollard v. Somerset Mut. F. Ins. Co., 42 Me. 251 ;

Jackson v. Massachusetts Mut. Ins. Co., 40 Mass. (23 Pick.) 418 ; s.c. 34 Am. Dec. 69 ;

Shepherd v. Union Ins. Co., 38 N. H. 232 ;

Conover v. Mut. Ins. Co., 1 N. Y. 290 ; s.c. 3 Den. (N. Y.) 254 ;

Howard Fire Ins. Co. v. Bruner, 23 Pa. St. 50.

See : *Indiana Ins. Co. v. Coquil- lard*, 2 Ind. 645.

⁵ *Brunswick Sav. Inst. v. Com. Ins. Co.*, 68 Me. 313 ; s.c. 28 Am. Rep. 56 ;

Macomber v. Cambridge Mut. F. Ins. Co., 62 Mass. (8 Cush.) 133 ;

McLaren v. Hartford F. Ins. Co., 5 N. Y. 151 ;

Mt. Vernon Mfr. Co. v. Summit Ins. Co., 10 Ohio St. 347 ;

Georgia Home Ins. Co. v. Kin- nien, 28 Gratt. (Va.) 88.

See : *McIntire v. Norwich F. Ins. Co.*, 102 Mass. 230 ; s.c. 3 Am. Rep. 458.

⁶ *Abbott v. Hampden Ins. Co.*, 30 Me. 414.

⁷ *Oakes v. Mfr. Ins. Co.*, 131 Mass. 164, 166 ;

the insured premises.¹ And it has been held that where a policy of insurance procured upon mortgaged premises stipulates that it shall be void if foreclosure proceedings are commenced against the insured, if such proceedings are instituted the policy is thereby avoided.²

SEC. 2120. **Same—By mortgages.**—The mortgagee has an insurable interest separate and independent of any other interest which may be the subject of insurance generally or specially in the mortgaged premises,³ to the extent of

Edmands v. Mut. S. F. Ins. Co.,
83 Mass. (1 Allen) 311; s.c. 79
Am. Dec. 746.

¹ Edmands v. Mutual S. F. Ins. Co.,
83 Mass. (1 Allen) 311; s.c. 79
Am. Dec. 746;

Bates v. Com. Ins. Co., 2 Cin.
Rep. (Ohio) 195.

See: Gould v. Holland Purchase
Ins. Co., 16 Hun (N. Y.) 538.

**Illinois rule—Hartford Fire Ins. Co.
v. Walsh.**—It is said by the
Supreme Court of Illinois, in
the case of Hartford F. Ins. Co.
v. Walsh, 54 Ill. 164; s.c. 5
Am. Rep. 115, that a mortgage
does not come within the pro-
visions of a policy of fire in-
surance prohibiting, without
consent, any change "in the
title or possession of the prop-
erty, whether by sale, volun-
tary transfer, or conveyance."

**As to what are alienation and altera-
tions in ownership within the
meaning of such a stipulation in
a fire insurance policy,**

See: Oakes v. Manufacturers'
Ins. Co., 131 Mass. 164, 166;
s.c. 20 Am. Dec. 507;

Young v. Eagle F. Ins. Co., 80
Mass. (14 Gray) 150; s.c. 74
Am. Dec. 673;

Morrison Admr. v. Tennessee F.
& M. Ins. Co., 18 Mo. 262; s.c.
59 Am. Dec. 299;

Appleton Iron Co. v. British
American Assurance Co., 46
Wis. 30; s.c. 1 N. W. Rep. 9;
50 N. W. Rep. 1100;

Bates v. Equitable F. & M. Ins.
Co., 77 U. S. (10 Wall.) 38; bk.
19 L. ed. 882.

² Titus v. Glens Falls Ins. Co., 81
N. Y. 410; s.c. 8 Abb. (N. Y.)

N. C. 315.

³ White v. Brown, 56 Mass. (2 Cush.)
412;

Foster v. Van Reed, 70 N. Y. 19;
s.c. 26 Am. Rep. 544;

Cone v. Niagara F. Ins. Co., 60
N. Y. 619, 624;

Excelsior F. Ins. Co. v. Royal
Ins. Co., 55 N. Y. 359; s.c. 14
Am. Rep. 271;

Ætna F. Ins. Co. v. Tyler, 16
Wend. (N. Y.) 385; s.c. 30 Am.
Dec. 90;

Carpenter v. Providence Wash-
ington Ins. Co., 41 U. S. (16
Pet.) 495; bk. 10 L. ed. 1044.

See: Honore v. Lamar Ins. Co.,
51 Ill. 409;

Fox v. Phoenix Ins. Co., 52 Me.
333;

Washington Ins. Co. v. Kelly, 32
Md. 421;

King v. State Mut. F. Ins. Co.,
61 Mass. (7 Cush.) 1; s.c. 54
Am. Dec. 683;

Strong v. Mfrs. Ins. Co., 27 Mass.
(10 Pick.) 40; s.c. 20 Am. Dec.
507;

Curry v. Com. Ins. Co., 27 Mass.
(10 Pick.) 535; s.c. 20 Am. Dec.
547;

Tillou v. Kingston Mut. Ins. Co.,
7 Barb. (N. Y.) 570;

Kernochan v. N. Y. Bowery Fire
Ins. Co., 17 N. Y. 428, aff'g 5
Duer (N. Y.) 1;

Traders' Ins. Co. v. Robert, 9
Wend. (N. Y.) 404;

McDonald v. Black, 20 Ohio 185;
s.c. 55 Am. Dec. 448;

Swift v. Mut. Ins. Co., 18 Vt.
305;

Columbian Ins. Co. v. Lawrence,
27 U. S. (2 Pet.) 25; bk. 7 L. ed.
335.

the lien which he holds,¹ and is entitled to insure as general owner of the property without disclosing his interest, unless the questions asked require such disclosure.² Insurance by the mortgagor and mortgagee severally may be effected without the policy of either impairing that of the other.³

SEC. 2121. Same—Same—Provision requiring insurance for benefit of.—It is not uncommon for the mortgagee to require that the mortgagor shall keep the buildings and other fixtures on the mortgaged premises insured for the benefit and protection of the mortgagee. Where the mortgage so provides, and the mortgagor takes out a policy in his own name in case of loss, the mortgagee will have a lien on the proceeds of the policy to the extent of his interest, although the policy of insurance is neither made payable to him as his interests may appear nor assigned to him.⁴ Notwithstanding the fact that the

¹ *Kernochan v. New York Ins. Co.*, 5 Duer 1; s.c. 17 N. Y. 428;

² *Excelsior F. Ins. Co. v. Royal Ins. Co.*, 7 Lans. (N. Y.) 138; s.c. 55 N. Y. 343; 14 Am. Rep. 271; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253; s.c. 55 Am. Dec. 546.

See: *McIntire v. Plaisted*, 68 Me. 363;

Clark v. Wilson, 103 Mass. 219, 221; s.c. 4 Am. Rep. 532;

King v. State Mut. F. Ins. Co., 61 Mass. (7 Cush.) 1; s.c. 54 Am. Dec. 683.

A mortgagee of real estate, who, independently of the mortgagor, insures his own interest, either by specific description or generally, is not bound, at law or equity, to assign his mortgage, or any part thereof, to the insurer, upon the payment of a loss.

Suffolk Ins. Co. v. Boyden, 91 Mass. (9 Allen) 123;

Foster v. Equitable Ins. Co., 68 Mass. (2 Gray) 216;

King v. State Mut. F. Ins. Co., 61 Mass. (7 Cush.) 1; s.c. 54 Am. Dec. 683.

³ *Norwich F. Ins. Co. v. Broomer*, 52 Ill. 442; s.c. 4 Am. Rep. 618;

Sussex Co. Mut. Ins. Co. v. Woodruff, 26 N. J. L. (2 Dutch.) 541.

⁴ *Jackson v. Massachusetts Mut. F. Ins. Co.*, 40 Mass. (23 Pick.) 418; s.c. 34 Am. Dec. 69.

See: *Ætna F. Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385; s.c. 30 Am. Dec. 90.

⁵ *Norwich F. Ins. Co. v. Broomer*, 52 Ill. 442; s.c. 4 Am. Rep. 618;

Thomas' Admr. v. Von Kapff's Exrs., 6 Gill & J. (Md.) 372;

Stearns v. Quincy Mut. Ins. Co., 124 Mass. 61; s.c. 26 Am. Rep. 647;

Hazard v. Draper, 89 Mass. (7 Allen) 267;

Providence Co. Bk. v. Benson, 41 Mass. (24 Pick.) 204;

Miller v. Aldrich, 31 Mich. 408;

Ames v. Richardson, 29 Minn. 330; s.c. 13 N. W. Rep. 137;

Ellis v. Kreutzinger, 27 Mo. 311;

Cromwell v. Brooklyn F. Ins. Co., 44 N. Y. 42, 47; s.c. 4 Am. Rep. 641;

Dunlop v. Avery, 23 Hun (N. Y.) 509;

Carter v. Rockett, 8 Paige Ch. (N. Y.) 437;

Nichols v. Baxter, 5 R. I. 491;

Plimpton v. Insurance Co., 43 Vt. 497;

contract of insurance is a personal contract between the insured and the insurer to indemnify the former against any loss he may sustain. This is upon the principle by which equity treats that as done which ought to have been done. That is to say, inasmuch as the insurance effected ought to have been made payable to the mortgagee, equity will give to the mortgagee the same benefit from it as if it had been made so payable.¹ An insurance in the name of the mortgagor, with loss, if any, payable to the mortgagee, is an insurance upon the property and not upon the interest of the mortgagee.²

SEC. 2122. **Registry and priority.**—In most if not all the states of the Union there have been passed registry acts, under which mortgages, like all other conveyances of land, or instruments affecting the title thereto, are required to be entered of record,³ and if they are not so recorded they will be void as to subsequent purchasers and incumbrancers in good faith,⁴ and judgment creditors,⁵ although

- Wheeler v. Factors & Traders' Ins. Co., 101 U. S. 439; bk. 25 L. ed. 1055;
Re Sands' Ale Brewing Co., 3 Biss. C. C. 175; s.c. 6 Am. L. Rev. 574; Nat. Bankr. Reg. 101; 4 Chicago L. News 137; Fed. Cas. No. 12307;
Vernon v. Smith, 5 Barn. & Ald. 1; s.c. 7 Eng. C. L. 43.
¹ *Ames v. Richardson*, 29 Minn. 330; s.c. 13 N. W. Rep. 137.
 Citing: *Thomas' Exrs. v. Von Kaff's Exrs.*, 6 Gill & J. (Md.) 372;
Miller v. Aldrich, 31 Mich. 408;
Cromwell v. Brooklyn F. Ins. Co., 44 N. Y. 42; s.c. 4 Am. Rep. 641;
Carter v. Rockett, 8 Paige Ch. (N. Y.) 437;
Nichols v. Barter, 5 R. I. 491;
Wheeler v. Factors & Traders' Ins. Co., 101 U. S. 439; bk. 25 L. ed. 1055;
Re Sands' Ale Brewing Co., 3 Biss. C. C. 175; s.c. 6 Am. L. Rev. 574; 6 Nat. Bankr. Reg. 101; 4 Chic. L. News 137; Fed. Cas. No. 12307.
² *Brunswick Sav. Inst. v. Commercial Union Ins. Co.*, 68 Me. 313; s.c. 28 Am. Rep. 56.
 Citing: *Franklin Sav. Inst. v. Central Mut. F. Ins. Co.*, 119 Mass. 240;
Turner v. Quincy Ins. Co., 109 Mass. 568;
Loring v. Manufacturers' Ins. Co., 74 Mass. (8 Gray) 28.
³ See: *Colham v. Bradford*, 50 Ga. 327; s.c. 15 Am. Rep. 692;
Watson v. Bondruant, 30 La. An. (pt. I.) 1. 2;
Bishop v. Schneider, 46 Mo. 472; s.c. 2 Am. Rep. 533;
Beekman v. Frost, 18 John. (N. Y.) 544; s.c. 9 Am. Dec. 546;
Wood's Appeal, 82 Pa. St. 116;
Curtis v. Lyman, 24 Vt. 338; s.c. 58 Am. Dec. 174;
Sawyer v. Adams, 8 Vt. 172; s.c. 30 Am. Dec. 459.
⁴ *De Vandal v. Malone*, 25 Ala. 272;
Bayley v. Bailey, 71 Mass. (5 Gray) 505;
King v. Portis, 77 N. C. 25;
Nice's Appeal, 54 Pa. St. 200;
Cavanaugh v. Peterson, 47 Tex. 195.
⁵ *Barker v. Bell*, 37 Ala. 354;
Davidson v. Cowan, 1 Dev. (N. C.) Eq. 470;
Friedly v. Hamilton, 17 Serg. & R. (Pa.) 70; s.c. 17 Am. Dec. 638.

valid between the parties without registration.¹ The rule in relation to registration applies to equitable mortgages² and to the mortgage of an equitable interest,³ as well as to the assignment of mortgages.⁴ The object of recording mortgages is to give notice to persons other than parties to the instrument of the transaction and of the respective rights of the parties.⁵ Registrations of mortgages are prospective and not retrospective in their operation,⁶ and give constructive notice to all subsequent purchasers and incumbrancers, who are bound, at their peril, to take notice of such mortgage,⁷ and that they

Wilson v. Shoenberger's Exrs., 34 Pa. St. 124 ;

Hendrickson's Appeal, 24 Pa. St. 363 ;

Moroney's Appeal, 21 Pa. St. 375 ;

Russell's Appeal, 15 Pa. St. 319, 322 ;

Hulings v. Guthie, 4 Pa. St. 123 ;

Hibberd v. Bower, 1 Grant Cas. (Pa.) 266 ;

Jaques v. Weeks, 7 Watts (Pa.) 261, 268 ;

Garber v. Henry, 6 Watts (Pa.) 59 ;

Barney v. Sutton, 2 Watts (Pa.) 40 ;

Miller v. Musselman, 6 Whart. (Pa.) 354, 358.

An unrecorded mortgage takes precedence over a judgment subsequently docketed, in some of the states.

See : *Thomas v. Vanlieu*, 28 Cal. 616 ;

Pixley v. Higgins, 15 Cal. 127 ;

Trust National Bank of Tama City v. Hayzlett, 40 Iowa 659 ;

Righter v. Forrester, 1 Bush (Ky.) 278 ;

Jackson ex d. Tuthill v. Dubois, 4 John. (N. Y.) 216 ;

Kelly v. Mills, 41 Miss. 267 ;

Greenleaf v. Edes, 2 Minn. 264 ;

Hampton v. Levy, 1 McC. (S. C.) Eq. 107.

¹ *Seaver v. Spink*, 65 Ill. 441 ;

Carleton v. Byington, 18 Iowa 482 ;

Kirkpatrick v. Caldwell, 32 Ind. 299 ;

Bergen v. Bennett, 1 Cai. Cas. (N. Y.) 17, 18 ; s.c. 2 Am. Dec. 281 ;

Jackson ex d. Walsh v. Colden,

4 Cow. (N. Y.) 266, 278 ;

Jackson ex d. Tuthill v. Dubois, 4 John. (N. Y.) 216 ;

Berry v. Mutual Ins. Co., 2 John. Ch. (N. Y.) 603, 611 ;

Sidle v. Maxwell, 4 Ohio St. 236 ;

McLaughlin v. Ilmsen, 85 Pa. St. 364.

² See : *Bank of Greensboro v. Clapp*, 76 N. C. 482 ;

Jarvis v. Dutcher, 16 Wis. 307.

³ *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381.

See : *Crane v. Turner*, 7 Hun (N. Y.) 375.

Compare : *Halstead v. Bank of Kentucky*, 4 J. J. Marsh. (Ky.) 554.

⁴ *Bowling v. Cook*, 39 Iowa 200 ;

Beeder v. Meeker, 47 N. Y. 307, affg s.c. 2 Lans. 470.

See : *Ante*, § 2113.

⁵ *Grant v. Bissett*, 1 Cai. Cas. (N. Y.) 112 ;

Berry v. Mutual Ins. Co., 2 John. Ch. (N. Y.) 603 ;

Sidle v. Maxwell, 4 Ohio St. 236 ;

Evans v. Jones, 1 Yeates (Pa.) 174 ;

Parker v. Wood, 1 U. S. (1 Dall.) 436 ; bk. 1 L. ed. 212.

⁶ *Ackerman v. Hensicker*, 85 N. Y. 43 ; s.c. 39 Am. Rep. 621 ;

Howard Ins. Co. v. Halsey, 8 N. Y. 271 ;

Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151 ;

King v. McVickar, 3 Sandf. Ch. (N. Y.) 192.

⁷ *Buchanan v. International Bank*, 78 Ill. 500 ;

Grant v. Bissett, 1 Cai. Cas. (N. Y.) 112 ;

Berry v. Mutual Ins. Co., 2 John. Ch. (N. Y.) 603.

take subject to all the equities existing between the mortgagor and the mortgagee.¹ It also operates as notice to all the world from the time it is deposited for record.² But the mortgage must be legally recordable,³ and the record thereof duly made according to law,⁴ in the order in which filed,⁵ and in the proper book ;⁶ and this is true even in those cases where the actual title has passed.⁷ And an unauthorized registration will not operate as constructive notice to a subsequent purchaser or incumbrancer.⁸ Thus the registration of an instrument not a proper subject for registry will not be notice to any one.⁹ The record of a mortgage is notice of the mortgage as recorded only, and if there is any error in the registration, the rights of the mortgagee are determined by the mortgage as registered and not by the provisions of the original instrument, because the registry laws do not

- ¹ McCabe v. Grey, 20 Cal. 509 ;
Heaton v. Pralter, 84 Ill. 330 ;
Coe v. Winters, 15 Iowa 481 ;
Maxwell v. Brooks, 54 Ind. 98 ;
Routh v. Spencer, 38 Ind. 393 ;
Ogden v. Walters, 12 Kan. 282 ;
Humphreys v. Newman, 51 Me.
40 ;
Johnson v. Stagg, 2 John. (N. Y.)
510 ;
Parkist v. Alexander, 1 John. Ch.
(N. Y.) 394 ;
Thomson v. Wilcox, 7 Lans. (N.
Y.) 376 ;
Mosgrove v. Bonser, 5 Oreg. 313 ;
s.c. 20 Am. Rep. 737 ;
Hickman v. Perrin, 6 Coldw.
(Tenn.) 135 ;
Pringle v. Dunn, 37 Wis. 449 ;
s.c. 19 Am. Rep. 772.
- ² Mutual L. Ins. Co. v. Dake, 87 N.
Y. 257 ;
Bloom v. Noggie, 4 Ohio St. 45 ;
Stansell v. Roberts, 13 Ohio 149 ;
Brooke's Appeal, 64 Pa. St. 127.
- ³ Pringle v. Dunn, 37 Wis. 449 ;
s.c. 19 Am. Rep. 782.
- ⁴ Frost v. Beekman, 1 John. Ch.
(N. Y.) 288.
See : New York Life Ins. Co. v.
White, 17 N. Y. 475 ;
Heister v. Fortner, 2 Binn. (Pa.)
40 ; s.c. 4 Am. Dec. 417 ;
Pringle v. Dunn, 37 Wis. 449 ;
s.c. 19 Am. Rep. 772.
- ⁵ Tefft v. Munson, 57 N. Y. 97 ;
Gellig v. Maass, 28 N. Y. 191,
214 ;
New York Life Ins. Co. v. White,
17 N. Y. 469 ;
Sawyer v. Adams, 8 Vt. 172.
- ⁶ Purdy v. Huntington, 42 N. Y.
334, 343.
See : Gellig v. Maass, 28 N. Y.
191, 213, 214 ;
New York Life Ins. & T. Co. v.
White, 17 N. Y. 469 ;
James v. Morey, 2 Cow. (N. Y.)
246, 316 ;
Dunham v. Dey, 15 John. (N. Y.)
555 ; s.c. 2 John. Ch. (N. Y.)
40, 188 ;
James v. Johnson, 6 John. Ch.
(N. Y.) 417, 432 ;
White v. Moore, 1 Paige Ch. (N.
Y.) 551 ;
Brown v. Dean, 3 Wend. (N. Y.)
208.
- ⁷ Frost v. Beekman, 1 John. Ch.
(N. Y.) 288.
See : Tefft v. Munson, 57 N. Y.
97, 102 ;
Heister v. Futner, 2 Binn. (Pa.)
40 ; s.c. 4 Am. Dec. 417.
- ⁸ Frost v. Beekman, 1 John. Ch.
(N. Y.) 288 ;
Troup v. Haight, Hopk. Ch. (N.
Y.) 239, 262.
- ⁹ Frost v. Beekman, 1 John. Ch.
(N. Y.) 288 ;
McNeil v. Magee, 5 Mas. C. C.
265 ; s.c. Fed. Cas. No. 8915.

require prospective purchasers or incumbrancers to inspect the original deed. Thus if the mortgage is for one thousand dollars, and it appears of record as for one hundred dollars, the equities of the mortgagee, as against subsequent *bona fide* purchasers or mortgagees, will be limited to one hundred dollars, and if the instrument, as it appears of record, is defectively executed, the mortgagee will acquire no rights under the mortgage, as against subsequent purchasers or mortgagees.¹ A different rule prevails in Alabama,² Illinois,³ Ohio,⁴ and Pennsylvania,⁵ owing to the peculiar phraseology of the statutes in these states.

SEC. 2123. **Same—Index to record.**—To be valid and give due notice to subsequent purchasers and incumbrancers, the record of a mortgage must conform in all respects to the essential requirements of the registry law. But in those states where the statute provides for the indexing of the record, such index forms no part of the record itself,⁶ and any errors appearing in the index will not prejudice the rights of the mortgagee or of his assignee under the mortgage.⁷ But on this subject the decisions are not in harmony, some of the courts holding that under statutes requiring the register of deeds to keep an index, and to enter therein every instrument received for record, and declaring that the instrument “shall be considered as recorded at the time so noted,” where the instrument so recorded in full appeared defective in some

¹ *Rushin v. Shields*, 11 Ga. 636 ;
Taylor v. Hotchkiss, 2 La. An. 917 ;

Dewitt v. Moulton, 17 Me. 418 ;
Johns v. Reardon, 5 Md. 81 ;

Farmers & M. Bank v. Bronson,
 14 Mich. 369 ;

Parrett v. Shaubhut, 5 Minn. 323 ;
Terrell v. Andrews Co., 44 Mo. 309 ;

Peck v. Mallams, 10 N. Y. 509 ;
Frost v. Beekman, 1 John. Ch. (N. Y.) 288 ; s.c. on error 18

John. (N. Y.) 544.

² *Mims v. Mims*, 35 Ala. 23.

³ *Merrick v. Wallace*, 19 Ill. 486.

⁴ *Tousley v. Tousley*, 5 Ohio St. 78.

⁵ *Wood's Appeal*, 82 Pa. St. 116 ;
Brooke's Appeal, 64 Pa. St. 127.

⁶ *Mutual Life Ins. Co. v. Dake*, 87 N. Y. 256, 264, aff'g 1 Abb. (N. Y.) N. C. 381.

⁷ *Chatham v. Bradford*, 50 Ga. 327 ;
 s.c. 15 Am. Rep. 692 ;

Bishop v. Schneider, 46 Mo. 472 ;
 s.c. 2 Am. Rep. 533 ;

Mutual Life Ins. Co. v. Dake, 1 Abb. (N. Y.) N. C. 381, aff'd in

87 N. Y. 257 ;
Dodge v. Potter, 18 Barb. (N. Y.) 193 ;

Green v. Garrington, 16 Ohio St. 549 ;

Schell v. Stein, 76 Pa. St. 398 ; s.c., 18 Am. Rep. 416.

material parts not supplied by the index, it was held that the latter did not operate as constructive notice.¹ In the case of *Prince v. Dunn*,² the Supreme Court of Wisconsin say that "the manifest intention of the statute seemed to be to make the index notice of all proper entries from its date, and also of the instrument itself until it was registered in full. The further consequence would seem necessarily to result from this view of the statute, that the registration of the instrument *in extenso* relates back to the registration in the index, and from thence there is constructive notice of the contents of the instrument."³ In this case the mortgage had no subscribing witnesses as required by the registry act, and the court said that under the statute constructive notice could not be presumed from the record, for the reason the principle that the registry is notice of the tenor and effect of the instrument recorded, only as it appears upon that record, fully applies.⁴

SEC. 2124. *Same*—Priority of registry.—The general rule is that where there are several equitable interests affecting the same estate, which are otherwise equal, they will attach upon it according to the periods at which they commenced, under the maxim of equity, as well as of law, "*qui prior est tempore potior est jure*."⁵ In

¹ *Pringle v. Dunn*, 37 Wis. 449; s.c. 19 Am. Rep. 772.

See: *Whalley v. Small*, 25 Iowa 184;

Gwynn v. Turner, 18 Iowa 1;

Shove v. Sarsen, 22 Wis. 142.

² 37 Wis. 449; s.c. 19 Am. Rep. 772.

³ See: *International Life Ins. Co. v. Scales*, 27 Wis. 640;

Hay v. Hill, 24 Wis. 235;

Shove v. Sarsen, 22 Wis. 142.

⁴ See: *Shepherd v. Burkhalter*, 13 Ga. 443;

Stevens v. Hampton, 46 Mo. 404;

Bishop v. Schneider, 46 Mo. 472; s.c. 2 Am. Rep. 533;

Terrell v. Andrews Co., 44 Mo. 309;

Frost v. Beekman, 1 John. Ch. (N. Y.) 288;

Brown v. Kirkman, 1 Ohio St.

116;

Shove v. Sarsen, 22 Wis. 142.

⁵ *Berry v. Mutual Ins. Co.*, 2 John. Ch. (N. Y.) 603.

See: *Watson v. Le Row*, 6 Barb. (N. Y.) 481, 485;

Grosvenor v. Allen, 9 Paige Ch. (N. Y.) 74, 76;

Skeel v. Spraker, 8 Paige Ch. (N. Y.) 182, 188;

Lynch v. Utica Ins. Co., 18 Wend. (N. Y.) 236, 253;

Downer v. South Royalton Bank, 39 Vt. 25, 30;

Boone v. Chiles, 35 U. S. (10 Pet.) 177; bk. 9 L. ed. 388;

Shirras v. Caig, 11 U. S. (7 Cr.) 34, 48; bk. 3 L. ed. 260, 265;

Rice v. Rice, 2 Drew. 73; s.c. 23 L. J. Ch. 289;

Phillips v. Phillips, 4 DeG. F. & J. 208, 215;

those cases where neither claim is accompanied by the legal estate, which is held by a third person, and neither possesses any special incident or feature, which would, irrespective of time, give it precedence over the others, priority of claim is determined by priority of time.¹ And this order of time will control even though a subsequent holder acquires his interest without notice of the prior equity;² that is, where two or more instruments are made simultaneously and so connected with each other that they may be regarded as one transaction, they will be held to take effect in such order of priority and succession as shall best carry out the intention and secure the rights of all the parties.³ But where mortgages are given simultaneously to different persons, as parts of the same transaction, each having notice of the other, priorities as between the mortgagees will depend upon the equities intrinsically belonging to them, without reference to the order of recording.⁴ Under the registry laws the mortgage first recorded is entitled to priority of right; and this is true even though the record be destroyed, and the mortgage recorded will

Cory v. Eyre, 1 DeG. J. & S. 149, 167;

Newton v. Newton, L. R. 6 Eq. 135, 140; s.c. L. R. 4 Ch. App. Cas. 143, 146;

2 Pom. Eq. Jur. 132.

¹ *Berry v. Mutual Ins. Co.*, 2 John. Ch. (N. Y.) 603.

See: *Fitzsimmons v. Ogden*, 11 U. S. (7 Cr.) 2; bk. 3 L. ed. 249;

Peto v. Hammond, 30 Beav. 495; s.c. 31 L. J. Ch. 354; 8 Jur. N. S. 550;

Beckett v. Cordley, 1 Bro. Ch. 353, 358;

Case v. James, 3 DeG. F. & J. 256;

Cory v. Eyre, 1 DeG. J. & S. 149;

Newton v. Newton, L. R. 6 Eq. 135;

Brace v. Duchess of Marlborough, 2 Pr. Wms. 491;

Loveridge v. Cooper, 3 Russ. 30;

Macreth v. Symmons, 15 Ves. 354; s.c. 10 Am. Dec. 85.

² *Berry v. Mutual Ins. Co.*, 2 John. Ch. (N. Y.) 603.

See: *Littlefield v. Nichols*, 42 Cal. 372;

Walker v. Matthews, 58 Ill. 196;

Hoadley v. Hadley, 48 Ind. 452;

Thorpe Bros. v. Durbon, 45 Iowa 192;

Stevens v. Watson, 4 Abb. (N. Y.) App. 302;

Cherry v. Munro, 2 Barb. Ch. (N. Y.) 618;

Grosvenor v. Allen, 9 Paige Ch. (N. Y.) 74, 76.

³ *Pomeroy v. Latting*, 81 Mass. (15 Gray) 435.

See: *Brooks v. Whitmore*, 139 Mass. 356, 358;

Cloyes v. Sweetser, 58 Mass. (4 Cush.) 403;

Merritt v. Harris, 102 Mass. 327.

⁴ *Jones v. Phelps*, 2 Barb. Ch. (N. Y.) 440;

Sparks v. State Bank, 7 Blackf. (Ind.) 469;

Pomeroy v. Latting, 81 Mass. (15 Gray) 435;

Rhoades v. Canfield, 8 Paige Ch. (N. Y.) 545.

not be affected by the destruction of the record where such registration can be established by other evidence.¹ Where such mortgage has been filed for record, it is notice to subsequent purchasers, notwithstanding the fact that the officer fails to index it as required,² or records it in the wrong book.³ Mortgages executed and recorded simultaneously become concurrent liens on the property ;⁴ and where mortgages are executed simultaneously, with the understanding that neither is to have precedence over the other, the fact of priority of record will not give priority of right.⁵ Where one of the mortgages is for purchase-money and the other is not, however, the rule does not apply, the purchase-money mortgage taking precedence ;⁶ yet if both are purchase-money mortgages the rule does apply, and they will be concurrent.⁷ Where the registry law requires a mortgage to be recorded, it will be valid though unrecorded as between the parties themselves and all persons claiming under them, without a valuable consideration and with or without notice of the mortgage.⁸ But sub-

¹ *Steele v. Boone*, 75 Ill. 457 ;

Alvis v. Morrison, 63 Ill. 181 ; s.c.

14 Am. Rep. 117 ;

Alston v. Alston, 4 S. C. 116.

See : *Russell v. Brown*, 41 Ill. 183 ;

Carpenter v. Mooers, 26 Ill. 162 ;

Woodbury v. Manlove, 14 Ill. 213 ;

Myers v. Buchanan, 46 Miss. 397.

^{*} *Bishop v. Schneider*, 46 Mo. 472 ; s.c. 2 Am. Rep. 533.

See : *Ante*, § 2123.

³ *Conklin v. Hinds*, 16 Miss. 457.

⁴ *Gausen v. Tomlinson*, 23 N. J. Eq. (8 C. E. Gr.) 405 ;

Stafford v. Van Rennsalaer, 9 Cow. (N. Y.) 316.

⁵ *Daggett v. Rankin*, 31 Cal. 327 ; *Howard v. Chase*, 104 Mass. 249 ;

Jones v. Phelps, 2 Barb. Ch. (N. Y.) 440.

See : *Tuite v. Stevens*, 98 Mass. 305 ;

Bingham v. Jordan, 83 Mass. (1 Allen) 373 ; s.c. 77 Am. Dec. 418 ;

Travis v. Bishop, 54 Mass. (13 Met.) 304 ;

Green v. Kemp, 13 Mass. 515 ; s.c.

7 Am. Dec. 169.

The mortgagors become tenants in common in such a case of the estate conveyed by the mortgages.

Howard v. Chase, 104 Mass. 249.

See : *Cochran v. Goodell*, 131 Mass. 464, 466 ;

Hubby v. Hubby, 59 Mass. (5 Cush.) 516 ; s.c. 52 Am. Dec. 742 ;

Burnett v. Pratt, 39 Mass. (22 Pick.) 556 ;

Westbrook v. Gleason, 79 N. Y. 23, 42 ;

Freeman v. Schroeder, 43 Barb. (N. Y.) 618 ; s.c. 29 How. (N. Y.) Pr. 263 ;

Wray v. Feddecke, 11 Jones & S. (N. Y. Super.) 335, 338.

⁶ *Clark v. Brown*, 85 Mass. (3 Allen) 509 ;

Turk v. Funk, 68 Mo. 18 ; s.c. 30 Am. Rep. 771.

⁷ *Pomeroy v. Latting*, 81 Mass. (15 Gray) 435 ;

Jones v. Phelps, 2 Barb. Ch. (N. Y.) 440.

⁸ See : *Wyatt v. Stewart*, 34 Ala. 716 ;

sequent grantees for value, without notice, whose conveyance has been recorded, will take precedence over the unrecorded mortgage, and a subsequent incumbrancer who has recorded his mortgage will take precedence over the one whose mortgage is not recorded, even though the debt secured by the latter was incurred before the execution of the second mortgage.¹ An unrecorded mortgage will also be postponed to the lien of a judgment, docketed subsequently to the execution of the mortgage.² But a different rule prevails in some of the states where the judgment creditor has notice of the prior unrecorded mortgage.³

SEC. 2125. **Payment—By mortgagor.**—The general rule is that the existence and continuance of the debt is essential to the life of the mortgage given to secure it; consequently whenever the debt is paid—either before or after maturity—released, discharged, or barred by the

Dearing v. Watkins, 16 Ala. 20 ;
Racouillet v. Sansevain, 32 Cal.
 375, 376 ;

Woodworth v. Guzman, 1 Cal.
 203 ;

Sparks v. State Bank, 7 Blackf.
 (Ind.) 469 ;

Bell v. Thomas, 2 Iowa 384 ;

Bibb v. Baker, 17 B. Mon. (Ky.)
 292 ;

Copeland v. Copeland, 28 Me.
 525 ;

Phillips v. Pearson, 27 Md. 242 ;

Harris v. Norton, 16 Barb. (N. Y.)
 264 ;

Leggett v. Bullock, 1 Busb. (N.
 C.) L. 283 ;

Nice's Appeal, 54 Pa. St. 200 ;

Boyce v. Shiver, 3 S. C. 515 ;

Dorow v. Kelly, 1 U. S. (1 Dall.)
 142 ; bk. 1 L. ed. 73,

Compare : *White v. Denman*, 1
 Ohio St. 110 ;

Henderson v. McGhee, 6 Heisk.
 (Tenn.) 55.

¹ *Ohio Life Ins. Co. v. Ledyard*, 8
 Ala. 866 ;

Buchanan v. International Bank,
 78 Ill. 500 ;

Hodgen v. Guttery, 58 Ill. 431 ;

Holbrook v. Dickenson, 56 Ill.
 497 ;

Routh v. Spencer, 38 Ind. 393 ;

Parrett v. Shaubhut, 5 Minn. 323 ;

Harrington v. Allen, 48 Miss. 493 ;

Pomet v. Scranton, 1 Miss. 406 ;

Tripe v. Marcy, 39 N. H. 439 ;

Taylor v. Thomas, 5 N. J. Eq. (1
 Halst.) 331 ;

Mathews v. Aiken, 1 N. Y. 595 ;

Grant v. Bissett, 1 Cal. Cas. (N.
 Y.) 112 ;

Tice v. Annin, 2 John. Ch. (N.
 Y.) 125 ;

Vanderkemp v. Shelton, 11 Paige
 Ch. (N. Y.) 28 ;

Burke v. Allen, 3 Yeates (Pa.)
 351.

² See : *Barker v. Bell*, 37 Ala. 354,
 374 ;

Moor v. Watson, 2 Root (Conn.)
 388 ;

Smith v. Jordan, 25 Ga. 687 ;

Reichert v. McClure, 23 Ill. 516 ;

Davidson v. Cowan, 1 Dev. (N.
 C.) Eq. 470 ;

Van Thorniley v. Peters, 26 Ohio
 St. 471 ;

Uhrer v. Hutchinson, 23 Pa. St.
 110 ;

Friedley v. Hamilton, 17 Serg. &
 R. (Pa.) 70 ; s.c. 17 Am. Dec.

638 ;

Semple v. Burd, 17 Serg. & R.
 (Pa.) 286, 290.

³ *Williams v. Tatnall*, 29 Ill. 553 ;

Wert's Appeal, 65 Pa. St. 306 ;

Britton's Appeal, 45 Pa. St. 172.

statute of limitations, this will discharge the mortgage lien without a formal release.¹ But payment of the note or bond and the mortgage securing the same after the legal transfer of the debt, and before its maturity, will not extinguish the note or prevent the enforcement of the mortgage.² It has been said that whether a mortgage will be discharged by payment by the mortgagor will depend upon the circumstances of the case and the intentions of the parties. Courts give that construction which best subserves the interests of the parties. A mortgage does not necessarily merge by being united in the same person with the fee.³

SEC. 2126. **Same—Same—Before maturity.**—The general rule is that where an estate is defeasible upon condition subsequent, as in the case of a mortgage, payment at or before the day saves the breach of the condition, defeats the estate at law, and restores the mortgagor to his old estates without release and without any process for redemption.⁴ Yet the mortgagee cannot be required to

¹ *Emory v. Keighan*, 94 Ill. 543 ;
Holman v. Bailey, 44 Mass. (3
Met.) 55 ;

Erskine v. Townshend, 2 Mass.
493, 495 ; s.c. 3 Am. Dec. 71 ;

Bergoyne v. Spurling, Cro. Car.
284 ;

2 Co. Litt. (19th ed.) 284a.

See : *Post*, §§ 2126, 2127.

² *Towner v. McClelland*, 110 Ill.
542 ;

*Goverin v. Humboldt Safe De-
posit & Trust Co.*, 113 Pa. St.
6 ; s.c. 4 Atl. Rep. 191.

³ *Pennock v. Eagles*, 102 Pa. St.
290.

See : *Harrison v. Hicks*, 1 Port.
(Ala.) 423 ; s.c. 27 Am. Dec.
638 ;

Crain v. McGoon, 86 Ill. 431 ;
s.c. 29 Am. Rep. 37 ;

Given v. Marr, 27 Me. 212 ;

Pool v. Hatheway, 22 Me. 85 ;

Doddy v. Pierce, 91 Mass. (9
Allen) 141 ;

Grover v. Flye, 87 Mass. (5 Allen)
543 ;

Joslyn v. Wyman, 87 Mass. (5
Allen) 62 ;

Merrill v. Chase, 85 Mass. (3 Allen)
339 ;

Richardson v. Cambridge, 84
Mass. (2 Allen) 118 ; s.c. 79
Am. Dec. 767 ;

Holman v. Bailey, 44 Mass. (3
Met.) 55 ;

Parks v. Hall, 19 Mass. (2 Pick.)
206 ;

Erskine v. Townshend, 2 Mass.
493 ; s.c. 3 Am. Dec. 71 ;

Champney v. Coope, 34 Barb. (N.
Y.) 539 ;

Cameron v. Irwin, 5 Hill (N. Y.)
272, 276 ;

Skeel v. Spraker, 8 Paige Ch. (N.
Y.) 182 ;

Anderson v. Neff, 11 Serg. & R.
(Pa.) 223 ;

Walker v. King, 44 Vt. 601 ;

Warren v. Warren, 30 Vt. 530 ;

*Daniels v. Flower Brook Mfg.
Co.*, 22 Vt. 274 ;

Burgoyne v. Spurling, Cro. Car.
283 ;

Watts v. Symes, 1 DeG. M. & G.
240 ;

Viscount v. Morris, 3 Hare 405.

⁴ *Barnes v. Boardman*, 149 Mass.
106, 114 ;

Holman v. Bailey, 44 Mass. (3
Met.) 55, 58 ;

Erskine v. Townsend, 2 Mass. 495 ;

receive payment of the mortgage debt, the acceptance must be voluntary.¹

SEC. 2127. **Same—Same—At maturity.**—The universal rule in this country is that the payment of a mortgage at maturity divests the mortgagee of his legal estate, and reinvests the mortgagor with his original estate without any release, reconveyance, or process instituted for redemption.²

SEC. 2128. **Same—Same—After condition broken.**—Under the system of mortgages prevailing in this country, payment of the mortgage debt after the law day, where no steps have been taken to foreclose and no new rights have sprung up, has the same effect as payment on or before the law day.³ The reason for this is the fact that the

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| Burgaine <i>v.</i> Spurling, Cro. Car. 284; | Erskine <i>v.</i> Townsend, 2 Mass. 493 ; s.c. 3 Am. Dec. 71 ; |
| 2 Co. Litt. (19th ed.) 212a; | Cameron <i>v.</i> Irwin, 5 Hill (N. Y.) 272, 276 ; |
| 1 Flowd. 291. | Anderson <i>v.</i> Neff, 11 Serg. & R. (Pa.) 223 ; |
| See : Gordon <i>v.</i> Ware, 115 Mass. 588, 590 ; | Burgoyne <i>v.</i> Spurling, Cro. Car. 283 ; |
| Merrill <i>v.</i> Chase, 85 Mass. (3 Allen) 339, 340 ; | Viscount <i>v.</i> Morris, 3 Hare 405. |
| Richardson <i>v.</i> Cambridge, 84 Mass. (2 Allen) 118, 121. | ³ Barnes <i>v.</i> Boardman, 149 Mass. 106, 114 ; |
| ¹ Abbe <i>v.</i> Goodwin, 7 Conn. 377 ; | Wall <i>v.</i> Mason, 102 Mass. 313. |
| Brown <i>v.</i> Cole, 14 Sim. 472. | See : Cross <i>v.</i> Robinson, 21 Conn. 379 ; |
| See : Hoyle <i>v.</i> Cazabat, 25 La. An. 438. | <i>Smith v. Vincent</i> , 15 Conn. 1, 13 ; s.c. 38 Am. Dec. 52 ; |
| ² Barnes <i>v.</i> Boardman, 149 Mass. 106, 114 ; | Routh <i>v.</i> Smith, 5 Conn. 133 ; |
| Holman <i>v.</i> Bailey, 44 Mass. (3 Met.) 55. | Phelps <i>v.</i> Sage, 2 Day (Conn.) 151 ; |
| See : Harrison <i>v.</i> Hicks, 1 Port. (Ala.) 423 ; s.c. 27 Am. Dec. 638 ; | Stewart <i>v.</i> Crosby, 50 Me. 130 ; |
| Crain <i>v.</i> McGoon, 86 Ill. 431 ; s.c. 29 Am. Rep. 317 ; | Smith <i>v.</i> Kelley, 27 Me. 237 ; s.c. 46 Am. Dec. 595 ; |
| Given <i>v.</i> Marr, 27 Me. 212 ; | Currier <i>v.</i> Gale, 91 Mass. (9 Allen) 522 ; |
| Doddy <i>v.</i> Pierce, 91 Mass. (9 Allen) 141 ; | Crosby <i>v.</i> Leavitt, 86 Mass. (4 Allen) 410 ; |
| Grover <i>v.</i> Flye, 87 Mass. (5 Allen) 543 ; | Warren <i>v.</i> Jennison, 72 Mass. (6 Gray) 559 ; |
| Joslyn <i>v.</i> Wyman, 87 Mass. (5 Allen) 62 ; | Burke <i>v.</i> Miller, 70 Mass. (4 Gray) 114 ; |
| Merrill <i>v.</i> Chase, 85 Mass. (3 Allen) 339 ; | Howard <i>v.</i> Howard, 44 Mass. (3 Met.) 548 ; |
| Richardson <i>v.</i> Cambridge, 84 Mass. (2 Allen) 118 ; s.c. 79 Am. Dec. 767 ; | Holman <i>v.</i> Bailey, 44 Mass. (3 Met.) 55 ; |
| Parks <i>v.</i> Hall, 19 Mass. (2 Pick.) 206 ; | Howe <i>v.</i> Lewis, 31 Mass. (14 Pick.) 329 ; |
| | Wade <i>v.</i> Howard, 28 Mass. (11 Pick.) 289 ; |

mortgage is not an independent security that survives the discharge of the debt for the purpose of assignment ; nor is there any presumption of an intention on part of plaintiff to foreclose the mortgage from the mode of payment.¹

SEC. 2129. **Same—Same—After decree of foreclosure.**—Where an action is brought to foreclose a mortgage upon real property, and a portion is due as principal or interest, and a portion is to become due, and judgment is rendered directing a sale and payment into court, payment of the amount due and the costs of the action, together with the expenses of the proceedings to sell, if any, will have the effect of staying the sale.²

SEC. 2130. **Same—Same—Directing application.**—In order to work an extinguishment of the debt and a discharge of the mortgage there must be an actual payment. Thus where the mortgagor performed work for mortgagee under agreement that wages should be applied to extinguish the mortgage debt, it was held that an actual application was necessary to work a discharge of the mortgage lien.³

Maynard v. Hunt, 23 Mass. (5 Pick.) 240 ;
Parsons v. Welles, 17 Mass. 419 ;
Ante, § 2125.

¹ Wall v. Mason, 102 Mass. 313, 315 ;
Warren v. Jennison, 72 Mass. (6 Gray) 559 .

See : *Johnson v. Sherman*, 15 Cal. 287 ; s.c. 76 Am. Dec. 481 ;
Howard v. Gresham, 27 Ga. 347 ;
Ledyard v. Chapin, 6 Ind. 320 ;
Breckenridge v. Ormsly, 1 J. J. Marsh. (Ky.) 236 ; s.c. 19 Am. Dec. 71 ;

Schinkel v. Hanewinkel, 19 La. An. 260 ;

Le Beau v. Glaze, 8 La. An. 474 ;
Terrio v. Guidry, 5 La. An. 589 ;
Paxton v. Paul, 3 Har. & M. (Md.) 399 ;

Morgan v. Davis, 2 Har. & M. (Md.) 7 ;

Caruthers v. Humphreys, 12 Mich. 270 ;

Griffin v. Lovell, 42 Miss. 402 ;

McNair v. Picotte, 33 Mo. 57 ;

Leighton v. Shapely, 8 N. H. 359 ;
Shields v. Lozeau, 34 N. J. L. (5 Vr.) 496 ; s.c. 3 Am. Rep. 256 ;

Osborne v. Tunis, 25 N. J. L. (1 Dutch.) 633 ;

Kortright v. Cady, 21 N. Y. 343 ;
s.c. 78 Am. Dec. 145 ;

Stoddard v. Hart, 23 N. Y. 556 ;
Jackson v. Stackhouse, 1 Cow. (N. Y.) 122 ; s.c. 13 Am. Dec. 544 ;

Arnot v. Post, 6 Hill (N. Y.) 65 ;
Cameron v. Irwin, 5 Hill (N. Y.) 272 ;

Runyan v. Mersereau, 11 John. (N. Y.) 534 ; s.c. 6 Am. Dec. 393 ;

Rogers v. De Forrest, 7 Paige Ch. (N. Y.) 272 ;

Farmers' F. & L. Co. v. Edwards, 26 Wend. (N. Y.) 541 ;

Perkins v. Dibble, 10 Ohio 433 ;
s.c. 36 Am. Dec. 97.

² *Weltsie on Mortg. Forecl.* (2d ed.) 62, § 498.

³ *Doody v. Pierce*, 91 Mass. 141.

SEC. 2131. **Same—By third party—Effect.**—Where payment of a mortgage debt is made by a stranger to the instrument, the mortgage will be discharged and extinguished, unless an assignment has been made to him of the interests of the mortgagee, although it may have been made without authority from the mortgagor, if it was subsequently ratified by him.¹ And a mere volunteer who has paid the mortgage debt will not be permitted to set up a claim to have an equitable assignment, even though he has paid the same at the mortgagor's request.² But where payment is made by one who is liable on the note secured, either as surety or as indorser, or who has an interest in the mortgaged premises, the payment does not necessarily operate as a discharge, where it is to the interest of such party that the mortgage should be kept alive.³ And where the mortgage is paid by the purchaser of the equity of redemption, in equity it will not operate as an extinguishment of the mortgage as against the mortgagor, his sureties, and junior incumbrancers, even though the mortgage is formally satisfied of record and canceled, except in those cases where he is primarily liable on his assumption of an agreement to pay the mortgage debt, as where such debt is made a part of the consideration of the land on transfer.⁴

Toll v. Hiller, 11 Paige Ch. (N. Y.) 228.

See: *Wiltsie Mortg. Forec.* (2d ed.), § 498.

¹ *Heermans v. Clarkson*, 64 N. Y. 171;

Commercial Bank of Buffalo v. Warren, 15 N. Y. 577;

Hayes v. Kedzie, 11 Hun (N. Y.) 577, 581.

² *Downer v. Wilson*, 33 Vt. 1. . See: *Guy v. De Uprey*, 16 Cal.

195; s.c. 76 Am. Dec. 518.

³ *Russell v. Mixer*, 42 Cal. 475; *Leavitt v. Pratt*, 53 Me. 147;

Wadsworth v. Williams, 100 Mass. 126;

Butler v. Seward, 92 Mass. (10 Allen) 466;

Wade v. Beldmeir, 40 Mo. 486;

Stantons v. Thompson, 49 N. H. 272;

Hinds v. Ballou, 44 N. H. 619;

Dudley v. Bergen, 23 N. J. Eq. (8 C. E. Gr.) 397;

Skillman v. Temple, 1 N. J. Eq. (1 Saxt.) 232;

Kellogg v. Ames, 41 N. Y. 259, rev'g 41 Barb. (N. Y.) 218;

Mickles v. Townsend, 18 N. Y. 575;

Champlin v. Laytin, 18 Wend. (N. Y.) 407; s.c. 31 Am. Dec. 382;

Abbott v. Kesson, 72 Pa. St. 183, 185;

Walker v. King, 44 Vt. 601.

⁴ *Mobile Branch Bank v. Hunt*, 8 Ala. 876;

Shinn v. Fredericks, 56 Ill. 439, 443;

Lilly v. Palmer, 51 Ill. 331,

Lyon v. McIlvaine, 24 Iowa 12;

Pool v. Hathaway, 22 Me. 85;

Hatch v. Kimball, 16 Me. 146;

Pitts v. Aldrich, 93 Mass. (11 Allen) 39;

SEC. 2132. Tender of payment—On law day.—A tender of the amount due on a mortgage on the law day and a refusal thereof, like a payment at such time, will discharge the mortgage lien.¹

SEC. 2133. Same—After default.—The general rule at common law is that a tender of the amount due on a mortgage after default will not have the effect to discharge the mortgage,² but will simply relieve the debtor from subsequently accruing interest and costs.³ But in those states where the lien theory of mortgage prevails, it has the effect of discharging the mortgage.⁴

SEC. 2134. Same—After foreclosure commenced.—Where an action is commenced to foreclose a mortgage upon which a portion only of the principal and interest is due, and another portion is to become due, a tender of payment of the sum due, together with the mortgagee's costs in the action, with the expenses of the proceeding to sell, if any, will have the effect of staying the proceedings.⁵

- Savage v. Hall*, 78 Mass. (12 Gray) 363 ;
Mickels v. Townsend, 18 N. Y. 575 ;
Skeel v. Spraker, 8 Paige Ch. (N. Y.) 182 ;
Millspaugh v. McBride, 7 Paige Ch. (N. Y.) 509 ; s.c. 34 Am. Dec. 360 ;
Fitch v. Cotheal, 2 Sandf. Ch. (N. Y.) 29 ;
Abbott v. Kesson, 72 Pa. St. 183 ;
Frey v. Vanderhoof, 15 Wis. 397.
¹ *Schearff v. Dodge*, 33 Ark. 340 ;
Blanchard v. Kenton, 4 Bibb (Ky.) 451 ;
Grover v. Flye, 87 Mass. (5 Allen) 543 ;
Merrill v. Chase, 85 Mass. (3 Allen) 339 ;
Richardson v. Cambridge, 84 Mass. (2 Allen) 118 ; s.c. 79 Am. Dec. 767 ;
Darling v. Chapman, 14 Mass 101 ;
Hill v. Robertson, 24 Miss. 368 ;
Willard v. Harvey, 5 N. H. 252 ;
Swett v. Horn, 1 N. H. 332 ;
Saields v. Lozeau, 34 N. J. L. (5 Vr.) 496 ; s.c. 3 Am. Rep. 256.
² See : *Post*, § 2135.
³ See : *Potts v. Plaisted*, 30 Mich. 149 ;
Van Huse v. Kanouse, 13 Mich. 303 ;
Caruthers v. Humphrey, 12 Mich. 270 ;
Moynahan v. Moore, 9 Mich. 9 ; s.c. 77 Am. Dec. 468 ;
Robinson v. Leavitt, 7 N. H. 73 ;
Bailey v. Metcalf, 6 N. H. 156 ;
Kortright v. Cady, 21 N. Y. 343 ; s.c. 78 Am. Dec. 145 ;
Houbie v. Volkening, 49 How. (N. Y.) Pr. 169 ;
Jackson v. Crafts, 18 John. (N. Y.) 110 ;
Hartley v. Tatham, 2 Abb. Ct. App. Dec. (N. Y.) 333, modifying 1 Robt. (N. Y.) 246 ; s.c. 26 How. (N. Y.) Pr. 158 ;
Farmers' F. I. & L. Co. v. Edwards, 26 Wend. (N. Y.) 541 ;
Edwards v. Farmers' Ins. & L. Co., 21 Wend. (N. Y.) 467.
⁴ See : *Post*, § 2135.
⁵ *Malcolm v. Allen*, 49 N. Y. 448 ; s.c. 5 Alb. L. J. 334.

SEC. 2135. Release and discharge—Form and effect.—The general rule in this country is that whatever extinguishes the debt releases the mortgage also.¹ Thus a payment, either before or after breach, discharges the mortgage deed and releases the premises.² Thus Justice STORY says that where the debt has been paid, there is no reason in law or justice why the mortgagee should have any judgment whatever in his favor, and declares that the plea of payment or satisfaction after the law day is good as a bar to any suit by the mortgagee, after condition broken, for the possession of the estate.³ In those states where the lien theory of mortgages prevails a payment of the mortgage debt either before, on, or after the law day has the effect of discharging the mortgaged premises from the lien of the mortgage;⁴ but in those states where the common-law doctrine of mortgages prevails, payment made after default does not release the premises from the lien of the mortgage.⁵ In those states the mortgagee will still hold the legal title in trust for the mortgagor and those claiming under him.⁶

SEC. 2136. Same—What acts amount to.—Any act on the part of the mortgagor or his assignee which amounts to a payment of the mortgage debt will work an extinguishment of the mortgage; but a mere change in the form of the obligation will not have that effect, unless such change is made with the intention that the new instrument of indebtedness shall be accepted as a payment of the debt. Whether or not such change amounts to a release of the mortgage depends upon the facts in each particular case, and presents a question of fact to be

¹ Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236; s.c. 19 Am. Dec. 71; Smith v. Durell, 16 N. H. 344; s.c. 41 Am. Dec. 732; Jackson ex d. Rosevelt v. Stackhouse, 1 Cow. (N. Y.) 122; s.c. 13 Am. Dec. 514; Stewart v. Service, 21 Wend. 37.

² Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236; Stewart v. Crosby, 50 Me. 134; Voe v. Handy, 2 Me. (2 Greenl.)

322; s.c. 11 Am. Dec. 101; Jackson ex d. Randall v. Davis, 18 John. (N. Y.) 7; Gray v. Jenks, 3 Mas. C. C. 520, 531; s.c. Fed. Cas. No. 5720. ³ Gray v. Jenks, 3 Mas. C. C. 520, 531; s.c. Fed. Cas. No. 5720. See Vose v. Handy, 2 Me. 322.

⁴ See: *Ante*, § 2130, *et seq.*

⁵ See: *Ante*, § 2133.

⁶ Robinson v. Cross, 22 Conn. 171; Den v. Dimon, 10 N. J. L. (5 Halst.) 156.

determined by a jury.¹ The mere extension of the time in which payment shall be made of a note secured by mortgage to which a married woman is not a party, does not discharge her inchoate right in her husband's property from a mortgage thereon, in which she joined to secure the note.² An equitable release of the mortgage will exist whenever there is an agreement to discharge the mortgage, based upon a sufficient consideration;³ and also where the purposes of the mortgage have been accomplished, even though in a method different from that which was contemplated.⁴ A release may be a limited one, affecting only a particular person,⁵ a particular debt,⁶ or a particular portion of the premises;⁷ but where a mortgagee has released portions of the mortgaged premises which have been successively alienated, he cannot, without first deducting the value of the portions released, charge the other portions of the premises with the payment of the mortgage debt.⁸ But where such release does not prejudicially affect the

¹ See: *Barker v. Bell*, 37 Ala. 354, 359;

Dillon v. Byrare, 5 Cal. 455;

Pond v. Clarke, 14 Conn. 334;

Boone v. Clark, 129 Ill. 466; s.c.

21 N. E. Rep. 850; 5 L. R. A. 276;

Vogle v. Ripper, 34 Ill. 100, 106; s.c. 85 Am. Dec. 298;

Applegate v. Mason, 13 Ind. 75;

Parkhurst v. Cummings, 56 Me. 155, 159;

Hadlock v. Bulfinsh, 31 Me. 246;

Markell v. Erchelberger, 12 Md. 78;

Baxter v. McIntire, 79 Mass. (13 Gray) 168;

Grafton Bank v. Foster, 77 Mass. (11 Gray) 265;

Fowler v. Bush, 38 Mass. (21 Pick.) 230;

Davis v. Maynard, 9 Mass. 242;

Boxheimer v. Gunn, 24 Mich. 372, 376;

Elliot v. Sleeper, 2 N. H. 525;

Brinkerhoff v. Lansing, 4 John. Ch. (N. Y.) 65; s.c. 8 Am. Dec. 538;

Rogers v. Traders' Ins. Co., 6 Paige Ch. (N. Y.) 583;

Jordan v. Smith, 30 Iowa 500;

Gault v. McGrath, 32 Pa. St. 392;

Euston v. Friday, 2 Rich. (S. C.) Eq. 427;

Bank of South Carolina v. Rose, 1 Strobb. (S. C.) Eq. 257;

Cleveland v. Martin, 2 Head (Tenn.) 128;

Mitchell v. Clark, 35 Vt. 104;

Dunshee v. Parmelee, 19 Vt. 172;

Dana v. Binney, 7 Vt. 493;

Williams v. Starr, 5 Wis. 534, 548.

² *Crawford v. Hazelrigg*, 117 Ind. 63; s.c. 18 N. E. Rep. 603; 2 L. R. A. 139.

³ *Griswold v. Griswold*, 7 Lans. (N. Y.) 72.

⁴ *Sergeant v. Ruble*, 33 Minn. 354; s.c. 23 N. W. Rep. 535;

Archambeau v. Green, 21 Minn. 520.

⁵ *Flower v. Elwood*, 66 Ill. 436.

⁶ *Mabie v. Hatingter*, 48 Mich. 431; s.c. 12 N. W. Rep. 198.

⁷ *Boone v. Clark*, 129 Ill. 466; s.c. 21 N. E. Rep. 850; 5 L. R. A. 276;

Coutant v. Servoss, 3 Barb. (N. Y.) 128.

⁸ *Boone v. Clark*, 129 Ill. 466; s.c. 21 N. E. Rep. 850; 5 L. R. A. 276.

rights of innocent third persons, it will be valid and binding upon the parties.¹

SEC. 2137. **Same—Effect of.**—The discharge of a mortgage by the payment of the debt extinguishes the lien, and it cannot be kept alive even though it be assigned to the mortgagor, because such payment in law works a merger of the legal and equitable interests in the property;² and the same is true where the mortgage debt is paid by the mortgagor,³ and an assignment is taken to a third person for his benefit. But where the mortgage has been delivered up and canceled through fraud or mistake, this will not have the effect of discharging the lien on the mortgage, and it will be enforceable in equity against the mortgagor and all subsequent purchasers or incumbrancers with notice of the facts;⁴ but to have the effect of keeping the mortgage alive the mistake must be one of fact and not one of law, because a mistake of law will not be relieved against in equity, unless made by a person of tender age or weak mind, or it be the result of undue influence.⁵

¹ *Wolf v. Smith*, 36 Iowa 454;
Cogswell v. Stout, 32 N. J. Eq. (5 Stew.) 240;

Paxton v. Harrier, 11 Pa. St. 312;
Kelley v. Whitney, 45 Wis. 110.

² *Swift v. Kromer*, 13 Cal. 526;
Peckham v. Haddock, 36 Ill. 38;
Fewell v. Kessler, 30 Ind. 195;
Ledyard v. Chapin, 6 Ind. 320;
Carlton v. Jackson, 121 Mass.

592;
Wadsworth v. Williams, 100 Mass. 126;

Strong v. Converse, 90 Mass. (8 Allen) 557, 559;

Brown v. Lapham, 57 Mass. (3 Cush.) 551, 554;

Wade v. Beldmeir, 40 Mo. 486;
Bowman v. Manter, 33 N. H. 530;

s.c. 66 Am. Dec. 743;
Large v. Van Downen, 14 N. J.

Eq. (1 McC.) 208;
Robinson v. Urquhart, 12 N. J.

Eq. (1 Beas.) 515;
Champney v. Coope, 32 N. Y.

543, rev'g 34 Barb. (N. Y.) 539;

Mead v. York, 6 N. Y. 499; s.c. 57 Am. Dec. 467;

McGiven v. Wheelock, 7 Barb. (N. Y.) 22;

Thomas' Appeal, 30 Pa. St. 378;
Gardner v. James, 7 R. I. 396;

Perkins v. Sterne, 23 Texas 561;
s.c. 76 Am. Dec. 72;

Pelton v. Knapp, 21 Wis. 63.

³ See: *Ante*, § 2125.

⁴ *De Yampert v. Brown*, 28 Ark. 166;

Stanley v. Valentine, 79 Ill. 544;

Mallett v. Page, 8 Ind. 364;

Vannice v. Bergen, 16 Iowa 555;

Robinson v. Sampson, 23 Me. 388;

Joslyn v. Wyman, 87 Mass. (5 Allen) 62, 63;

Grimes v. Kimball, 85 Mass. (3 Allen) 518, 578;

Howe v. Wilder, 77 Mass. (11 Gray) 267;

Lawrence v. Stratton, 60 Mass. (6 Cush.) 163.

⁵ *Smith v. Smith*, 15 N. H. 55;

Hampton v. Nicholson, 23 N. J. Eq. (8 C. E. Gr.) 423;

Bentley v. Whittlemore, 18 N. J. Eq. (3 C. E. Gr.) 366;

Peters v. Florence, 38 Pa. St. 194.

SECTION V.—REMEDIES INCIDENT.

- SEC. 2138. Subrogating mortgagees.
- SEC. 2139. Tacking mortgages.
- SEC. 2140. Enforcing mortgages—Foreclosure,
- SEC. 2141. Same—Same—Nature of foreclosure.
- SEC. 2142. Same—Same—Methods of foreclosure.
- SEC. 2143. Same—Same—Foreclosure by entry and possession.
- SEC. 2144. Same—Same—Strict foreclosure.
- SEC. 2145. Same—Same—Statutory foreclosure.
- SEC. 2146. Same—Same—By action in equity.
- SEC. 2147. Same—Same—Parties to foreclosure—Parties plaintiff.
- SEC. 2148. Same—Same—Same—Parties defendant.
- SEC. 2149. Same—Same—Decree of foreclosure.
- SEC. 2150. Same—Same—Same—Effect upon the land.
- SEC. 2151. Same—Same—Same—Effect upon the debt.
- SEC. 2152. Same—Same—Sale of mortgaged premises—Under decree.
- SEC. 2153. Same—Same—Same—Under power.
- SEC. 2154. Same—Same—Same—Same—Extinguishment of power.
- SEC. 2155. Same—Same—Rights of purchaser.
- SEC. 2156. Same—Same—Same—Purchase by mortgagee.
- SEC. 2157. Same—Same—Application of proceeds of sale.
- SEC. 2158. Same—Same—Judgment for deficiency.
- SEC. 2159. Redemption—Definition and process.
- SEC. 2160. Same—Who may redeem.
- SEC. 2161. Same—When redemption may be made.
- SEC. 2162. Same—When right barred.
- SEC. 2163. Same—Same—How right of barred or lost.
- SEC. 2164. Same—Contribution on redemption.
- SEC. 2165. Same—Same—Between sureties of the mortgagor.
- SEC. 2166. Same—Same—Between mortgagor and his grantees.
- SEC. 2167. Same—Same—Between mortgagor's grantees.
- SEC. 2168. Same—Same—Between mortgagor's personal property and pledged estate.
- SEC. 2169. Same—Same—Between mortgagor's devisees, heirs, and widow.
- SEC. 2170. Same—Same—Agreements affecting rights of.
- SEC. 2171. Same—Accounting by mortgagee.
- SEC. 2172. Waste—Action for damages.
- SEC. 2173. Same—Injunction against.

SECTION 2138. Subrogating mortgagees.—The general rule is that where two or more persons are interested in property subject to a mortgage, such as a junior mortgagee,¹

¹ *Cowley v. Shelby*, 71 Ala. 122 ;
Davis v. Cook, 65 Ala. 617 ;

Wiley v. Ewing, 47 Ala. 418 ;
Carpentier v. Brenham, 40 Cal. 221 ;

sureties,¹ co-sureties or co-guarantors,² co-creditors,³ or

Ketchum v. Crippen, 37 Cal. 223;
Ebert v. Gerding, 116 Ill. 219; s.c.

5 N. E. Rep. 591;

Chicago R. Land Co. v. Peck,
112 Ill. 408, 431;

Tyrrell v. Ward, 102 Ill. 29;

Worcester Nat. Bank v. Cheeny,
87 Ill. 602;

Gardner v. Emerson, 40 Ill. 296;

Flacks v. Kelly, 30 Ill. 471;

Smith v. Dinsmore, 16 Ill. App.
115;

Lowrey v. Byers, 80 Ind. 443;

Rardin v. Walpole, 38 Ind. 146;

Benton v. Shreeve, 4 Ind. 66;

Shimer v. Hammond, 51 Iowa
487; s.c. 1 N. W. Rep. 656;

Gilbert v. Gilbert, 39 Iowa 657;

Marshall v. Ruddick, 28 Iowa 487;

State v. Brown, 73 Md. 484; s.c.
21 Atl. Rep. 374;

Cobb v. Dyer, 69 Me. 494;

Rappanier v. Bannon (Md.), 8
Atl. Rep. 555; s.c. 7 Cent. Rep.
420;

Davis v. Winn, 84 Mass. (2 Allen)
111;

Green v. Tanner, 49 Mass. (8 Met.)
411;

Kitchell v. Mudgett, 37 Mich. 81;

Sager v. Tupper, 35 Mich. 134;

Baker v. Pierson, 6 Mich. 522;

Reyburn v. Mitchell, 106 Mo. 365;
s.c. 16 S. W. Rep. 592;

Moore v. Beason, 44 N. H. 215;

Weld v. Sabin, 20 N. H. 533; s.c.
51 Am. Dec. 240;

*Homeopathic Mut. Life Ins. Co.
v. Marshall*, 32 N. J. Eq. (5
Stew.) 103;

Bigelow v. Cassedy, 26 N. J. Eq.
(2 Dutch.) 557;

Hamilton v. Dobbs, 19 N. J. Eq.
(4 C. E. Gr.) 227;

Clark v. Mackin, 95 N. Y. 346;

Twombly v. Cassidy, 82 N. Y. 155;

Ellsworth v. Lockwood, 42 N. Y.
89, 96;

Pardee v. Van Anken, 3 Barb. (N.
Y.) 535; s.c. 6 N. Y. Leg. Obs.
378;

Sheldon v. Hoffnagle, 51 Hun (N.
Y.) 478; s.c. 4 N. Y. Supp. 287;

Dings v. Parshall, 7 Hun (N. Y.)
522;

Burnet v. Denniston, 5 John. Ch.
(N. Y.) 35;

Silver Lake Bank v. North, 4

John. Ch. (N. Y.) 370;

Milligan's Appeal, 104 Pa. St. 503;

Hogg v. Longstreth, 97 Pa. St.
255, 259;

Ward v. Seymour, 51 Vt. 320;

Wood v. Hubbard, 50 Vt. 82;

Wheeler v. Willard, 44 Vt. 640;

Downer v. Fox, 20 Vt. 388;

Bank of U. S. v. Peters, 38 U. S.
(13 Pet.) 123; bk. 10 L. ed. 89;

Russell v. Howard, 2 McL. C.
C. 489; s.c. Fed. Cas. No.
12156;

Searles v. Jacksonville R. Co., 2
Woods C. C. 621; s.c. Fed. Cas.
No. 12586;

Stonehewer v. Thompson, 3 Pr.
Wms. 331.

¹ *Cullum v. Branch Bank at Mobile*,
23 Ala. 797;

Root v. Bancroft, 51 Mass. (10
Met.) 44, 48;

Ellsworth v. Lockwood, 42 N. Y.
89, 98;

Hayes v. Ward, 4 John. Ch. (N.
Y.) 123; s.c. 8 Am. Dec. 554;

Burton v. Wheeler, 7 Ired. (N.
C.) Eq. 217;

Muller v. Wadlington, 5 S. C. 342;

Drew v. Lockett, 32 Beav. 499.

Subrogating surety—New York doc-
trine—*Ellsworth v. Lockwood*.—

In *Ellsworth v. Lockwood*, 42

N. Y. 89, 98, the New York

Court of Appeals say that as the

result of the reported cases, the

law may be said to be that the

surety on payment of the debt

is entitled, not only to an as-
signment or effectual transfer

of all such additional collaterals

taken and held by the creditor,
but also to an assignment or

effectual transfer of the debt
and of the bonds or other in-
strument evidencing the debt.

Citing: *Mathews v. Aiken*, 1 N.
Y. 595;

Hayes v. Ward, 4 John. Ch. (N.
Y.) 123; s.c. 8 Am. Dec. 554;

King v. Baldwin, 2 John. Ch. (N.
Y.) 554;

Speiglemeyer v. Crawford, 6
Paige Ch. (N. Y.) 254, 257;

New York State Bank v. Fletcher,
5 Wend. (N. Y.) 85.

² *Stamford Bank v. Benedict*, 15
Conn. 437;

89, 90;

Brainard v. Cooper, 10 N. Y. 356.

³ See: *Flachs v. Kelly*, 30 Ill. 462;
Ellsworth v. Lockwood, 42 N. Y.

other incumbrancers,¹ and one of them pays all the prior incumbrances, for the protection of his own interest in the encumbered estate, he will be entitled to succeed to the lien of the mortgagee against the others, in equity, to the extent of his claim against them for indemnity, by way of subrogation,² and may compel an assignment of the securities for his protection.³ This doctrine arises or proceeds on the theory that the mortgage debt is paid,⁴ and is founded upon the equitable principle that the mortgage having been originally intended as a security for the payment of the debt by the mortgagor, any one interested in the property paying it for him and in his stead has a right to the security originally given.⁵ Thus

Muir v. Berkshire, 52 Ind. 149 ;

Dye v. Mann, 10 Mich. 291 ;

Low v. Smart, 5 N. H. 353 ;

Cheesebrough v. Millard, 1 John. Ch. (N. Y.) 409 ; s.c. 7 Am. Dec. 494.

¹ *Kalsheuer v. Upton*, 6 Dak. 449 ; s.c. 43 N. W. Rep. 816 ;

Magill v. De Witt Co. County Sav. Bank, 126 Ill. 244 ; s.c. 19 N. E. Rep. 295 ;

Lamb v. Richards, 43 Ill. 312 ;

Gerdine v. Menage, 41 Minn. 417 ; s.c. 43 N. W. Rep. 91 ;

Reyburn v. Mitchell, 106 Mo. 365 ; s.c. 16 S. W. Rep. 592 ;

Hackensack Sav. Bank v. Terhune Mfg. Co., 45 N. J. Eq. 610 ; s.c. 18 Atl. Rep. 155 ;

Shinn v. Budd, 14 N. J. Eq. (1 McC.) 237 ;

Brainard v. Cooper, 10 N. Y. 356 ; *Bank of U. S. v. Peters*, 38 U. S. (13 Pet.) 123 ; bk. 10 L. ed. 89.

² *Holland v. Citizens' Sav. Bank*, 16 R. I. 734 ; s.c. 19 Atl. Rep. 654 ; 8 L. R. A. 553.

³ *Renard v. Brown*, 7 Neb. 449 ;

Miller v. Finn, 1 Neb. 254, 301 ;

Twombly v. Cassidy, 82 N. Y. 155 ;

Pardee v. Van Anken, 3 Barb. (N. Y.) 534 ; s.c. 6 N. Y. Leg. Obs. 378 ;

Dauchy v. Bennett, 7 How. (N. Y.) Pr. 375.

See : *Post*, § 2157, *et seq.*

⁴ *Lamb v. Montague*, 112 Mass. 352 ; *Ellsworth v. Lockwood*, 42 N. Y. 89, 97 ;

Pardee v. Van Anken, 3 Barb. (N. Y.) 534, 536, 537 ; s.c. 6 N. Y. Leg. Obs. 378 ;

Jenkins v. Continental Ins. Co., 12 How. (N. Y.) Pr. 66 ;

Carter v. Taylor, 3 Head (Tenn.) 30 ;

Copis v. Middleton, 1 Durnf. & E. (1 T. & R.) 224, 231 ;

Hodgson v. Shaw, 2 Myl. & K. 190, 192 ;

Craythorne v. Swinburne, 14 Ves. 159 ; s.c. 9 Rev. Rep. 264 ;

1 Story's Eq. Jur. (13th ed.), §§ 499, 499b.

In *Ellsworth v. Lockwood*, *supra*, the court say : " I have made these very elementary remarks, which may, perhaps, seem somewhat out of place in view of what was said by a learned judge in *Pardee v. Van Anken*, 3 Barb. (N. Y.) 534, 536, 537 ; s.c. 6 N. Y. Leg. Obs. 378, to the effect, that the right of the plaintiff in that case to compel an assignment of the mortgage sprung directly from his right of redemption. See, also, the very able opinion of Judge WOODRUFF, in *Jenkins v. Continental Ins. Co.*, 12 How. (N. Y.) Pr. 66, in which it seems to have been assumed by the learned judge throughout, that the right to compel an assignment of the prior bond and mortgage flowed from the right of redemption."

⁵ *Lockwood v. Marsh*, 3 Nev. 138 ; *Miller v. Winchell*, 70 N. Y. 437 ; *Cox v. Wheeler*, 7 Paige Ch. (N. Y.) 248, 258 ;

Roddy's Appeal, 72 Pa. St. 98 ; *Gossin v. Brown*, 11 Pa. St. 527

where a junior incumberer pays the mortgage debt he will be entitled in equity to a suitable remedy to enforce reimbursement, whether he takes an assignment of the mortgage or not.¹ Some of the cases carry this doctrine to the extent of holding that such mortgagee is entitled in equity to be indemnified out of the mortgage estate for such payment of the mortgage debt, notwithstanding the fact that the prior mortgage is discharged of record.² But in order to entitle the party paying the mortgage debt to subrogation such payment must have been essential to the protection of his interest in the mortgaged property, otherwise subrogation will be denied.³

SEC. 2139. Tacking mortgages.—Under the doctrine of the English common law, where there are more than two mortgages upon the same property without notice, or a mortgage, then a judgment, and then a mortgage,

- See : *Rardin v. Walpole*, 38 Ind. 146 ;
Robinson v. Urquhart, 12 N. J. Eq. (1 Beas.) 515 ;
Walker v. King, 45 Vt. 525.
¹ *Mattison v. Marks*, 31 Mich. 421 ; s.c. 18 Am. Rep. 197 ;
Ellsworth v. Lockwood, 42 N. Y. 89 ;
Dale v. McEvers, 2 Cow. (N. Y.) 118 ;
McLean v. Towle, 3 Sandf. Ch. (N. Y.) 117 ;
Downer v. Fox, 20 Vt. 388 ;
Russell v. Howard, 2 McL. C. C. 489 ; s.c. Fed. Cas. No. 12586.
² *Ebert v. Gerding*, 116 Ill. 217 ; s.c. 5 N. E. Rep. 591 ;
Tyrrell v. Ward, 102 Ill. 29 ;
Rappanier v. Bannon (Md.), 8 Atl. Rep. 555 ; s.c. 7 Cent. Rep. 420 ;
Moore v. Beasom, 44 N. H. 215 ;
Patterson v. Birdsall, 64 N. Y. 294, 295 ; s.c. 21 Am. Dec. 609 ;
Milligan's Appeal, 104 Pa. St. 503, 510 ;
Ward v. Seymour, 51 Vt. 320 ;
Wheeler v. Willard, 44 Vt. 640.
³ *Bayard v. McGraw*, 1 Ill. App. 134 ;
Norton v. Highleyman, 88 Mo. 621, 624 ;
Frost v. Yonkers Sav. Bank, 70 N. Y. 553 ; s.c. 26 Am. Rep. 627 ;
Adams v. McPartlin, 11 Abb. (N. Y.) N. C. 369 ;
Jenkins v. Continental Ins. Co., 12 How. (N. Y.) Pr. 66 ;
Bloomington v. Barnard, 7 Hun (N. Y.) 459 ;
Mosier's Appeal, 56 Pa. St. 76 ; s.c. 93 Am. Dec. 783.
 See : *Richards v. Griffith*, 92 Cal. 493 ; s.c. 28 Pac. Rep. 484 ;
Persons v. Shaeffer, 65 Cal. 79 ; s.c. 3 Pac. Rep. 94 ;
Guy v. De Uprey, 16 Cal. 195, 196 ; s.c. 76 Am. Dec. 518 ;
Smith v. Dinsmoor, 119 Ill. 656 ; s.c. 4 N. E. Rep. 648 ;
Thomas v. Stewart, 117 Ind. 50 ; s.c. 18 N. E. Rep. 505 ;
Davis v. Winn, 84 Mass. (2 Allen) 111 ;
Kelly v. Kelly, 54 Mich. 30 ; s.c. 19 N. W. Rep. 580 ;
Ahern v. Freeman, 46 Minn. 156 ; s.c. 24 Am. St. Rep. 206 ; 48 N. W. Rep. 677 ;
Gerdine v. Menage, 41 Minn. 417 ; s.c. 43 N. W. Rep. 91 ;
Bunn v. Lindsay, 95 Mo. 250 ; s.c. 6 Am. St. Rep. 48 ; 7 S. W. Rep. 473 ;
Wyckoff v. Noyes, 36 N. J. Eq. (9 Stew.) 227, 230 ;
Gring's Appeal, 89 Pa. St. 336, 339 ;
McGinnis's Appeal, 16 Pa. St. 445, 447.

the junior incumbrancer, on acquiring the first mortgage, may tack to it his later claim, and thus bring in the latter as a prior lien upon the property, thereby gaining preference over a second mortgage or judgment.¹ This is on the principle that the mortgagee who has a legal title is entitled to priority of satisfaction in whatever order he may stand in the incumbrancers, where he takes his security without notice of prior equity. This doctrine is founded on the general principle that where equities are equal the law must prevail.² But a junior incumbrancer will not be entitled to tack his third mortgage on the first mortgage lien upon payment thereof where he has notice of a second incumbrance at the time when he entered his lien.³ This doctrine of the common law was wholly superseded at an early day in this country by the adoption of laws requiring registration of mortgages, under which mortgages are required to be paid off according to the date of first registry, and the doctrine of tacking does not apply.⁴ In England the doctrine of tacking was abolished in 1874 by the vendors and purchasers' act, so that the learning upon this subject is not of further utility to the active practitioner, either in this country or in England, a record of mortgages and other incumbrances being notice to let the world know, such notice sustaining priority of equities that might otherwise be equal between the parties.⁵ But this rule does

¹ *Marsh v. Lee*, 1 Ch. Cas. 162; s.c. 3 Ch. Rep. 62; 1 Lead. Cas. Eq. ; 2 Vent. 337; *Belcher v. Butler*, 1 Eden 523; *Freere v. Moore*, 8 Price 575; *Edmunds v. Povey*, 1 Vern. 187; *Wortley v. Bukgad*, 2 Ves. 371; *Brace v. Marlborough*, 2 Pr. Wms. 491; 4 Kent Com. (13th ed.) 176.

² See: *Benton v. Kent*, 61 N. H. 124; 2 Min. Inst. 312.

³ See: 4 Kent Com. (13th ed.) 177.

⁴ *Grant v. United States Bank*, 1 Cai. Cas. (N. Y.) 112.

See: *Humphreys v. Newman*, 51 Me. 40;

Chandler v. Dyer, 37 Vt. 345;

Dorow v. Kelly, 1 U. S. (1 Dall.) 142; bk. 1 L. ed. 73;

Bond v. Hopkins, 1 Sch. & Lef. 430;

Latouche v. Dunsany, 1 Sch. & Lef. 157.

⁵ *Osborn v. Carr*, 12 Conn. 195; *Averill v. Guthrie*, 8 Dana (Ky.) 82;

Thompson v. Chandler, 7 Me. (7 Greenl.) 377, 381;

Green v. Tanner, 49 Mass. (8 Met.) 411;

Loring v. Cooke, 20 Mass. (3 Pick.) 48;

Wing v. McDowell, 1 Walk. (Mich.) 175;

Grant v. United States Bank, 1 Cai. Cas. (N. Y.) 112;

Bridgen v. Carhartt, 1 Hopk. Ch. (N. Y.) 234;

Burnett v. Denniston, 5 John. Ch. (N. Y.) 35;

not apply between the mortgagor and mortgagee, the latter being entitled to hold the mortgaged premises until all subsequent advances have been paid.¹

SEC. 2140. **Enforcing mortgages — Foreclosures.***—Upon breach of the conditions in a mortgage the mortgagee or his assignee is entitled to have the rights of the mortgagor in the equity of redemption foreclosed.² Lapse of time, however, is not always a criterion by which to determine the mortgagee's right to foreclose, for that right may be made to depend upon other events or contingencies. Particularly is this true in the case of indemnity mortgages, conditioned to protect the mortgagee harmless from loss,³ in which case a right to foreclose does not accrue until the mortgagee has paid the

- McKinstry v. Marvin, 3 John. Ch. (N. Y.) 466 ;
 Brazee v. Lancaster Bank, 14 Ohio 318 ;
 Thomas' Appeal, 30 Pa. St. 378 ;
 Chandler v. Dyer, 37 Vt. 345.
¹ Orvis v. Newell, 17 Conn. 97 ;
 Hughes v. Worley, 1 Bibb (Ky.) 200 ;
 Downing v. Palmetteer, 1 T. B. Mon. (Ky.) 64 ;
 Chase v. McDonald, 7 Har. & J. (Md.) 160 ;
 Lee v. Stone, 5 Gill & J. (Md.) 1 ;
 Coombs v. Jordan, 3 Bland Ch. (Md.) 284 ; s.c. 22 Am. Dec. 236 ;
 Stone v. Lane, 92 Mass. (10 Allen) 74 ;
 Joslyn v. Wyman, 87 Mass. (5 Allen) 62 ;
 Towner v. Wells, 8 Ohio 136 ;
 Walling v. Aiken, 1 McM. (S. C.) Eq. 1 ;
 Siter v. McClanachan, 2 Gratt. (Va.) 280 ;
 Colquhoun v. Atkinson, 6 Munf. (Va.) 550.
² Koch v. Briggs, 14 Cal. 256, 262 ; s.c. 73 Am. Dec. 651 ;
 Davies v. New York Concert Co., 41 Hun (N. Y.) 492.
 See: Wilkinson v. Flowers, 37 Miss. 579, 584 ; s.c. 75 Am Dec. 78 ;
 James v. Fuste, 17 Miss. (9 Smed. & M.) 144, 150 ; s.c. 794 Am. Dec. 111 ;
 Gladwyn v. Hitchman, 2 Vern. 135.
 There is no breach of a mortgage given for support for life until an application for such support and a failure to furnish it.
 Coleman v. Whitney, 62 Vt. 125 ; s.c. 20 Atl. Rep. 322 ; 9 L. R. A. 517.
 An equitable assignment by a prior mortgagee of a portion of the indebtedness will not affect his right to foreclosure, if he has retained the legal title as well as a large equitable interest.
 Boone v. Clark, 129 Ill. 466 ; s.c. 21 N. E. Rep. 850 ; 5 L. R. A. 276.
³ Ellis v. Martin, 7 Ind. 652 ;
 Francis v. Porter, 7 Ind. 213 ;
 Lewis v. Rickey, 5 Ind. 152 ;
 Butler v. Ladue, 12 Mich. 173 ;
 Dye v. Mann, 10 Mich. 291 ;
 Thurston v. Prentiss, 1 Mich. 193.

* It is not the purpose in this place to discuss fully the subject of mortgage foreclosures ; the volume of decisions to be examined and systematized, and the space required

therefor, will not permit. This work has already been well done by Mr. Charles H. Wiltsie, in his second edition of his work on Mortgage Foreclosures.

whole or a portion of the debt, or the mortgagor has defaulted thereon.¹ No entry upon the mortgaged premises, on breach of condition, is necessary to enable the mortgagee to maintain an action to foreclose the mortgagor's right of redemption, even where the mortgage is in the form of a deed absolute with a condition annexed.² Where the mortgage is security for interest as well as principal, it may be foreclosed on default in the payment of the interest, in the absence of any special provision on that subject.³ In those cases, however, where the mortgagor stipulates that the mortgage shall not be foreclosed except upon certain conditions, in the absence of the stipulated conditions foreclosure proceedings cannot be commenced, although the mortgage debt be past due. Thus, where it is stipulated that no proceeding in law or equity shall be taken by any holder of a note or bond of a series secured by the mortgage to foreclose independently of the trustee named in the mortgage until after the latter's refusal to comply with the request by a certain percentage of the stockholders, the mortgage cannot be foreclosed until this condition be complied with.⁴ In all cases where the mortgagee's right to foreclose depends upon a condition precedent, the performance of such condition should be distinctly

¹ *Ketchum v. Jauncey*, 23 Conn. 123, 126;

Beckwith v. Windsor Mfr. Co., 14 Conn. 594;

Pond v. Clarke, 14 Conn. 334;

Shepard v. Shepard, 6 Conn. 37;

Francis v. Porter, 7 Ind. 213;

McLean v. Ragsdale, 31 Miss. 701;

Ohio L. Ins. & T. Co. v. Reeder, 18 Ohio 35;

McConnell v. Scott, 15 Ohio 401; s.c. 45 Am. Dec. 533;

Kramer v. Trustees of F. & M. Bank of Steubenville, 15 Ohio 254;

Platt v. Smith, 14 John. (N. Y.) 368;

Powell v. Smith, 8 John. (N. Y.) 249;

Rodman v. Hedden, 10 Wend. (N. Y.) 499, 500.

² *Cook v. Bartholomew*, 60 Conn. 24; s.c. 22 Atl. Rep. 444; 13 L. R. A. 452.

Where a mortgage provides for entry, which is not to be made until six months after default and demand of payment, and another article provides for sale equally limited, followed by a paragraph saying: "This provision is cumulative to the ordinary remedies by foreclosure in the courts * * * upon default being made as aforesaid," * * * six months' delay after default is not necessary before suit for foreclosure.

Mercantile Trust Co. v. Missouri, K. & T. R. Co., 36 Fed. Rep. 221; s.c. 1 L. R. A. 397.

³ *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 36 Fed. Rep. 221; s.c. 1 L. R. A. 397.

⁴ *Seibert v. Minneapolis & St. L. R. Co.*, 53 Minn. ; s.c. 53 N. W. Rep. 1151; 20 L. R. A. 535.

averred;¹ except in those cases where the note secured is a demand note, in which case a demand need not be alleged.²

SEC. 2141. **Same—Same—Nature of foreclosure.**—A foreclosure is the process adopted by the mortgagee for the purpose of closing up, shutting out, or barring the mortgagor's equity of redemption beyond possibility of recall,³ whereby the estate becomes the absolute property of the mortgagee or of another. The foreclosure takes place where the mortgagor has forfeited his estate by non-payment of the money due under the mortgage, but still retains his equity of redemption, and the mortgagee by instituting proceedings in court compels the debtor to redeem the estate presently, or in default to be forever closed and barred of any rights therein. This is known as strict foreclosure.⁴ In several of the states, as in Arkansas,⁵ Kentucky, Maryland,⁶ Minnesota,⁷ New York,⁸ Ohio,⁹ South Carolina, Tennessee, and Virginia,¹⁰ and perhaps others, the mortgagee obtains a decree for the sale of the lands, the proceeds to be applied in satisfying incumbrances in the order of their priority. Where no personal judgment is sought in an action to foreclose a mortgage, the proceedings are essentially proceedings *in rem*.¹¹

SEC. 2142. **Same—Same—Methods of foreclosure.**—There are four methods in which a mortgage may be foreclosed,

¹ Curtis v. Goodenow, 24 Mich. 18.

36 Pa. St. 141, 150.

² See: Austin v. Burbank, 2 Day (Conn.) 474; s.c. 2 Am. Dec. 119;

⁴ See: Post, § 2144.

⁵ Du Val v. Johnson, 39 Ark. 182, 188.

Gillett v. Balcom, 6 Barb. (N. Y.) 370;

⁶ Hatch v. White, 2 Gall. C. C. 152, 154; s.c. Fed. Cas. No. 6209.

Haxtum v. Bishop, 3 Wend. (N. Y.) 13;

⁷ Sprague v. Martin, 29 Minn. 229; s.c. 13 N. W. Rep. 34.

Rumball v. Ball, 10 Mod. 38.

⁸ 2 Daniels' Chancery Prac. 1204.

³ 2 Bl. Com. 159.

⁹ Brown v. National Bank, 44 Ohio St. 269, 275.

See: Swift v. Edson, 5 Conn. 531; Johnson v. Donnell, 15 Ill. 97, 100;

¹⁰ 4 Kent Com. (13th ed.) 180.

Puffer v. Clark, 89 Mass. (7 Allen) 80, 85;

¹¹ Martin v. Pond, 30 Fed. Rep. 15, 18.

Packer v. Rochester & S. R. Co., 17 N. Y. 283, 287;

See: Day v. Micou, 85 U. S. (18 Wall.) 160; bk. 21 L. ed. 860;

Bradley v. Chester Valley R. Co.,

Pennoyer v. Neff, 95 U. S. 714; bk. 24 L. ed. 565.

as follows : (1) Foreclosure by entry and possession.¹ This method originally required an actual entry and possession of the mortgaged premises, and is mainly confined to the New England and a few of the Southern states. (2) Strict foreclosure,² that is, a foreclosure without a sale, the purposes of which are to perfect in the mortgagee an absolute title instead of obtaining a decree of sale. While this method of foreclosure is recognized in many of the states, it is allowed only in exceptional cases, because of its severity upon the rights of the owner of the equity of redemption. (3) Statutory foreclosure by advertisement.³ This is a method of foreclosure provided in many states by legislative enactment. In foreclosures by this method all the steps which are prescribed in the statute are necessary to be taken. Because of its extreme technicality and insufficiency of remedy, this method of foreclosure is seldom resorted to where an equitable action is allowed. (4) By equitable action.⁴ This is the method of foreclosure generally adopted in the states of the Union.⁵

SEC. 2143. **Same—Same—Foreclosure by entry and possession.**—Foreclosure by entry and possession is a form of procedure not in general practice in this country, outside of New England. In those states where it is practiced, a constructive entry is all that is now required, though formerly an actual entry was necessary. The object of such entry is to give notice to the mortgagor and those claiming under him that the equity of redemption will be extinguished unless the debt secured be paid and the terms of the mortgage fulfilled. The form of this procedure is a suit at law, though controlled by rules of equity, except where statutory provisions have prescribed a method of procedure.⁶

SEC. 2144. **Same—Same—Strict foreclosure.**—Strict foreclosure is a procedure in which there is an extinguish-

¹ See : *Post*, § 2143.

² See : *Post*, § 2144.

³ See : *Post*, § 2145.

⁴ See : *Post*, § 2146.

⁵ Wiltsie Mortg. Forec. (2d ed.), § 3.

⁶ Wiltsie Mortg. Forec. (2d ed.), § 4.

ment of the right of redemption. This method of procedure permits neither a sale nor a redemption, but requires payment of the debt within a certain period after notice, and on default of such payment the absolute title passes to the mortgagee. At any time after default of payment of the mortgage debt according to the terms of the contract, the mortgagee may exhibit his bill in a court of equity against the mortgagor, and compel him to redeem by payment of the debt, or submit to a foreclosure. Such foreclosure forever bars his right of redemption.¹ This method of foreclosure is adopted in Alabama,² Connecticut,³ Florida,⁴ Illinois,⁵ Maine,⁶ Massachusetts,⁷ Minnesota,⁸ New Jersey,⁹ and New York.¹⁰ This method of foreclosure is a severe remedy which should not be adopted except where required by the interests of both parties.¹¹ A decree for the strict foreclosure of a mortgage should include an order requiring the mortgagor to vacate the premises,¹² otherwise a mortgagee out of

¹ *Derby Bank v. Landon*, 3 Conn. 62;

Caufman v. Sayre, 2 B. Mon. (Ky.) 202, 206;

Van Husan v. Kanouse, 13 Mich. 303;

Lansing v. Goelet, 9 Cow. (N. Y.) 346, 351.

² *Hitchcock v. United States Bank of Pa.*, 7 Ala. 386.

³ *Mix v. Hotchkiss*, 14 Conn. 32, 45.

⁴ *Ellis v. Leek*, 127 Ill. 60; s.c. 20 N. E. Rep. 218; 3 L. R. A. 259;

Johnson v. Donnell, 15 Ill. 97.

A final decree in strict foreclosure proceedings in Illinois, expressly providing that in default of payment all the right, title, and interest, both legal and equitable, of defendants, shall be vested absolutely and forever unconditionally in the complainants, being in conformity with the practice in that state, is sufficient to make a complete transfer of the title, although under the English practice the title is not completely transferred until a final order based on proof that the money was

not paid according to the terms of the decree.

Ellis v. Leek, 127 Ill. 60; s.c. 20 N. E. Rep. 218; 3 L. R. A. 259.

⁶ *Chamberlain v. Gardner*, 38 Me. 548.

⁷ *Botham v. McIntier*, 36 Mass. (19 Pick.) 346;

Newall v. Wright, 3 Mass. 138, 155; s.c. 3 Am. Dec. 98.

⁸ *Wilder v. Haughey*, 21 Minn. 101.

⁹ *Schenck v. Conover*, 13 N. J. Eq. (2 Beas.) 220; s.c. 78 Am. Dec. 95.

¹⁰ *Moulton v. Cornish*, 138 N. Y. 133; s.c. 33 N. E. Rep. 842; 20 L. R. A. 370;

Bolles v. Duff, 43 N. Y. 469, 474; s.c. 10 Abb. Pr. N. S. 399; 41 How. (N. Y.) Pr. 355;

Kendall v. Treadwell, 5 Abb. (N. Y.) Pr. 16, 76; s.c. 14 How. (N. Y.) Pr. 165.

¹¹ *Johnson v. Donnell*, 15 Ill. 97; *Bolles v. Duff*, 43 N. Y. 474; s.c. 10 Abb. (N. Y.) Pr. N. S. 399; 41 How. (N. Y.) Pr. 355.

¹² *Kendall v. Treadwell*, 5 Abb. (N. Y.) Pr. 16, 76; s.c. 14 How. (N. Y.) Pr. 165;

Buswell v. Peterson, 41 Wis. 82; *Landón v. Burke*, 36 Wis. 378.

possession will be required to institute an action in ejectment to recover possession.¹ A strict foreclosure will not be granted to cut off the rights of a second mortgagee who was not made a party on foreclosure of the prior mortgage, at which the mortgagee was a purchaser, where the failure to make the second mortgagee a party was known before the decree, and leave was given by the court to make him a party to the action, which leave was not accepted.²

SEC. 2145. **Same—Same—Statutory foreclosure.**—In some of the states of the Union there prevails a method of foreclosure by means of advertisement and sale pursuant to a power of sale contained in the mortgage. This is a simple and cheap method of procedure which prevails, in addition to the procedure by an equitable action, but is not so quick and certain in results as an equitable action. Like strict foreclosure it is extremely technical, and is employed mostly in pioneer sections of the country, and in sections where real estate is of but little value.³

SEC. 2146. **Same—Same—By action in equity.**—In the United States the prevalent mode of foreclosing a mortgage is by an equitable action and a sale of the property under a decree of court to the highest bidder, the proceeds arising from such sale being applied to the discharge of the incumbrances upon the property in the order of their priority, and the balance, if any, turned over to the mortgagor or his assignee.⁴ This method of

¹Montgomery v. Middlemiss, 21 Cal. 103, 106; s.c. 81 Am. Dec. 146;

Schenck v. Conover, 13 N. J. Eq. (2 Beas.) 220; s.c. 78 Am. Dec. 95;

Kershaw v. Thompson, 4 John. Ch. (N. Y.) 609;

Sutton v. Stone, 2 Atk. 101.

²Moulton v. Cornish, 138 N. Y. 133; s.c. 33 N. E. Rep. 842; 20 L. R. A. 370.

On denial of strict foreclosure to cut off a second mortgage, the ordinary decree of foreclosure may be allowed if necessary parties

are brought in.

Moulton v. Cornish, 138 N. Y. 133; s.c. 33 N. E. Rep. 842; 20 L. R. A. 370.

³See: Wiltie Mortg. Forec. (2d ed.), § 6.

⁴Mussina v. Bartlett, 8 Port. (Ala.) 277, 288;

Belloc v. Rogers, 9 Cal. 123;

Shrieker v. Field, 9 Iowa 366;

Riley v. McCord, 24 Mo. 265;

Lansing v. Goelet, 9 Cow. (N. Y.) 346, 352, 355;

Mills v. Dennis, 3 John. Ch. (N. Y.) 367, 369.

foreclosure is regarded as more just and fair to all of the parties, and, outside of the New England states, courts of equity will exercise their ordinary power of discretion and order a sale of the premises wherever a strict foreclosure would be of manifest detriment to the mortgagor.¹ In an equitable action a bill to foreclose may be filed at any time after breach of condition, provided the bar of the statute of limitations has not run.² The right of foreclosure, like every other right, may be lost by lapse of time and the laches of the party.³

SEC. 2147. Same—Same—Parties to foreclosure—Parties plaintiff.—The general rule is that all persons who have an interest in the mortgage debt, and all who are interested in the mortgaged property, including the owners of the equity of redemption, must be made parties to an action brought to foreclose.⁴ All parties interested in ob-

¹ *Belloc v. Rogers*, 9 Cal. 123 ;
Hinds v. Allen, 34 Conn. 185,
 193 ;
Williams' Case, 3 Bland Ch. (Md.)
 186, 193 ;
Shaw v. Norfolk Co. R., 71 Mass.
 (5 Gray) 162 ;
Packer v. Rochester & S. R.
Co., 17 N. Y. 283, 287 ;
Lansing v. Goelet, 9 Cow. (N.
 Y.) 346, 352 ;
Mills v. Dennis, 3 John. Ch. (N.
 Y.) 367 ;
Green v. Crockett, 2 Dev. & B.
 (N. C.) Eq. 393 ;
McCurdy's Appeal, 65 Pa. St.
 290 ;
De Haven v. Landell, 31 Pa. St.
 120, 124.
² *Harding v. Mill River Co.*, 34
 Conn. 458 ;
Trayser v. Trustees of Indiana,
Asbury University, 39 Ind. 556 ;
Pope v. Durant, 26 Iowa 233 ;
Blethen v. Dwinal, 35 Me. 556 ;
Inches v. Leonard, 12 Mass. 379 ;
Nevitt v. Bacon, 32 Miss. 212 ; s.c.
 66 Am. Dec. 609 ;
Tripe v. Marcy, 39 N. H. 439 ;
Williams v. Townsend, 31 N. Y.
 411 ;
Gillett v. Balcom, 6 Barb. (N. Y.)
 370 ;
Giles v. Baremore, 5 John. Ch. (N.
 Y.) 545 ;

Roberts v. Welch, 8 Ired. (N. C.)
 Eq. 287 ;
Hughes v. Edwards, 22 U. S. (9
 Wheat.) 489 ; bk. 6 L. ed. 142 ;
Gladwyn v. Hitchman, 2 Vern.
 134.
³ *Howland v. Shurtleff*, 43 Mass. (2
 Met.) 26 ; s.c. 35 Am. Dec.
 384, 389.
See : Fry v. Shehee, 55 Ga. 208 ;
Hoffman v. Harrington, 33 Mich.
 392 ;
Nevitt v. Bacon, 32 Miss. 212 ; s.c.
 66 Am. Dec. 609 ;
Boon v. Pierpont, 28 N. J. Eq. (1
 Stew.) 7 ;
Hughes v. Edwards, 22 U. S. (9
 Wheat.) 499 ; bk. 6 L. ed. 142.
⁴ *Hunt v. Acre*, 28 Ala. 580 ;
Porter v. Clements, 3 Ark. 364 ;
Skinner v. Buck, 29 Cal. 253,
 257 ;
Carpentier v. Williamson, 25 Cal.
 154, 161 ;
Goodman v. White, 26 Conn.
 317 ;
Ohling v. Luitjens, 32 Ill. 23 ;
Newcomb v. Dewey, 27 Iowa 381,
 388 ;
White v. Watts, 18 Iowa 74, 76 ;
Webster v. Vandevanter, 72 Mass.
 (6 Gray) 428 ;
Goodrich v. Staples, 56 Mass. (2
 Cush.) 258 ;
Bates v. Miller, 48 Mo. 409 ;

taining the judgment demanded should be made parties plaintiff; such as the sole mortgagee;¹ the assignee of the mortgagee;² the assignee of one of several notes or bonds secured by the mortgage,³ or the holder of several of such notes or bonds;⁴ joint mortgagees;⁵ the repre-

- Valentine *v.* Havener, 20 Mo. 133;
 McCall *v.* Yard, 9 N. J. Eq. (1 Stock.) 358;
 Winslow *v.* Clark, 47 N. Y. 261;
 Haines *v.* Beach, 3 John. Ch. (N. Y.) 459;
 Vanderkemp *v.* Shelton, 11 Paige Ch. (N. Y.) 28;
 Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 533;
 McArthur *v.* Franklin, 15 Ohio St. 485, 509;
 Webb *v.* Mexan, 11 Tex. 678;
 Caldwell *v.* Taggart, 29 U. S. (4 Pet.) 190; bk. 7 L. ed. 828;
 Finley *v.* United States Bank, 24 U. S. (11 Wheat.) 304; bk. 6 L. ed. 480.
¹ Haskell *v.* Bailey, 22 Conn. 569, 573;
Newall v. Wright, 3 Mass. 138; s.c. 3 Am. Dec. 98;
Wendell v. New Hampshire Bank, 9 N. H. 404, 417;
Hubbell v. Sibley, 5 Lans. (N. Y.) 51;
Sulton v. Stone, 2 Atk. 101.
² Brown *v.* Snell, 6 Fla. 741.
 See: *Dempster v. West*, 69 Ill. 613;
Wilson v. Spring, 64 Ill. 14;
Heath v. Hall, 60 Ill. 344;
Strothers v. Law, 54 Ill. 413;
Douglass v. Durin, 51 Me. 121;
Crooker v. Jewell, 31 Me. 306;
Hills v. Eliot, 12 Mass. 26;
Gould v. Newman, 6 Mass. 239;
Fisher v. Meister, 24 Mich. 447;
Dolman v. Cook, 14 N. J. Eq. (1 McC.) 56;
Kinna v. Smith, 3 N. J. Eq. (2 H. W. Gr.) 14;
Andrews v. Gillispie, 47 N. Y. 487;
Meeker v. Claghorn, 44 N. Y. 228, 349;
Allen v. Brown, 44 N. Y. 228;
Christie v. Herrick, 1 Barb. Ch. (N. Y.) 254;
Franklyn v. Hayward, 61 How. (N. Y.) Pr. 43;
Whitney v. McKinney, 7 John. Ch. (N. Y.) 144;
Miller v. Bear, 3 Paige Ch. (N. Y.) 466;
McCuffey v. Finley, 20 Ohio 474;
Horstman v. Gerker, 49 Pa. St. 282; s.c. 88 Am. Dec. 501;
Knox v. Galligan, 21 Wis. 470;
Wood v. Williams, 4 Madd. 186.
³ See: *Grattan v. Wiggins*, 23 Cal. 16;
Gower v. Howe, 20 Ind. 396;
Hough v. Osborne, 7 Ind. 140;
Stanley v. Beatty, 4 Ind. 134;
Johnson v. Candage, 31 Me. 28;
Andrews v. Fiske, 101 Mass. 422;
Brown v. Delaney, 22 Minn. 349;
Chappell v. Allen, 38 Mo. 213;
Anderson v. Baungartner, 27 Mo. 80;
Lambertville National Bk. v. McCready Bag & P. Co. (N. J.), 15 Atl. Rep. 388; s.c. 13 Cent. Rep. 388; 1 L. R. A. 334;
Furbush v. Goodwin, 25 N. H. (5 Fost.) 425;
Swartz v. Leist, 13 Ohio St. 419.
 The bondholders under trust mortgage given to secure their bonds are not necessary parties to a suit to foreclose a second mortgage, when the holder of the trust mortgage, which is a first lien, is made a party.
Lambertville Nat. Bank v. McCready Bag & P. Co. (N. J.), 15 Atl. Rep. 388; s.c. 13 Cent. Rep. 388; 1 L. R. A. 334.
⁴ *Hartwell v. Blocker*, 6 Ala. 581;
Wilson v. Hayward, 6 Fla. 171;
⁵ *Woodward v. Wood*, 19 Ala. 213;
Sanford v. Bulkeley, 30 Conn. 344;
Shirkey v. Hanna, 2 Blackf. (Ind.) 403; s.c. 26 Am. Dec. 426;
Baker v. Shepard, 30 Ga. 706;
Hopkins v. Ward, 12 B. Mon. (Ky.) 185;
Glaises v. Maignan, 3 La. An. 530;
Brown v. Bates, 55 Me. 520; s.c. 92 Am. Dec. 613;
Platt v. Squire, 53 Mass. (12 Met.) 494, 501;
Paton v. Murray, 6 Paige Ch. (N. Y.) 474.

sentatives of a deceased mortgagee,¹ and in some states the heirs of the deceased mortgagee,² though in other states the heirs of the deceased mortgagee are not necessary.³ In some of the states, however, prior mortgagees are not required to be joined as parties.⁴ The general rule is that prior mortgagees and grantees are not necessary parties to a foreclosure proceeding;⁵ but where the

Myers v. Wright, 33 Ill. 284 ;
Pogue v. Clark, 25 Ill. 351 ;
Ross v. Utter, 15 Ill. 402 ;
Goodall v. Mopley, 45 Ind. 355 ;
Merritt v. Wells, 18 Ind. 171 ;
Stanley v. Beatty, 4 Ind. 134 ;
Barrett v. Blackman, 47 Iowa
 565, 569 ;

Lyster v. Brewer, 13 Iowa 461 ;
Sangster v. Love, 11 Iowa 580 ;
Rankin v. Major, 9 Iowa 297 ;
Swenson v. Moline Plow Co., 14
 Kan. 387 ;

Jenkins v. Smith, 4 Met. (Ky.)
 380 ;

Bell v. Shrock, 2 B. Mon. (Ky.)
 29 ;

Jordon v. Cheney, 74 Me. 359 ;
Moore v. Ware, 38 Me. 496 ;
Johnson v. Candage, 31 Me. 28 ;
Haynes v. Wellington, 25 Me.
 458 ;

Pugh v. Holt, 27 Miss. 461 ;
Archer v. Jones, 26 Miss. 583 ;
Johnson v. Brown, 31 N. H. (11
 Fost.) 405 ;

King v. Merchants' Exchange Co.,
 5 N. Y. 547, 556 ;

Wiley v. Pinson, 23 Tex. 486 ;
Pettibone v. Edwards, 15 Wis.
 95.

Martin v. McReynolds, 6 Mich. 70 ;
Mutual Life Ins. Co. v. Sturges,
 32 N. J. Eq. (5 Stew.) 678, 683 ;
Savings Bank v. Freese, 26 N. J.
 Eq. (11 C. E. Gr.) 453 ;
Freeman v. Scofield, 16 N. J. Eq.
 (1 C. E. Gr.) 28.

The personal representatives of the deceased assignee of a prior undischarged trust mortgage are proper parties defendant to a suit to foreclose a second mortgage.

Lambertville Nat. Bk. v. McCready Bag & P. Co. (N. J.),
 15 Atl. Rep. 388 ; s.c. 13 Cent.
 Rep. 388 ; 1 L. R. A. 334.

Where either the original trustee or the assignee of a mortgage held in trust for the benefit of third

parties disposes thereof by will, the interest of such trustee or assignee passes on his death to his personal representatives, and neither his heirs nor devisees are necessary parties to a suit to foreclose.

Lambertville Nat. Bk. v. McCready Bag & P. Co. (N. J.),
 15 Atl. Rep. 388 ; s.c. 13 Cent.
 Rep. 388 ; 1 L. R. A. 334.

² *Huggins v. Hall*, 10 Ala. 283 ;
Dayton v. Dayton, 7 Ill. App.
 136 ;

McIver v. Cherry, 8 Humph.
 (Tenn.) 713 ;

Atchison v. Surguine, 1 Yerg.
 (Tenn.) 400 ;

Etheridge v. Vernoy, 71 N. C.
 184 ;

Winne v. Littleton, 2 Ch. Cas. 51 ;
Ellis v. Guavas, 2 Ch. Cas. 50 ;

Freak v. Hearsey, 1 Ch. Cas. 51 ;
Scott v. Nicoll, 3 Russ. 476.

³ *Dayton v. Dayton*, 7 Ill. App. 136.

⁴ *Persons v. Alsip*, 2 Ind. 67 ;
Standish v. Dow, 21 Iowa 363 ;
Shiveley v. Jones, 6 B. Mon.
 (Ky.) 274 ;

Wylie v. McMakin, 2 Md. Ch. 413 ;
Hudnit v. Nash, 16 N. J. Eq. (1
 C. E. Gr.) 550 ;

Roll v. Smalley, 6 N. J. Eq. (2
 Halst.) 464 ;

Person v. Merrick, 5 Wis. 231 ;
Finley v. United States Bank, 24
 U. S. (11 Wheat.) 306 ; bk. 6 L.
 ed. 480.

⁵ *Wright v. Bundy*, 11 Ind. 398 ;
Tome v. Merchants and Builders'
Loan Co., 34 Md. 12 ;

Summers v. Bromley, 28 Mich.
 125 ;

Bogey v. Shute, 4 Jones (N. C.)
 Eq. 174 ;

Morris v. Wheeler, 45 N. Y. 708 ;
Kay v. Whittaker, 44 N. Y. 505,
 565 ;

Hancock v. Hancock, 23 N. Y.
 568 ;

Hall v. Hall, 11 Tex. 526, 547 ;

sale of premises is to be had, all prior mortgagees and grantees should be joined in the suit, although they are not necessary parties, because without them the property cannot be sold, except subject by their prior rights.¹

SEC. 2148. **Same—Same—Same—Parties defendant.**—The general rule is that all persons interested in the mortgage property, or the equity of redemption, and affected by the foreclosure, are necessary parties defendant in an action of foreclosure: such as a mortgagor still owning the premises;² assignees of the mortgaged premises, who

- Weed v. Beebe, 21 Vt. 495, 499;
Walker v. Jarvis, 16 Wis. 28;
Jerome v. McCarter, 94 U. S. 734;
bk. 24 L. ed. 136.
- ¹ Mack v. Grover, 12 Ind. 254;
Troth v. Hunt, 8 Blackf. (Ind.)
580;
Champlin v. Foster, 7 B. Mon.
(Ky.) 104;
Clark v. Prentice, 3 Dana (Ky.) 468;
Ducker v. Belt, 3 Md. Ch. 13;
Rucks v. Taylor, 49 Miss. 552;
Brown v. Nevitt, 27 Miss. 801;
Howard v. Handy, 35 N. H. 315;
Downer v. Clement, 11 N. H. 40;
Holcomb v. Holcomb, 2 Barb.
(N. Y.) 20;
Wood v. Oakley, 11 Paige Ch. (N.
Y.) 400;
Vanderkemp v. Shelton, 11 Paige
Ch. (N. Y.) 28;
Rowan v. Mercer, 10 Humph.
(Tenn.) 359;
Mims v. Mims, 1 Humph. (Tenn.)
425;
Weed v. Beebe, 21 Vt. 495;
Hagan v. Walker, 55 U. S. (14
How.) 29, 37; bk. 14 L. ed. 312.
- ² Harvey's Admrs. v. Thornton, 14
Ill. 217;
Lane v. Erskine, 13 Ill. 501, 503;
Hughes v. Patterson, 23 La. An.
679;
Raynor v. Selmes, 52 N. Y. 579,
rev'g 7 Lans. (N. Y.) 440;
Kay v. Whittaker, 44 N. Y. 565,
572;
Griswold v. Fowler, 6 Abb. (N.
Y.) Pr. 113;
Reed v. Marble, 10 Paige Ch. (N.
Y.) 409;
Fell v. Brown, 2 Bro. Ch. 276;
Palk v. Clinton, 12 Ves. 48; s.c.
8 Rev. Rep. 283;
- Thomson & Baskerville Case, 3
Rep. in Ch. 215;
Hunter v. Macklew, 5 Hare 238.
The reason for this rule is because
no title can be made that would
not be defeasible by the person
in whom the equity of redeem-
ing the mortgage remain not
barred or destroyed.
- Buckner v. Sessions, 27 Ark. 219;
Cox v. Vickers, 35 Ind. 27;
Lennox v. Reed, 12 Kan. 223;
Champlin v. Foster, 7 B. Mon.
(Ky.) 104, 105;
Lasere v. Rochereau, 21 La. An.
205;
Hall v. Nelson, 23 Barb. (N. Y.)
88, 90; s.c. 14 How. (N. Y.) Pr.
32;
Watson v. Spence, 20 Wend. (N.
Y.) 260.
- A mortgagor who has conveyed the
premises by an unrecorded mort-
gage is a necessary party to a
foreclosure.
- Boice v. Mich. Mut. L. Ins. Co.,
114 Ind. 480; s.c. 13 West. Rep.
377; 15 N. E. Rep. 825;
Hall v. Nelson, 23 Barb. (N. Y.)
88; 14 How. (N. Y.) Pr. 32;
Ostrom v. McCann, 21 How. (N.
Y.) Pr. 431;
Crooke v. O'Higgins, 14 How. (N.
Y.) Pr. 154.
- Where mortgagor has no interest in
the property, he is not a neces-
sary party.
- Horn v. Jones, 28 Cal. 194;
Boggs v. Fowler, 16 Cal. 559; s.c.
76 Am. Dec. 561;
Swift v. Edson, 5 Conn. 531, 534;
Bennett v. Mattingly, 110 Ind.
197; s.c. 10 N. E. Rep. 229; 11
N. E. Rep. 792;

have assumed and agreed to pay the mortgage debt;¹ a subsequent incumbrancer, although not holding the relation of security for the mortgage debt;² tenants by entirety;³ a vendor or vendee under a land contract;⁴

Stevens v. Campbell, 21 Ind. 471;
Burkham v. Beaver, 17 Ind. 367;
Shaw v. Hoadley, 8 Blackf. (Ind.)

165;
Johnson v. Monell, 13 Iowa 300,
 303;

Jones v. Lapham, 15 Kan. 540;
True v. Haley, 24 Me. 297;

Osborne v. Crump, 57 Miss. 622;
Andrews v. Stelle, 22 N. J. Eq.

(7 C. E. Gr.) 478;
Daly v. Burchell, 13 Abb. (N. Y.)

Pr. N. S. 268;
Griswold v. Fowler, 6 Abb. (N.

Y.) Pr. 113
Van Nest v. Latsom, 19 Barb. (N.

Y.) 604, 608;
Cherry v. Monro, 2 Barb. Ch. (N.

Y.) 618, 627;
Rhodes v. Evans, Clarke Ch. (N.

Y.) 168;
Trustees of the South Baptist

Church v. Yates, 1 Hoffm. Ch.
 (N. Y.) 142;

Drury v. Clark, 16 How. (N. Y.)
 Pr. 424, 428;

Crooke v. O'Higgins, 14 How. (N.
 Y.) Pr. 154;

Bram v. Bram, 34 Hun (N. Y.)
 487;

Whitney v. McKinney, 7 John.
 Ch. (N. Y.) 144;

Bigelow v. Bush, 6 Paige Ch. (N.
 Y.) 343;

Crenshaw v. Thackston, 14 S. C.
 437;

Wright v. Eaves, 10 Rich. (S. C.)
 Eq. 582;

Buchanan v. Monroe, 22 Tex.
 537;

Miner v. Smith, 53 Vt. 551;
Delaplaine v. Lewis, 19 Wis. 476;

Brown v. Stead, 5 Sim. 535.

¹ See: *Matteson v. Thomas*, 41 Ill.
 110;

Risk v. Hoffman, 69 Ind. 137;
Hoffman v. Risk, 58 Ind. 113;

Josselyn v. Edwards, 57 Ind. 212;
Wood v. Smith, 51 Iowa 156;

Baker v. Terrell, 8 Minn. 195;
Hoysradt v. Holland, 50 N. H.

433;
Marshall v. Davies, 78 N. Y. 414,
 421; s.c. 58 How. (N. Y.) Pr.

231;

Calvo v. Davies, 73 N. Y. 211,
 215;

Johnson v. Zink, 51 N. Y. 333,
 aff'g 52 Barb. (N. Y.) 396;

Averill v. Taylor, 3 N. Y. 44, 51;
Stebbins v. Hall, 29 Barb. (N. Y.)

524, 525;
Cornell v. Prescott, 2 Barb. (N.

Y.) 16;
Cherry v. Monro, 2 Barb. Ch. (N.

Y.) 618;
Ferris v. Crawford, 2 Den. (N. Y.)

595;
Tice v. Annin, 2 John. Ch. (N.

Y.) 125;
Marsh v. Pike, 10 Paige Ch. (N.

Y.) 595;
Halsey v. Read, 9 Paige Ch. (N.

Y.) 446;
Cox v. Wheeler, 7 Paige Ch. (N.

Y.) 248;
Brewer v. Staples, 3 Sandf. Ch.

(N. Y.) 579.

² See: *Carpentier v. Brenham*, 40
 Cal. 221;

Tyrrell v. Ward, 102 Ill. 29;
Shinn v. Shinn, 91 Ill. 477;

White v. Fisher, 62 Ill. 258;
Conwell v. McCowan, 53 Ill. 363;

Lowrey v. Byers, 80 Ind. 443;
Rardin v. Walpole, 38 Ind. 146;

Benton v. Shreeve, 4 Ind. 66;
Hamilton v. Dobbs, 19 N. J. Eq.

(4 C. E. Gr.) 227;
Ellsworth v. Lockwood, 42 N. Y.

89, 99;
Averill v. Taylor, 8 N. Y. 44;

Cornell v. Prescott, 2 Barb. (N.
 Y.) 16, 20;

Dings v. Parshall, 7 Hun (N. Y.)
 522;

Champlin v. Williams, 9 Pa. St.
 341.

³ *Frost v. Frost*, 3 Sandf. Ch. (N.
 Y.) 188;

Wiley v. Pinson, 23 Tex. 486;
Stephen v. Beall, 89 U. S. (22

Wall.) 329; bk. 22 L. ed. 786;
Pete v. Hammond, 29 Beav. 91;

Ireson v. Denn, 2 Cox Ch. 425;
 s.c. 2 Rev. Rep. 97;

Palk v. Clinton, 12 Ves. 58, 59;
 s.c. 8 Rev. Rep. 283.

⁴ *Greither v. Alexander*, 15 Iowa
 470;

or the party who has purchased the equity of redemption from the mortgagor or another.¹ But a purchaser or

- Blair *v.* Marsh, 8 Iowa 144 ;
 Griswold *v.* Fowler, 6 Abb. (N. Y.) Pr. 113 ;
 Crooke *v.* O'Higgins, 14 How. (N. Y.) Pr. 154 ;
 Equitable Life Assoc. Soc. *v.* Bostwick, 22 N. Y. Week. Dig. 360 ;
 Roddy *v.* Elam, 12 Rich. (S. C.) Eq. 343 ;
 Martin *v.* Morris, 62 Wis. 418 ; s.c. 22 N. W. Rep. 525.
 * Merritt *v.* Phenix, 48 Ala. 87 ;
 Hall *v.* Huggins, 19 Ala. 200 ;
 Porter *v.* Muller, 65 Cal. 512 ; s.c. 4 Pac. Rep. 531 ;
 Blutwerth *v.* Lake, 33 Cal. 255, 265 ;
 Skinner *v.* Buck, 29 Cal. 253 ;
 Horn *v.* Jones, 28 Cal. 194 ;
 Carpentier *v.* Williamson, 25 Cal. 154 ;
 Heyman *v.* Lowell, 23 Cal. 106 ;
 Boggs *v.* Fowler, 16 Cal. 559 ; s.c. 76 Am. Dec. 561 ;
 Goodenow *v.* Ewer, 16 Cal. 461 ; s.c. 76 Am. Dec. 540 ;
 De Leon *v.* Higuera, 15 Cal. 483 ;
 Luning *v.* Brady, 10 Cal. 265 ;
 Coker *v.* Smith, 63 Ga. 517 ;
 Williams *v.* Terrell, 54 Ga. 462 ;
 May *v.* Rawson, 21 Ga. 461 ;
 Knowles *v.* Lawton, 18 Ga. 476 ; s.c. 63 Am. Dec. 290 ;
 Jeneson *v.* Jeneson, 66 Ill. 260 ;
 Rose *v.* Swann, 56 Ill. 37 ;
 Ohling *v.* Luitjens, 32 Ill. 23 ;
 Chickering *v.* Failes, 26 Ill. 507, 519 ; s.c. 29 Ill. 301 ;
 Daugherty *v.* Deardorf, 107 Ind. 527 ; s.c. 8 N. E. Rep. 296 ;
 Petry *v.* Ambroscher, 100 Ind. 501, 511 ;
 Curtis *v.* Gooding, 99 Ind. 45 ;
 Searle *v.* Whipperman, 79 Ind. 424 ;
 Mark *v.* Murphy, 76 Ind. 534 ;
 Logan *v.* Smith, 70 Ind. 597, 598 ;
 Sumner *v.* Coleman, 20 Ind. 486 ;
 Day *v.* Patterson, 18 Ind. 114 ;
 Cline *v.* Inlow, 14 Ind. 419 ;
 Jefferson *v.* Coleman, 110 Ind. 515 ; s.c. 11 N. E. Rep. 465 ; 9 West. Rep. 73 ;
 Lennox *v.* Reed, 12 Kan. 223, 228 ;
 Reney *v.* Bell, 9 Dana (Ky.) 4 ;
 Cooper *v.* Martin, 1 Dana (Ky.) 25 ;
 Semple *v.* Lee, 13 Iowa 304 ;
 Bates *v.* Ruddick, 2 Clarke (Iowa) 423 ; s.c. 65 Am. Dec. 774 ;
 Bailey *v.* Myrick, 36 Me. 50 ;
 Learned *v.* Foster, 117 Mass. 365 ;
 Dinnan *v.* Nichols, 115 Mass. 353 ;
 Roche *v.* Farnsworth, 106 Mass. 509 ;
 Campbell *v.* Bemis, 82 Mass. (16 Gray) 485 ;
 Putnam *v.* Putnam, 21 Mass. (4 Pick.) 139 ;
 Thayer *v.* Smith, 17 Mass. 426 ;
 McDonald *v.* McDonald, 45 Mich. 44 ; s.c. 7 N. W. Rep. 230 ;
 Adam *v.* Bradley, 12 Mich. 346 ;
 Nichols *v.* Randall, 5 Minn. 304, 308 ;
 Wolf *v.* Banning, 3 Minn. 202, 204 ;
 Merriman *v.* Hyde, 9 Neb. 113 ; s.c. 2 N. W. Rep. 218 ;
 Brundred *v.* Walker, 12 N. J. Eq. (1 Beas.) 140 ;
 Johnston *v.* Donvan, 106 N. Y. 269 ; s.c. 12 N. E. Rep. 594 ;
 Raynor *v.* Selmes, 52 N. Y. 579 ;
 Miner *v.* Beekman, 50 N. Y. 337, 344 ;
 Winslow *v.* Clark, 47 N. Y. 261 ;
 Robinson *v.* Ryan, 25 N. Y. 320 ;
 St. John *v.* Bumpstead, 17 Barb. (N. Y.) 100 ;
 Van Slyke *v.* Shelden, 9 Barb. (N. Y.) 278 ;
 Hall *v.* Nelson, 14 How. (N. Y.) Pr. 32 ;
 Burnham *v.* De Bevoise, 8 How. (N. Y.) Pr. 159 ;
 Mickles *v.* Dillaye, 15 Hun (N. Y.) 296 ;
 Reed *v.* Marble, 10 Paige Ch. (N. Y.) 409 ;
 Watson *v.* Spence, 20 Wend. (N. Y.) 260 ;
 Williamson *v.* Field, 2 Sandf. Ch. (N. Y.) 533 ;
 Spillerb *v.* Spiller, 1 Hayw. (N. C.) L. 482 ;
 Mevey's Appeal, 4 Pa. St. 80 ;
 Durand *v.* Isaacks, 4 McC. (S. C.) Eq. 221 ;
 Rodgers *v.* Jones, 1 McC. (S. C.) Eq. 221 ;
 Meng *v.* Houser, 13 Rich. (S. C.) Eq. 210, 220 ;
 Norton *v.* Lewis, 3 Rich. (S. C.) N. S. 25 ;

incumbrancer, *pendente lite*, is not a necessary party to an action to foreclose.¹ Neither is a married woman having a separate estate.² But where the wife of the mortgagor, or of the owner of the equity of redemption, is not the possessor of a separate estate, she is a necessary party in an action to foreclose a mortgage.

SEC. 2149. **Same—Same—Decree of foreclosure.**—The decree of foreclosure is rendered after full hearing and the adjustment of the equities of the parties. This decree should contain a description of the premises, the amount of the debt, and a direction for the sale of the property. Where portions of the mortgaged premises have been disposed of by the mortgagor, the decree of sale should

- Fielder *v.* Murphy, 2 Rich. (S. C.) Eq. 58;
Morrow *v.* Morgan, 48 Tex. 304;
Buchanan *v.* Monroe, 22 Tex. 537;
Cord *v.* Hirsch, 17 Wis. 403;
Green *v.* Dixon, 9 Wis. 532;
Hodson *v.* Treat, 7 Wis. 263;
Peto *v.* Hammond, 29 Beav. 91;
Manly *v.* Beaufort, 1 Russ. 349;
Brown *v.* Stead, 5 Sim. 535.
¹ Horn *v.* Jones, 28 Cal. 194;
Taylor *v.* Adams, 115 Ill. 570;
s.c. 4 N. E. Rep. 837; 2 West.
Rep. 827;
Chickering *v.* Fullerton, 90 Ill.
520;
Loomis *v.* Riley, 24 Ill. 307;
Addison *v.* Crow, 5 Dana (Ky.)
271, 279;
Rogers *v.* Holyoke, 14 Minn. 514;
Osborne *v.* Crump, 57 Miss. 622;
Seward *v.* Huntington, 94 N. Y.
104, 114;
Fuller *v.* Scribner, 76 N. Y. 190;
Lamont *v.* Cheshire, 65 N. Y. 30;
Lenihan *v.* Hamann, 55 N. Y.
652;
Chapman *v.* West, 17 N. Y. 125;
Cleveland *v.* Boerum, 23 Barb.
(N. Y.) 201; s.c. 3 Abb. (N. Y.)
Pr. 294;
Zeiter *v.* Bowman, 6 Barb. (N. Y.)
133;
Smith *v.* Sanger, 3 Barb. Ch. (N.
Y.) 360;
Watt *v.* Watt, 2 Barb. Ch. (N. Y.)
371;
Ostrom *v.* McCann, 21 How. (N.
Y.) Pr. 431;
Kindberg *v.* Freeman, 39 Hun
(N. Y.) 466;
Weeks *v.* Tones, 16 Hun (N. Y.)
349;
Anonymous, 10 Paige Ch. (N. Y.)
20;
Curtis *v.* Hitchcock, 10 Paige Ch.
(N. Y.) 399;
Sedgwick *v.* Cleveland, 7 Paige
Ch. (N. Y.) 287, 290, 291;
Jackson *v.* Losee, 4 Sandf. Ch.
(N. Y.) 381;
Clow *v.* Derby Coal Co., 98 Pa.
St. 432;
Eyster *v.* Gaff, 91 U. S. 521; bk.
23 L. ed. 403;
Coles *v.* Forrest, 10 Beav. 552;
Foster *v.* Deacon, 6 Madd. 59.
² Ellis *v.* Kenyon, 25 Ind. 134;
Eaton *v.* Nason, 47 Me. 132;
Weed Sewing Mach. Co. *v.* Emer-
son, 115 Mass. 554;
Merchant *v.* Thomson, 34 N. J.
Eq. (8 Stew.) 73;
Armstrong *v.* Ross, 20 N. J. Eq.
(5 C. E. Gr.) 109;
Galway *v.* Fullerton, 17 N. J. Eq.
(2 C. E. Gr.) 389;
Albany F. Ins. Co. *v.* Bay, 4 N.
Y. 9, 38;
Conde *v.* Shepard, 4 How. (N. Y.)
Pr. 75;
Graham *v.* Long, 65 Pa. St. 383;
Newhart *v.* Peters, 80 N. C. 166;
Glass *v.* Warwick, 40 Pa. St. 140;
s.c. 80 Am. Dec. 566;
Black *v.* Galway, 24 Pa. St. 18;
McFerrin *v.* White, 6 Coldw.
(Tenn.) 499;
Hill *v.* Edmonds, 5 DeG. & S.
603.

require the portion retained to be first sold, and if a sum sufficient to pay the mortgage debt is not realized, the remaining parcels or so many as may be required in the inverse order of their alienation ;¹ and where there have been subsequent incumbrances, either by judgment or mortgage, upon different portions of the premises, a similar order should be made,² for the reason that all subsequent incumbrances are to be deemed sales within the rule.³ The decree must also set forth the time, place,

- ¹ *Niles v. Harmon*, 80 Ill. 396 ;
Lock v. Fulford, 52 Ill. 166 ;
Dickey v. Thompson, 8 B. Mon. (Ky.) 312, 314 ;
Blight v. Banks, 6 T. B. Mon. (Ky.) 192, 197 ; s.c. 17 Am. Dec. 136 ;
Hoy v. Bramhall, 19 N. J. Eq. (4 C. E. Gr.) 563 ; s.c. 97 Am. Dec. 687 ;
Gaskill v. Sine, 13 N. J. Eq. (2 Beas.) 400 ; s.c. 78 Am. Dec. 105 ;
Blackledge v. Nelson, 2 Dev. (N. C.) Eq. 65, 66 ;
Mevey's Appeal, 4 Pa. St. 80 ;
Messervey v. Barelli, 2 Hill (S. C.) Eq. 567 ;
Wiltzie Mort. Forec. (2d ed.), § 499.
- ² *Fassett v. Mullock*, 5 Colo. 466 ;
Dodds v. Snyder, 44 Ill. 153 ;
Bernhardt v. Lymburner, 85 N. Y. 172 ;
Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151, 155 ;
New York Life Ins. & T. Co. v. Milnor, 1 Barb. Ch. (N. Y.) 353 ;
Steere v. Child, 15 Hun (N. Y.) 511 ;
Snyder v. Stafford, 11 Paige Ch. (N. Y.) 71 ;
Conrad v. Harrison, 3 Leigh (Va.) 532.
- ³ *Milligan's Appeal*, 104 Pa. St. 503.
- See : *Mobile, M. D. & M. Ins. Co. v. Huder*, 35 Ala. 713 ;
Fassett v. Mullock, 5 Colo. 466 ;
Moore v. Chandler, 59 Ill. 466 ;
Summer v. Waugh, 56 Ill. 531 ;
Tompkins v. Wiltberger, 56 Ill. 385 ;
Lock v. Fulford, 52 Ill. 166 ;
Dodds v. Snyder, 44 Ill. 53 ;
Iglehart v. Crain, 42 Ill. 261 ;
Matteson v. Thomas, 41 Ill. 110 ;
McLaurie v. Thomas, 39 Ill. 291 ;
- Marshall v. Moore*, 36 Ill. 321 ;
Evansville Gas Light Co. v. State, 73 Ind. 219 ;
Medsker v. Parker, 70 Ind. 509 ;
McCullom v. Turpie, 32 Ind. 146 ;
Aiken v. Bruen, 21 Ind. 137 ;
Williams v. Perry, 20 Ind. 437 ; s.c. 83 Am. Dec. 327 ;
Cissna v. Haynes, 18 Ind. 496 ;
Day v. Patterson, 18 Ind. 114 ;
Sheperd v. Adams, 32 Me. 63 ;
Holden v. Pike, 24 Me. 427 ;
Beard v. Fitzgerald, 105 Mass. 134 ;
Pike v. Goodnow, 94 Mass. (12 Allen) 472, 474 ;
George v. Wood, 91 Mass. (9 Allen) 80 ; s.c. 85 Am. Dec. 741 ;
Kilborn v. Robbins, 90 Mass. (8 Allen) 466 ;
George v. Kent, 89 Mass. (7 Allen) 16 ;
Chase v. Woodbury, 60 Mass. (6 Cush.) 143 ;
Parkman v. Welch, 36 Mass. (19 Pick.) 231 ;
Allen v. Clark, 34 Mass. (17 Pick.) 47 ;
McVeigh v. Sherwood, 47 Mich. 545 ; s.c. 11 N. W. Rep. 379 ;
Sager v. Tupper, 35 Mich. 134 ;
McKinney v. Miller, 19 Mich. 142 ;
Ireland v. Woolman, 15 Mich. 253 ;
Cooper v. Bigley, 13 Mich. 463 ;
Briggs v. Kaufman, 2 Mich. N. P. 160 ;
Mason v. Payne, Walk. Ch. (Mich.) 459 ;
Johnson v. Williams, 4 Minn. 260, 268 ;
Mahagan v. Mead, 63 N. H. 570 ; s.c. 3 Atl. Rep. 919 ;
Brown v. Simons, 44 N. H. 475 ;
Hill v. McCarter, 27 N. J. Eq. (12 C. E. Gr.) 41 ;
Mutual L. Ins. Co. of New York v. Boughrum, 24 N. J. Eq. (9 C. E. Gr.) 44 ;

and manner of sale, and the officer by whom to be made,¹ and should state whether or not the premises are to be

Mount v. Potts, 23 N. J. Eq. (8 C. E. Gr.) 188 ;
Wetherby v. Slack, 16 N. J. Eq. (1 C. E. Gr.) 491 ;
Keene v. Munn, 16 N. J. Eq. (1 C. E. Gr.) 398 ;
Gaskill v. Sine, 13 N. J. Eq. (2 Beas.) 400 ; s.c. 78 Am. Dec. 105 ;
Winters v. Henderson, 6 N. J. Eq. (2 Halst.) 31 ;
Wikoff v. Davis, 4 N. J. Eq. (3 H. W. Gr.) 224 ;
Britton v. Updyke, 3 N. J. Eq. (2 H. W. Gr.) 125 ;
Shannon v. Marsellis, 1 N. J. Eq. (1 Saxt.) 413 ;
Bernhardt v. Lymburner, 85 N. Y. 172 ;
Hopkins v. Wooley, 81 N. Y. 77 ;
Barnes v. Mott, 64 N. Y. 397, 402 ; s.c. 21 Am. Rep. 625 ;
Chapman v. West, 17 N. Y. 125 ;
Ingalls v. Morgan, 10 N. Y. 178 ;
Howard Ins. Co. v. Halsey, 8 N. Y. 271 ; s.c. 59 Am. Dec. 478 ;
Crafts v. Aspinwall, 2 N. Y. 289 ;
McDonald v. Whitney, 2 N. Y. Week. Dig. 529 ;
Woods v. Spaulding, 45 Barb. (N. Y.) 602, 608 ;
La Farge F. Ins. Co. v. Bell, 22 Barb. (N. Y.) 54 ;
St. John v. Bumstead, 17 Barb. (N. Y.) 100, 102 ;
Weaver v. Toogood, 1 Barb. (N. Y.) 238 ;
Ferguson v. Kimball, 3 Barb. Ch. (N. Y.) 616 ;
Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151, 155 ;
New York L. Ins. & T. Co. v. Milnor, 1 Barb. Ch. (N. Y.) 353 ;
Ex parte Merrian, 4 Den. (N. Y.) 254 ;

Van Slyke v. Van Loan, 26 Hun (N. Y.) 344 ;
Coles v. Appleby, 22 Hun (N. Y.) 72 ;
Steere v. Childs, 15 Hun (N. Y.) 511 ;
Clowes v. Dickinson, 5 John. Ch. (N. Y.) 235 ; s.c. 9 Cow. (N. Y.) 403 ;
Gill v. Lyon, 1 John. Ch. (N. Y.) 447 ;
Snyder v. Stafford, 11 Paige Ch. (N. Y.) 71 ;
Kellogg v. Rand, 11 Paige Ch. (N. Y.) 59 ;
Rathbone v. Clark, 9 Paige Ch. (N. Y.) 648 ;
Schryver v. Teller, 9 Paige Ch. (N. Y.) 173 ;
Farmers' Loan & T. Co. v. Maltbey, 8 Paige Ch. (N. Y.) 361 ;
Patty v. Pease, 8 Paige Ch. (N. Y.) 277 ; s.c. 35 Am. Dec. 63 ;
Akeel v. Spraker, 8 Paige Ch. (N. Y.) 182 ;
Guion v. Knapp, 6 Paige Ch. (N. Y.) 35 ; s.c. 29 Am. Dec. 741 ;
Jenkins v. Freyer, 4 Paige Ch. (N. Y.) 47 ;
Gouverneur v. Lynch, 2 Paige Ch. (N. Y.) 300 ;
James v. Hubbard, 1 Paige Ch. (N. Y.) 228 ;
New York L. Ins. & T. Co. v. Cutler, 3 Sandf. Ch. (N. Y.) 176 ;
Nellons v. Truax, 6 Ohio St. 97 ;
Green v. Ramage, 18 Ohio 428 ; s.c. 51 Am. Dec. 458 ;
Cary v. Folsom, 14 Ohio 365 ;
Commercial Bank of Lake Erie v. Western Reserve Bank, 11 Ohio 444 ; s.c. 38 Am. Dec. 739 ;
Carpenter v. Koons, 20 Pa. St. 222 ;
Warren v. Sennett, 4 Pa. St. 114 ;

¹ *Gould v. Garrison*, 48 Ill. 258 ;
Reynolds v. Wilson, 15 Ill. 394 ; s.c. 60 Am. Dec. 753 ;
Jennings v. Jennings, 2 Abb. (N. Y.) Pr. 6, 7, 17 ;
Center v. Billinghamurst, 1 Cow. (N. Y.) 33 ;
Yates v. Woodruff, 4 Edw. Ch. (N. Y.) 700 ;
Fuller v. Van Geesen, 4 Hill (N. Y.) 171, 176 ;
Lynde v. O'Donnell, 21 How. (N.

Y.) Pr. 34 ; s.c. 12 Abb. (N. Y.) Pr. 286 ;
Heyer v. Deaves, 2 John. Ch. (N. Y.) 154 ;
Blossom v. Milwaukee & C. R. Co., 70 U. S. (3 Wall.) 196, 205 ; bk. 18 L. ed. 43 ;
Williamson v. Berry, 49 U. S. (8 How.) 495, 544 ; bk. 12 L. ed. 1170 ;
Cleve v. Veer, Cro. Car. 450.

sold subject to redemption, giving the terms of sale, whether for cash, or part cash and part on time.¹ The decree generally provides that the plaintiff may bid at the sale,² and for the placing of the purchaser in possession.³ On foreclosure of a deed of trust on land across which a railroad is constructed, a decree should not except the right of way from the sale, where the deeds for the land, and the trust created therein, make no exception thereof, and the record does not show that there is any right of way through the lands.⁴

SEC. 2150. ~~Same—Same—Same—Effect upon land.~~—The

- Cowden's Estate, 1 Pa. St. 267;
 Donley v. Hayes, 17 Serg. & R. (Pa.) 400;
 Nailor v. Stanley, 10 Serg. & R. (Pa.) 450; s.c. 13 Am. Dec. 691;
 Norton v. Lewis, 3 S. C. 25;
 Stoney v. Schultz, 1 Hill (S. C.) Eq. 465; s.c. 27 Am. Dec. 429;
 Meng v. Houser, 13 Rich. (S. C.) Eq. 210;
 Rippetoe v. Dwyer, 49 Tex. 498;
 Root v. Collins, 34 Vt. 153;
 Lyman v. Lyman, 32 Vt. 79; s.c. 76 Am. Dec. 151;
 Jones v. Myrick, 8 Gratt. (Va.) 170, 179;
 Henkle v. Allstadt, 4 Gratt. (Va.) 284;
 Conrad v. Harrison, 3 Leigh (Va.) 532;
 Aiken v. Milwaukee & St. P. R. Co., 37 Wis. 469;
 State v. Titus, 17 Wis. 241;
 Worth v. Hill, 14 Wis. 559;
 Ogden v. Glidden, 9 Wis. 46;
 Hartley v. O'Flaherty, Lloyd & Goold Cas. temp. Plunkett, 208;
 Averall v. Walde, Lloyd & Goold Cas. temp. Sugden, 252;
 Hamilton v. Royse, 2 Sch. & Lef. 315;
 Barnes v. Raester, 1 Young & C. 401.
Compare: Huff v. Farwell, 67 Iowa 298;
 Barney v. Myers, 28 Iowa 472;
 Griffith v. Lovell, 26 Iowa 226;
 Massie v. Wilson, 16 Iowa 390, 391;
 Bates v. Ruddick, 2 Iowa 423; s.c. 65 Am. Dec. 774;
 Barden v. Grady, 37 Ga. 600;
 Cumming v. Cumming, 3 Ga. 460;
 Knowles v. Lawton, 18 Ga. 476; s.c. 63 Am. Dec. 290;
 Hammond v. Myrick, 14 Ga. 77;
 Campbell v. Johnston, 4 Dana (Ky.) 177, 182;
 Hughes v. Graves, 1 Litt. (Ky.) 317;
 Poston v. Eubanks, 3 J. J. Marsh. (Ky.) 44, 47;
 Dickey v. Thompson, 8 B. Mon. (Ky.) 312;
 Burk v. Chrisman, 3 B. Mon. (Ky.) 50;
 Hunt v. M'Connell, 1 T. B. Mon. (Ky.) 219;
 Stanly v. Stocks, 1 Dev. (N. C.) Eq. 314.
¹ Pursley v. Forth, 82 Ill. 387;
 Sage v. Central R. Co. (Iowa), 13 West. Jur. 218.
 As to where the mortgagee becomes the purchaser, see:
 Jacobs v. Turpin, 82 Ill. 424.
² See: Holcomb v. Holcomb, 11 N. J. Eq. (3 Stockt.) 281;
 Ten Eyck v. Caig, 62 N. Y. 406, 421;
 Williams v. Townsend, 31 N. Y. 411, 415;
 Cameron v. Irwin, 5 Hill (N. Y.) 272, 280;
 Edwards v. Sanders, 6 S. C. 316;
 Shaw v. Bunny, 2 DeG. J. & S. 468; s.c. 13 W. R. 374.
³ Frisbie v. Fogarty, 34 Cal. 11;
 Montgomery v. Middlemiss, 21 Cal. 103; s.c. 81 Am. Dec. 146;
 Belloc v. Rogers, 9 Cal. 123, 125.
⁴ Hardin v. Iowa R. & C. Co., 78 Iowa 726; s.c. 43 N. W. Rep. 543; 6 L. R. A. 52.

effect upon the land of a decree of foreclosure will be to bar the interest of the mortgagor, and all those claiming under and through him who have been made parties to the suit, but will have no effect whatever upon mortgagees and grantees who acquire their interests prior to the date of the execution of the mortgage foreclosed; neither will it affect the interests or rights of those who were not made parties to the action.¹ In a majority of the states there are statutes regulating the right of redemption by the mortgagor, and those claiming under him, and fixing the time within which it shall be made after the date of sale. Until such date has expired the deed is not properly delivered to the purchaser at the foreclosure sale, and the rights of the mortgagor or his assignees will not be barred.² And until the expiration of the period for redemption the mortgagor or his assignee will be entitled to the possession of the premises and to the rents and profits,³ unless a receiver has been appointed of them. When a deed is delivered to the purchaser it relates back to the date of the sale and cuts off all intervening rights.⁴ In the absence of statutory provision in relation to the matter, a court of equity, in the exercise of its discretion, may provide for a period of redemption before the sale shall become absolute.⁵ The

¹ *Burton v. Lies*, 21 Cal. 87, 91;
Montgomery v. Tutt, 11 Cal. 190,
 192;

Hinds v. Allen, 34 Conn. 185,
 193;

Kramer v. Rebman, 9 Iowa 114;
Ritger v. Parker, 62 Mass. (8

Cush.) 145, 149; s.c. 54 Am.
 Dec. 744;

Packer v. Rochester & S. R. Co.,
 17 N. Y. 283, 287;

Kershaw v. Thompson, 4 John.
 Ch. (N. Y.) 609;

De Haven v. Landell, 31 Pa. St.
 120, 124;

Hodson v. Treat, 7 Wis. 263;

Tallman v. Ely, 6 Wis. 244.

² *Harlan v. Smith*, 6 Cal. 173;
Boester v. Byrne, 72 Ill. 466;
Rhinehart v. Stevenson, 23 Ill.
 524;

Walker v. Jarvis, 16 Wis. 28;

Jones v. Gilman, 14 Wis. 450.

³ *Whitney v. Allen*, 21 Cal. 233;

Whalin v. White, 25 N. Y. 462,
 464;

Clason v. Corley, 5 Sandf. Ch.
 (N. Y.) 447.

⁴ *Miller v. Sharp*, 49 Cal. 233;
Horner v. Zimmerman, 45 Ill.
 14;

Markel v. Evans, 47 Ind. 326;

Ogden v. Walters, 12 Kan. 282;

Torrums v. Hicks, 32 Mich. 307;

Graham v. Bleakie, 2 Daly (N.
 Y.) 55;

Burford v. Rosenfield, 37 Tex. 42.

Butsee: Brindernagle v. German
Ref. Church, 1 Barb. Ch. (N.
 Y.) 15.

⁵ *Durrett v. Whiting*, 7 T. B. Mon.
 (Ky.) 547;

Richardson v. Parrott, 7 B. Mon.
 (Ky.) 379;

Stockton v. Dundee Manfg. Co.,
 22 N. J. Eq. (7 C. E. Gr.) 156;

Perine v. Dunn, 4 John. Ch. (N.
 Y.) 140;

general rule is that the effect of foreclosure proceedings is simply to bar the right of redemption on the part of the mortgagor or those claiming under him ;¹ hence, where a decree of foreclosure does not provide for putting the purchaser in possession, the mortgagee will be left to pursue his legal remedies to establish his title to the estate.²

SEC. 2151. **Same — Same — Same — Upon the debt.**— The effect of a foreclosure, whether strict or otherwise, does not of itself operate to discharge the mortgage debt,³ and if the value of the property, or the price for which it is sold, is not sufficient to satisfy the entire debt, the mortgagee may sue at law for the balance remaining due to him,⁴ or have a decree for the unsatisfied balance.⁵ It is the usual practice for courts of equity, in rendering a decree in foreclosure for the sale of mortgaged premises, to give judgment for any unpaid balance that may remain against the mortgagor, and those who are jointly liable with him, which is known as a judgment for deficiency.⁶

- Harkins *v.* Forsyth, 11 Leigh (Va.) 294 ;
 Smith *v.* Hoyt, 14 Wis. 252.
¹ Weiner *v.* Heintz, 17 Ill. 259 ;
 Packer *v.* Rochester & S. R. Co., 17 N. Y. 283, 287 ;
 Bradley *v.* Chester Valley R. R. Co., 36 Pa. St. 141. 150.
² Palmer *v.* Mead, 7 Conn. 149 ;
 Jones *v.* Weed, 4 Sandf. Ch. (N. Y.) 208 ;
 Sutton *v.* Stone, 2 Atk. 101.
 See : Bright *v.* Pennywit, 21 Ark. 130 ;
 Skinner *v.* Beatty, 16 Cal. 156 ;
 Jackson *v.* Warren, 32 Ill. 331.
³ Vansant *v.* Allmon, 23 Ill. 30 ;
 Nunemacher *v.* Ingle, 20 Ind. 135 ;
 Porter *v.* Pillsbury, 36 Me. 278 ;
 Paris *v.* Hulett, 26 Vt. 308 ;
 Hatch *v.* White, 2 Gall. C. C. 152 ; s.c. Fed. Cas. No. 6209.
⁴ Stevens *v.* Dufour, 1 Blackf. (Ind.) 387 ;
 Watson *v.* Hawkins, 60 Mo. 550 ;
 Lansing *v.* Goelet, 9 Cow. (N. Y.) 346 ;
 Hatch *v.* White, 2 Gall. C. C. 152 ; s.c. Fed. Cas. No. 6209 ;
 Tooke *v.* Hartley, 2 Bro. C. C. 125.
⁵ Bassett *v.* Mason, 18 Conn. 131, 136 ;
 Edgerton *v.* Young, 43 Ill. 464, 470 ;
 Patten *v.* Pearson, 57 Me. 428, 434 ;
 Porter *v.* Pillsbury, 36 Me. 278 ;
 Andrews *v.* Scotton, 2 Bland (Md.) 629, 666 ;
 Leland *v.* Loring, 51 Mass. (10 Met.) 122 ;
 Armory *v.* Fairbanks, 3 Mass. 562 ;
 Smith *v.* Packard, 19 N. H. 575 ;
 Hunt *v.* Stiles, 10 N. H. 466 ;
 Osborne *v.* Tunis, 25 N. J. L. (1 Dutch.) 633 ;
 Lansing *v.* Goelet, 9 Cow. (N. Y.) 346 ;
 Morgan *v.* Plumb, 9 Wend. (N. Y.) 287 ;
 Spencer *v.* Harford, 4 Wend. (N. Y.) 381 ;
 Paris *v.* Hulett, 26 Vt. 308 ;
 Lovell *v.* Leland, 3 Vt. 581 ;
 Bean *v.* Whitcomb, 13 Wis. 431.
⁶ Rollins *v.* Forbes, 10 Cal. 299 ;

SEC. 2152. **Same—Same—Sale of mortgaged premises—Under decree.**—The sale of mortgaged premises under a decree of foreclosure must be conducted by the officer named in the decree, or designated by statute, in strict accordance with the terms of the decree as to time, place, manner, and terms of sale. The notice to be given of the sale, its contents,¹ and method of publication² are regulated either by the decree or the statute under which the sale is made. The sale must be made at public vendue or auction, and must be sold to the highest responsible bidder,³ and the land should be sold in parcels to separate purchasers or in one parcel to a single purchaser, by whichever method the sale will bring the greatest amount of money.⁴ Where the land consists of several separate and distinct tracts, the tracts should generally be sold separately. If sale is made as one parcel, it will not be void, but voidable only for good cause shown, such as that it was the result of fraud, or that prejudice resulted to the mortgagor or the owner of the equity of redemp-

- Johnson *v.* Harmon, 19 Iowa 56, 58 ;
 Marston *v.* Marston, 45 Me. 412 ;
 Andrews *v.* Scotton, 2 Bland (Md.) 629, 666 ;
 Hale *v.* Rider, 59 Mass. (5 Cush.) 231 ;
 Payne *v.* Harrell, 40 Miss. 498 ;
 Stark *v.* Mercer, 4 Miss. (3 How.) 377 ;
 Deare *v.* Carr, 3 N. J. Eq. (2 H. W. Gr.) 513 ;
 Gage *v.* Brewster, 31 N. Y. 218, 220 ;
 Jones *v.* Conde, 6 John. Ch. (N. Y.) 77 ;
 Dunkley *v.* Van Buren, 3 John. Ch. (N. Y.) 330 ;
 Drayton *v.* Marshall, 1 Rice (N. C.) Eq. 373, 386 ; s.c. 33 Am. Dec. 84 ;
 Mott *v.* Clark, 9 Pa. St. 399 ; s.c. 49 Am. Dec. 566 ;
 Pierce *v.* Potter, 7 Watts (Pa.) 475 ;
 Lee *v.* Kingsbury, 13 Tex. 68, 69 ; s.c. 42 Am. Dec. 546.
 See : *Post*, § 2158.
- ¹ Marsh *v.* Ridgway, 18 Abb. (N. Y.) Pr. 262 ;
 Laight *v.* Pell, 1 Edw. Ch. (N. Y.) 577 ;
- Hoffman *v.* Burke, 21 Hun (N. Y.) 580 ;
 Ray *v.* Oliver, 6 Paige Ch. (N. Y.) 489 ;
 Veeder *v.* Fonda, 3 Paige Ch. (N. Y.) 94.
² Wilson *v.* Page, 76 Me. 279 ;
 Market National Bank *v.* Pacific National Bank, 89 N. Y. 398, 399 ; s.c. 12 Abb. (N. Y.) N. C. 104 ;
 Olcott *v.* Robinson, 21 N. Y. 150 ; s.c. 78 Am. Dec. 126 ;
 Sheldon *v.* Wright, 5 N. Y. 497 ;
 Steinle *v.* Bell, 12 Abb. (N. Y.) Pr. N. S. 171, 177 ;
 Valentine *v.* McCue, 26 Hun (N. Y.) 456 ; s.c. 14 Week. Dig. 142 ;
 Merritt *v.* Village of Portchester, 8 Hun (N. Y.) 40, 45 ;
 Wood *v.* Terry, 4 Lans. (N. Y.) 80, 85 ;
 Hackley *v.* Draper, 4 T. & C. (N. Y.) 614, 622 ; s.c. 60 N. Y. 88 ;
 Kopmeier *v.* O'Neil, 47 Wis. 593 ; s.c. 3 N. W. Rep. 365.
³ Wiltsie Mortg. Forec. 578, § 480.
⁴ Holmes *v.* Turner's Falls Lumber Co., 150 Mass. 535 ; s.c. 23 N. E. Rep. 305 ; 6 L. R. A. 283.

tion.¹ The officer making the sale should be personally present,² and should report the sale made to the court.³

SEC. 2153. ~~Same—Same—Same—~~Under power.—It is not unusual to insert in a mortgage a power of sale upon breach of condition. This is a cumulative remedy introduced for the purpose of avoiding the burdensome and expensive proceedings for foreclosure, and does not affect the right of the mortgagee to resort to either legal or equitable proceedings to enforce the mortgage.⁴ This power of sale may be contained in the mortgage itself or in a separate instrument.⁵ No matter by what means the power is conferred, its exercise by the mortgagee is an effectual foreclosure and bar to the right of the mortgagor to exercise his equity of redemption.⁶ Formerly this power was looked upon with disfavor, whether granted in the mortgage itself or in a separate instru-

¹ Willard v. Finnegan, 42 Minn. 476; s.c. 44 N. W. Rep. 985; 8 L. R. A. 50.

² See: Sebastian v. Johnson, 72 Ill. 283; s.c. 22 Am. Rep. 145; Taylor v. Hopkins, 40 Ill. 442; Reynolds v. Wilson, 15 Ill. 394; s.c. 60 Am. Dec. 753;

Blakey v. Abert, 1 Dana (Ky.) 185;

Meyer v. Bishop, 27 N. J. Eq. (12 C. E. Gr.) 145;

Powell v. Tuttle, 3 N. Y. 396; Berger v. Duff, 4 John. Ch. (N. Y.) 368;

Blossom v. Milwaukee & C. R. Co., 70 U. S. (3 Wall.) 205; bk. 18 L. ed. 43, 46;

Williamson v. Berry, 49 U. S. (8 How.) 499, 544; bk. 12 L. ed. 1170, 1191;

Connolly v. Belt, 5 Cranch C. C. 405, 408; s.c. 6 Fed. Cas. 310.

³ Agricultural Ins. Co. v. Barnard, 96 N. Y. 525.

As to errors in such report, see: Ruggles v. First National Bank of Centreville, 43 Mich. 192; s.c. 5 N. W. Rep. 257.

⁴ Carradine v. O'Connor, 21 Ala. 573;

Cormerais v. Genella, 22 Cal. 116; Fogarty v. Sawyer, 17 Cal. 589; Montague v. Dawes, 94 Mass. (12

Allen) 397;

Hyde v. Warren, 46 Miss. 13;

Wayne v. Hanham, 9 Hare 62.

⁵ Brisbane v. Stoughton, 17 Ohio 482.

It has been said that it may arise by necessary implication.

Purdie v. Whitney, 37 Mass. (20 Pick.) 25;

Mundy v. Vawter, 3 Gratt. (Va.) 518.

⁶ Calloway v. People's Bank, 54 Ga. 441;

Barnes v. Ehrman, 74 Ill. 402; Longwith v. Butler, 8 Ill. (3 Gilm.) 32;

Lydston v. Powell, 101 Mass. 77; Waters v. Randall, 47 Mass. (6

Met.) 479, 484;

Jackson v. Henry, 10 John. (N. Y.) 185; s.c. 6 Am. Dec. 328;

Hyman v. Devereux, 63 N. C. 624;

Brisbane v. Stoughton, 17 Ohio 482;

Leigh v. Lloyd, 35 Beav. 455;

Clarke v. Royal Panopticon, 4 Drew. 26;

Cruikshank v. Duffin, L. R. 13 Eq. 555;

In re Chawner's Will, L. R. 8 Eq. 569; s.c. 22 L. T. 262.

Compare: Sanders v. Richards, 2 Coll. 586.

ment, but it is not generally regarded as valid.¹ It has been said that an assignee of a mortgage cannot execute a power of sale thereby given, unless the debt secured has been transferred to him so as to pass the legal title thereto;² but that an assignee of a mortgage for collateral security can, as against the mortgagor and those who claim under him, execute the power of sale as fully as if the assignment were absolute.³ The reason for this rule is the fact that the power of sale, being coupled with an interest, will vest in any person entitled to the money secured to be paid.⁴ In some cases courts of equity will interfere by injunction and restrain an exercise of the power of sale where the causes for interference are strong,⁵ as where it is sought to use such power for a purpose foreign to that for which it was intended.⁶ A perversion of the power to sell land under a mortgage is not shown by the fact that some advantage may accrue to the mortgagee besides the payment of the debt, or an advantage may accidentally accrue thereby to others;⁷ and a sale under a power in a mortgage will not be en-

¹ *Walthall's Exrs. v. Rives*, 34 Ala. 91;

Calloway v. People's Bank, 54 Ga. 441;

Bloom v. Van Rensselaer, 15 Ill. 503;

Longwith v. Butler, 8 Ill. (3 Gilm.) 32;

Fanning v. Kerr, 7 Iowa 450, 462;

Smith v. Provin, 86 Mass. (4 Allen) 516, 518;

Kinsley v. Ames, 43 Mass. (2 Met.) 29;

Sims v. Hundley, 3 Miss. (2 How.) 896;

Mann v. Best, 62 Mo. 491;

Clark v. Condit, 18 N. J. Eq. (3 C. E. Gr.) 358;

Wilson v. Troup, 7 John. Ch. (N. Y.) 25;

Hyman v. Deveraux, 63 N. C. 624;

Turner v. Johnson, 10 Ohio 204;

Bradley v. Chester Valley R., 36 Pa. St. 141;

Mitchell v. Bogan, 11 Rich. (S. C.) L. 686;

Morrison v. Bean, 15 Tex. 267;

Wing v. Cooper, 37 Vt. 169, 184.

² *Sanford v. Kane*, 133 Ill. 199; s.c.

24 N. E. Rep. 414; 8 L. R. A. 724.

³ *Holmes v. Turner's Falls Lumber Co.*, 150 Mass. 535; s.c. 23 N. E. Rep. 305; 6 L. R. A. 283.

⁴ *McGuire v. Van Pelt*, 55 Ala. 344;

Cheek v. Waldrum, 25 Ala. 152;

Bush v. Sherman, 80 Ill. 160;

Harnickell v. Orndorff, 35 Md. 341;

Randall v. Hazleton, 94 Mass. (12 Allen) 412;

Pickett v. Jones, 63 Mo. 195;

Wilson v. Troup, 2 Cow. (N. Y.) 195; s.c. 14 Am. Dec. 458;

Wilson v. Bennett, 5 DeGex & S. 475.

⁵ *Bedell v. McClellan*, 11 How. (N. Y.) Pr. 172;

Frieze v. Chapin, 2 R. I. 429, 432.

⁶ *Davey v. Durant*, 1 DeGex & J. 535.

See: *Montgomery v. McEwen*, 9 Minn. 103;

Bedell v. McClellan, 11 How. (N. Y.) Pr. 172.

⁷ *Holland v. Citizens' Sav. Bank*, 16 R. I. 734; s.c. 19 Atl. Rep. 654; 8 L. R. A. 553.

joined and set aside on the ground of a perversion of the power to improper purposes, where the mortgagee is acting within the letter of his power, unless the perversion is very clearly shown.¹

SEC. 2154. Same—Same—Same—Same—Extinguishment of power.—The power of sale contained in a mortgage will be extinguished by any act on the part of the mortgagor or those claiming under him which would discharge the mortgage, such as a payment before due or a tender of payment on the law day.² But an exercise of the power conferred will not vest title in the purchaser unless the mortgagor or his assignee are estopped by their own act to deny the validity of the sale.³ A tender after condition broken, however, will not have the effect of extinguishing the power of sale;⁴ neither will actual payment after breach have that effect.⁵

SEC. 2155. Same—Same—Same—Rights of purchaser.—The purchaser at a mortgage foreclosure sale acquires whatever interests or rights the mortgagee had in the premises at the time of the sale, and has a right to have the sale completed upon the terms on which the bid was made. Thus it has been held that the purchaser at a mortgage foreclosure sale cannot be compelled to pay a sum in addition to the amount of his bid upon the ground that such is required to make the bid correspond with the terms upon which alone the referee was authorized to make the sale;⁶ and where the sale is made on time, the

¹ *Holland v. Citizens' Sav. Bank*, 16 R. I. 734; s.c. 19 Atl. Rep. 654; 8 L. R. A. 553.

² *Lowe v. Grinnan*, 19 Iowa 192, 193;

Warner v. Blakeman, 36 Barb. (N. Y.) 501;

Charter v. Stevens, 2 Den. (N. Y.) 33; s.c. 45 Am. Dec. 444;

Cameron v. Irwin, 5 Hill (N. Y.) 272;

Burnet v. Denniston, 5 John. Ch. (N. Y.) 35;

Jenkins v. Jones, 2 Giff. 99.

³ *Smith v. Newton*, 38 Ill. 230;

Cromwell v. Bank of Pittsburg, 2 Wall. Jr. C. C. 569; s.c. 6 Fed. Cas. 852.

⁴ *Cranstone v. Crane*, 97 Mass. 459; s.c. 93 Am. Dec. 106;

Montague v. Dawes, 94 Mass. (12 Allen) 397.

⁵ *Flower v. Elwood*, 66 Ill. 438;

Whelan v. Reilly, 61 Mo. 565;

Cameron v. Irwin, 5 Hill (N. Y.) 272;

Burnet v. Denniston, 5 John. Ch. (N. Y.) 35;

Jenkins v. Jones, 2 Giff. 99.

⁶ *Hotchkiss v. Clifton Air Cure*, 4 Keyes (N. Y.) 476.

purchaser cannot be compelled to pay cash.¹ The purchaser not only acquires whatever right or interest the mortgagee had in the premises at the time of the sale, but where the sale is regular, also all the interest, right, and title the mortgagor had in and to the premises sold, and will be entitled to immediate possession of the land and to the rents and profits thereof.² But he does not acquire the absolute title to the premises or the right of possession thereof until after the delivery of the deed thereto. Until after the delivery of the deed the owner of the equity of redemption will be entitled to the possession of the land and to receive the rents and profits.³ The title of a *bona fide* purchaser for value without notice on a mortgage sale is not affected by the fact that the holder of the mortgage had prevented a tender by refusing to accept payment, except on conditions which he had no right to make.⁴ The fact that a person procures a trustee or a creditor to foreclose a trust deed, and buys at the sale, made openly and fairly, in strict accordance with the terms of the trust, is not evidence of fraud against the devise of the grantor, where such purchaser is ignorant of a will, and believes the land had descended to the heir-at-law, whose vendee proposes to convey to him upon such sale being made by the trustee, and where the sole object in procuring such foreclosure is to exhaust the creditor's remedies against the land; and this although the vendee of the heir had assumed the payment of the incumbrance.⁵

SEC. 2156. Same—Same—Same—Purchase by mortgagee.—

¹ *Rhodes v. Dutcher*, 6 Hun (N. Y.) 453.

² *Butler v. Page*, 48 Mass. (7 Met.) 40, 42; s.c. 39 Am. Dec. 757.

See: *Higgins v. York Bldgs. Co.*, 2 Atk. 107;

Hele v. Bexley, 20 Beav. 127;

Drummond v. Duke of St. Albans, 5 Ves. 438;

Coleman v. Duke of St. Albans, 3 Ves. 25.

³ *Mitchell v. Bartlett*, 51 N. Y. 447, aff'g 52 Barb. (N. Y.) 319.

See: *Taliaferro v. Gay*, 78 Ky. 496;

Mutual Life Ins. Co. of New York v. Balch, 4 Abb. (N. Y.) N. C. 200;

Astor v. Turner, 11 Paige Ch. (N. Y.) 436; s.c. 43 Am. Dec. 766;

Clason v. Corley, 5 Sandf. (N. Y.) 447;

Nichols v. Foster, 9 N. Y. Week. Dig. 468.

⁴ *Holland v. Citizens' Sav. Bank*, 16 R. I. 734; s.c. 19 Atl. Rep. 654; 8 L. R. A. 553.

⁵ *Kansas City Land Co. v. Hill*, 87 Tenn. 589; s.c. 11 S. W. Rep. 797; 5 L. R. A. 45.

Under an ordinary power of sale contained in a mortgage the mortgagee cannot purchase the mortgaged premises for the reason that he is the trustee of all parties concerned, and cannot purchase unless he is authorized to do so by statute, by the express terms of the mortgage, or by the order of the court.¹ It is the general practice in many of the states to insert in the decree of foreclosure an order of sale of the mortgaged premises a provision allowing the plaintiff or any other party to become the purchaser of the property. This provision is frequently necessary in order to protect the interests of the parties and prevent a sacrifice of the premises.² Statutory provisions allowing such purchase by the mortgagee are found in Maryland, Michigan, Minnesota, Wisconsin, and other states. In the absence of such a statutory provision or permission in the decree of foreclosure, a purchase by the mortgagee will not be avoided without showing either fraud or unfair dealings on his part;³ but in all cases where a sale is made under a judicial decree or by a public officer instead of the mortgagee, the reason for the rule is removed, and there is no restriction upon the

¹ *Benham v. Rowe*, 2 Cal. 387; s.c. 56 Am. Dec. 342;

Roberts v. Fleming, 53 Ill. 196;

Hall v. Towne, 45 Ill. 493;

Patten v. Pearson, 57 Me. 428, 435;

Korns v. Shaffer, 27 Md. 83;

Hall v. Bliss, 118 Mass. 554, 560; s.c. 19 Am. Rep. 476;

Dyer v. Shurtleff, 112 Mass. 165; s.c. 17 Am. Rep. 77;

Montague v. Dawes, 94 Mass. (12 Allen) 397, 400;

Howard v. Ames, 44 Mass. (3 Met.) 308;

Jennison v. Hapgood, 24 Mass. (7 Pick.) 1; s.c. 19 Am. Dec. 258;

Scott v. Freeland, 15 Miss. (7 Smed. & M.) 409, 418; s.c. 45 Am. Dec. 310;

Rutherford v. Williams, 42 Mo. 18;

Elliott v. Wood, 45 N. Y. 71;

Jackson ex d. Cadwallader v. Walsh, 14 John. (N. Y.) 407, 415;

Davoue v. Fanning, 2 John. Ch. (N. Y.) 252;

Whitehead v. Hellen, 76 N. C. 99;

Parmenter v. Walker, 9 R. I. 225;

Hyndman v. Hyndam, 19 Vt. 9; s.c. 46 Am. Dec. 171;

Michoud v. Girod, 45 U. S. (4 How.) 503, 553;

Waters v. Groom, 11 Clark & F. 684;

Downes v. Grazebrook, 3 Meriv. 200, 207; s.c. 17 Rev. Rep. 62.

² *Halcomb v. Halcomb*, 11 N. J. Eq. (3 Stockt.) 281;

Wiltie Mortg. Forec., p. 621, § 521.

³ *Blockley v. Fowler*, 21 Cal. 326;

Thornton v. Irwin, 43 Mo. 153;

Rutherford v. Williams, 42 Mo. 18.

See: *Hamilton v. Lubukee*, 51 Ill. 415, 420;

Richards v. Holmes, 18 How. (N. Y.) 143;

Howard v. Davis, 6 Tex. 174.

right of the mortgagee to purchase the mortgaged premises.¹

SEC. 2157. **Same—Same—Same—Application of proceeds of sale.**—Where the mortgaged premises are sold at judicial sale, the money arising from such sale must be applied, first, to the expenses of the sale, and then to the satisfaction of the mortgage debt or debts due, in the order of their priority,² and ordered to be foreclosed, and the surplus, if any, to be held in trust for junior incumbrancers and the mortgagor. Should any surplus remain to the mortgagor it will in equity be invested with all the qualities of real estate, be governed by the same rules, and on the death of the mortgagor will take the same course.³ In some states, however, as in Massachusetts, Michigan, and Vermont, the surplus proceeds arising from the sale of mortgaged premises is held to be personal property, and on death of the mortgagor vests in the personal representatives instead of the widow and heirs.⁴

SEC. 2158. **Same—Same—Judgment for deficiency.**—The

- ¹ *Bloom v. Van Rensselaer*, 15 Ill. 503 ;
Allen v. Chatfield, 8 Minn. 435 ;
Ramsey v. Merriam, 6 Minn. 168 ;
Richards v. Holmes, 18 How. (N. Y.) 143.
² *Cope v. Wheeler*, 41 N. Y. 303 ;
Matthews v. Duryea, 45 Barb. (N. Y.) 69 ;
Bevier v. Schoonmaker, 29 How. (N. Y.) Pr. 411 ;
Stoever v. Stoever, 9 Serg. & R. (Pa.) 434.
 See : *Marr v. Lewis*, 31 Ark. 203 ;
 s.c. 25 Am. Rep. 553 ;
Ayres v. Husted, 15 Conn. 504, 516 ;
Clark v. Bancroft, 13 Iowa 321, 327 ;
Swigert v. Bank of Kentucky, 17 B. Mon. (Ky.) 268, 285 ;
Reilly v. Mayer, 12 N. J. Eq. (1 Beas.) 55 ;
Cheesebrough v. Milliard, 1 John. Ch. (N. Y.) 409, 412 ; s.c. 7 Am. Dec. 494 ;
Evertson v. Booth, 19 John. (N. Y.) 486 ;
Miami Ex. Co. v. United States Bank, Wright (Ohio) 249 ;
Cowden's Estate, 1 Pa. St. 267, 274 ;
Warren v. Warren, 30 Vt. 530 ;
Conrad v. Harrison, 3 Leigh (Va.) 532 ;
White v. Polleys, 20 Wis. 503, 505 ; s.c. 91 Am. Dec. 432 ;
Lanoy v. Athol, 2 Atk. 446.
³ *Shaw v. Hoadley*, 8 Blackf. (Ind.) 165 ;
Andrews v. Fisk, 101 Mass. 422 ;
Buttrick v. Wentworth, 83 Mass. (6 Allen) 79 ;
Pickett v. Buckner, 45 Miss. 226 ;
Reid v. Mullins, 43 Mo. 306 ;
Foster v. Potter, 37 Mo. 525, 534 ;
Hinchman v. Stiles, 9 N. J. Eq. (1 Stock.) 361, 454 ;
Dunning v. Ocean National Bank, 61 N. Y. 497 ; s.c. 19 Am. Rep. 293 ;
Sweezy v. Thayer, 1 Duer (N. Y.) 286 ;
Hawley v. Bradford, 9 Paige Ch. (N. Y.) 200 ; s.c. 37 Am. Dec. 390 ;
Fox v. Pratt, 27 Ohio St. 512.
⁴ *Varnum v. Meserve*, 90 Mass. (8 Allen) 158 ;
Smith v. Smith, 13 Mich. 258.

general rule is that a court of equity possesses no power to give a lien upon or sequester property of the mortgagor, other than that covered by the mortgage, as an additional security for the mortgage debt, until after the mortgage property has been exhausted. For this reason such a court cannot render personal judgment for deficiency remaining after the proceeds of the sale of the mortgaged premises have been applied to the payment of the debt, unless the court has jurisdiction to enforce the debt without the mortgage,¹ in the absence of a statute conferring such power,² enacted for the purpose of enabling the court to dispose of the whole case and avoid the necessity of a separate action at law.³ In the absence of such statutes the mortgagee has to resort to courts of law for the enforcement of his right to a personal judgment. The right in foreclosure suits to a judgment for deficiency remaining after a deduction of the proceeds arising from the sale, has been conferred by statute in most of the states of the Union. Under these statutes a judgment for deficiency may be given against the mortgagor,⁴

¹ *Wiltie on Mortg. Forec.* (2d ed.), § 604.

See : *Hunt v. Lewin*, 4 Stew. & P. (Ala.) 138 ;

Crutchfield v. Coke, 6 J. J. Marsh. (Ky.) 89 ;

Morgan v. Wilkins, 6 J. J. Marsh. (Ky.) 28 ;

McGee v. Davie, 4 J. J. Marsh. (Ky.) 70 ;

Downing v. Palmateer, 1 T. B. Mon. (Ky.) 64 ;

Stark v. Mercer, 4 Miss. (3 How.) 377 ;

Dunkley v. Van Buren, 3 John. Ch. (N. Y.) 330 ;

Fleming v. Sitton, 1 Dev. & B. (N. C.) Eq. 621 ;

Waddell v. Hewitt, 2 Ired. (N. C.) Eq. 252 ;

Orchard v. Hughes, 68 U. S. (1 Wall.) 73 ; bk. 17 L. ed. 560 ;

Noonan v. Braley, Admr. of Lee, 67 U. S. (2 Black.) 499 ; bk. 17 L. ed. 278.

² See : *McCrickett v. Wilson*, 50 Mich. 513 ; s.c. 15 N. W. Rep. 885 ;

Stark v. Mercer, 4 Miss. (3 How.) 377 ;

Fleming v. Sitton, 1 Dev. & B. (N. C.) Eq. 621 ;

Waddell v. Hewitt, 2 Ired. (N. C.) Eq. 252 ;

Wightman v. Gray, 10 Rich. (S. C.) Eq. 518 ;

Orchard v. Hughes, 68 U. S. (1 Wall.) 73 ; bk. 17 L. ed. 560.

³ *Wiltie on Mortg. Forec.* (2d ed.), § 601.

See : *Scofield v. Doscher*, 72 N. Y. 491 ;

Equitable Life Ins. Co. v. Stevens, 63 N. Y. 341 ;

Thorne v. Newby, 59 How. (N. Y.) Pr. 120.

⁴ See : *Marshall v. Davies*, 78 N. Y. 414 ;

Siewert v. Hamel, 33 Hun (N. Y.) 44 ;

Moore v. Shaw, 15 Hun (N. Y.) 428 ;

Bache v. Doscher, 41 N. Y. Super. Ct. (9 J. & S.) 150, aff'g 67 N. Y. 429 ;

Bank of Rochester v. Emerson, 10 Paige Ch. (N. Y.) 359 ;

Tormey v. Gerhart, 41 Wis. 54 ;

Baird v. McConkey, 20 Wis. 297.

against an assignor guaranteeing payment of the mortgage,¹ against the grantee assuming and agreeing to pay the mortgage debt;² and when such judgment is

- ¹ *Jarmon v. Wiswall*, 24 N. J. Eq. (9 C. E. Gr.) 68;
Vanderbilt v. Schreyer, 91 N. Y. 392;
Rushmore v. Miller, 4 Edw. Ch. (N. Y.) 84;
Bristol v. Morgan, 3 Edw. Ch. (N. Y.) 142;
Ofpeer v. Burchell, 44 N. Y. Super. Ct. (12 J. & S.) 575; s.c. 19 Abb. L. J. 57.
- ² *Tuttle v. Armstead*, 53 Conn. 175; 22 Atl. Rep. 677;
Meech v. Ensign, 49 Conn. 191; s.c. 44 Am. Rep. 225;
Bassett v. Bradley, 48 Conn. 224;
Bay v. Williams, 112 Ill. 91; s.c. 54 Am. Rep. 209;
Birke v. Abbott, 103 Ind. 1; s.c. 53 Am. Rep. 474; 1 N. E. Rep. 485;
Wright v. Briggs, 99 Ind. 563;
Ellis v. Johnson, 96 Ind. 377;
Logan v. Smith, 70 Ind. 597;
Wallace v. Furber, 62 Ind. 103;
Prentice v. Brimhall, 123 Mass. 291;
Gage v. Jenkinson, 58 Mich. 169; s.c. 24 N. W. Rep. 815;
Unger v. Smith, 44 Mich. 22; s.c. 5 N. W. Rep. 1069;
Booth v. Conn. Mut. Life Ins. Co., 43 Mich. 299; s.c. 5 N. W. Rep. 381;
Stuart v. Worden, 42 Mich. 154; s.c. 3 N. W. Rep. 876;
Fitzgerald v. Barker, 70 Mo. 685;
Heim v. Vogel, 69 Mo. 529;
Bond v. Dolby, 17 Neb. 491; s.c. 23 N. W. Rep. 351;
Cubberly v. Yager, 42 N. J. Eq. (15 Stew.) 289; s.c. 11 Atl. Rep. 113;
Vreeland v. Van Blarcom, 35 N. J. Eq. (8 Stew.) 530;
Allen v. Allen, 34 N. J. Eq. (7 Stew.) 493;
Trustees for Support of Public Schools v. Anderson, 30 N. J. Eq. (3 Stew.) 366;
Marshall v. Davies, 78 N. Y. 414;
Jones v. Steinbergh, 1 Barb. Ch. (N. Y.) 250;
Bristol v. Morgan, 3 Edw. Ch. (N. Y.) 142;
Halsey v. Reed, 9 Paige Ch. (N. Y.) 446;
- Gifford v. McCloskey*, 38 Hun (N. Y.) 350;
Douglass v. Wells, 18 Hun (N. Y.) 88;
Brewer v. Maurer, 38 Ohio St. 543; s.c. 43 Am. Rep. 436;
Davis v. Hulett, 58 Vt. 90; s.c. 4 Atl. Rep. 139;
Palmater v. Carey, 63 Wis. 426; s.c. 21 N. W. Rep. 793; 23 N. W. Rep. 586.
- Where the party assumes and agrees to pay the mortgage debt he becomes primarily liable.**
See: Comstock v. Drohan, 71 N. Y. 9;
Hartley v. Harrison, 24 N. Y. 170;
Russell v. Pistor, 7 N. Y. 171; s.c. 57 Am. Dec. 509;
Cornell v. Prescott, 2 Barb. (N. Y.) 16;
Ferris v. Crawford, 2 Den. (N. Y.) 595;
Thayer v. Marsh, 11 Hun (N. Y.) 501;
Marsh v. Pike, 10 Paige Ch. (N. Y.) 595;
Blyer v. Monholland, 2 Sandf. Ch. (N. Y.) 478.
- Same—The obligation inures to the benefit of the holder of the mortgage.**
Stiger v. Mahone, 24 N. J. Eq. (9 C. E. Gr.) 426;
Hoy v. Bramhall, 19 N. J. Eq. (2 Beas.) 62; s.c. 78 Am. Dec. 68;
Ricard v. Sanderson, 41 N. Y. 179;
Ranney v. McMullen, 5 Abb. (N. Y.) N. C. 246;
Thayer v. Marsh, 75 N. Y. 340, aff'g 11 Hun (N. Y.) 501;
Comstock v. Drohan, 71 N. Y. 9, aff'g s.c. 8 Hun (N. Y.) 373;
Halsey v. Reed, 9 Paige Ch. (N. Y.) 446.
- Where a person takes the land subject to a mortgage without agreeing to pay the same, he does not become personally liable thereon.**
Gage v. Jenkinson, 58 Mich. 169; s.c. 24 N. W. Rep. 815;
Equitable Life Ins. Co. v. Bostwick, 100 N. Y. 628; s.c. 3 N. E. Rep. 296;

rendered and docketed,¹ it becomes a lien,² on the general property of the judgment debtor, the same as though rendered in a court of law, and may be enforced by execution.³ But a judgment for a deficiency under a junior mortgage is not prevented by the impossibility of a sale of the land which results from the fact that, pending appeal from the judgment of foreclosure, a sale of the land was made under a prior mortgage and a surplus was left insufficient to pay the junior mortgage, although the statute provides for a personal judgment for the residue of the debt which is unsatisfied after a sale of the mortgaged property.⁴

SEC. 2059. **Redemption—Definition and process.**—By redemption is understood the right of the mortgagor or his assignee, either before or after breach of condition, to satisfy the condition of the mortgage and to resume his

Ranney v. McMullen, 5 Abb. (N. Y.) N. C. 246;

Wales v. Sherwood, 52 How. (N. Y.) Pr. 413.

¹ As to when judgment for deficiency may be docketed,

See: *Brown v. Willis*, 67 Cal. 235; s.c. 7 Pac. Rep. 682;

Cormerais v. Genella, 22 Cal. 116;

Mickle v. Maxfield, 42 Mich. 304; s.c. 3 N. W. Rep. 961;

Howe v. Lemon, 37 Mich. 164;

Clapp v. Maxwell, 13 Neb. 542, 547; s.c. 14 N. W. Rep. 653;

De Agreda v. Mantel, 1 Abb. (N. Y.) Pr. 130;

Cobb v. Thornton, 8 How. (N. Y.) Pr. 66;

Siewert v. Hamel, 33 Hun (N. Y.) 44;

Loeb v. Willis, 22 Hun (N. Y.) 508;

Bache v. Doscher, 41 N. Y. Super. Ct. (9 J. & S.) 150, aff'd in 67 N. Y. 429.

² *England v. Lewis*, 25 Cal. 337; *Cormerais v. Genella*, 22 Cal. 116;

Chapin v. Broder, 16 Cal. 403;

Rowe v. Table Mountain Water Co., 10 Cal. 441;

Rollins v. Forbes, 10 Cal. 299;

Fletcher v. Holmes, 25 Ind. 458;

Mutual Life Ins. Co. v. Southard, 25 N. J. Eq. (10 C. E. Gr.) 337;

Bell v. Gilmore, 25 N. J. Eq. (10

C. E. Gr.) 104;

De Agreda v. Mantel, 1 Abb. (N. Y.) Pr. 130;

Cobb v. Thornton, 8 How. (N. Y.) Pr. 66;

McCarthy v. Graham, 8 Paige Ch. (N. Y.) 480.

³ See: *McCrickett v. Wilson*, 50 Mich. 513; s.c. 15 N. W. Rep. 885;

Ransom v. Sutherland, 46 Mich. 489; s.c. 9 N. W. Rep. 530;

Gies v. Green, 42 Mich. 107; s.c. 3 N. W. Rep. 283;

Clapp v. Maxwell, 13 Neb. 542; s.c. 14 N. W. Rep. 653;

Bicknell v. Byrnes, 23 How. (N. Y.) Pr. 486;

Cobb v. Thornton, 8 How. (N. Y.) Pr. 66;

Moore v. Shaw, 15 Hun (N. Y.) 428;

Hanover Fire Ins. Co. v. Tomlinson, 3 Hun (N. Y.) 630;

Bache v. Doscher, 41 N. Y. Super. Ct. (9 J. & S.) 150, aff'd in 67 N. Y. 429;

Bank of Rochester v. Emerson, 10 Paige Ch. (N. Y.) 115; s.c. 10 Paige Ch. (N. Y.) 359;

Tormey v. Gerhart, 41 Wis. 54;

Baird v. McConkey, 20 Wis. 297.

⁴ *Frank v. Davis*, 135 N. Y. 275; s.c. 31 N. E. Rep. 1100; 17 L. R. A. 306.

estate discharged therefrom.¹ Where the amount is paid before breach of condition, the redemption is a legal right; where it is paid after breach of condition, it is an equitable right. This right of redemption is one that cannot be waived by an agreement made simultaneously with the mortgage;² but it is otherwise where such an agreement is made subsequently, for a valuable consideration, and is fairly reasonable.³

¹ See: Anderson's L. Dict. 866;

2 Bouv. L. Dict. (15th ed.) 524.

² Fields v. Helms, 82 Ala. 449; s.c. 3 So. Rep. 106;

Parmer v. Parmer, 74 Ala. 285;

Pritchard v. Elton, 38 Conn. 434;

Workman v. Greening, 115 Ill.

477; s.c. 4 N. E. Rep. 385;

Bearss v. Ford, 108 Ill. 16;

Willetts v. Burgess, 34 Ill. 494;

Skinner v. Miller, 5 Litt. (Ky.) 84;

Linnell v. Lyford, 72 Me. 280;

Waters v. Randall, 47 Mass. (6 Met.) 479;

Nugent v. Riley, 42 Mass. (1 Met.)

117; s.c. 35 Am. Dec. 355;

Wilson v. Drumrite, 21 Mo. 325;

Clark v. Henry, 2 Cow. (N. Y.) 324;

Cooper v. Whitney, 3 Hill (N. Y.) 95;

Palmer v. Gurnsey, 7 Wend. (N. Y.) 248;

Wharf v. Howell, 5 Binn. (Pa.) 499;

Heister v. Fortner, 2 Binn. (Pa.) 40, 43; s.c. 4 Am. Dec. 417;

Rankin v. Mortimere, 7 Watts (Pa.) 372;

Jaques v. Weeks, 7 Watts (Pa.) 261, 277;

Heister v. Maderia, 3 Watts & S. (Pa.) 384;

Wheeland v. Swartz, 1 Yeates (Pa.) 579, 584;

Cherry v. Bowen, 4 Sneed (Tenn.) 415;

Burrow v. Henson, 2 Sneed (Tenn.) 658;

Chapman v. Turner, 1 Call (Va.) 280; s.c. 1 Am. Dec. 514;

Pennington v. Hanby, 4 Munf. (Va.) 140;

King v. Newman, 2 Munf. (Va.) 40;

Thompson v. Davenport, 1 Wash. (Va.) 125;

Davis v. Demming, 12 W. Va.

246, 247;

Plato v. Roe, 14 Wis. 453;

Knowlton v. Walker, 13 Wis. 264;

Orton v. Knab, 3 Wis. 576;

Jackson v. Lawrence, 117 U. S. 679; bk. 29 L. ed. 1024;

Peugh v. Davis, 96 U. S. 332, 337; bk. 24 L. ed. 775, 777;

Hughes v. Edwards, 22 U. S. (9 Wheat.) 489; bk. 6 L. ed. 142;

Casborne v. Scarfe, 1 Atk. 603;

Goodman v. Grierson, 2 Ball & B. 274, 278; s.c. 12 Rev. Rep.

82, 85;

Jason v. Eyres, 2 Ch. Cas. 23;

East India Co. v. Atkyns, 1 Com. R. 349;

Floyer v. Lavington, 1 Pr. Wms. 268;

Newcomb v. Bonham, 2 Vent. 364;

Howard v. Harris, 1 Vern. 191;

Seton v. Slade, 7 Ves. 265, 273; s.c. 6 Rev. Rep. 124.

³ Stoutz v. Rouse, 84 Ala. 309; s.c. 4 So. Rep. 170;

McKinstry v. Conley, 12 Ala. 678;

Mills v. Mills, 26 Conn. 213;

Wyncoop v. Cowing, 21 Ill. 570;

Linnell v. Lyford, 72 Me. 280;

Baughner v. Merryman, 32 Md. 185;

Sheckell v. Hopkins, 2 Md. Ch. 89;

Dougherty v. McColgan, 6 Gill & J. (Md.) 275;

Hicks v. Hicks, 5 Gill & J. (Md.) 75;

Trull v. Skinner, 34 Mass. (17 Pick.) 213;

Batty v. Snook, 5 Mich. 231;

McNees v. Swaney, 50 Mo. 388;

Remsen v. Hay, 2 Edw. Ch. (N. Y.) 535;

Holdridge v. Gillespie, 2 John. Ch. (N. Y.) 30, 34;

Shaw v. Walbridge, 33 Ohio St. 1;

Hyndman v. Hyndman, 19 Vt. 9, 10; s.c. 46 Am. Dec. 171;

SEC. 2160. **Same—Who may redeem.**—Any person who holds a legal estate in the mortgaged premises, or in any part thereof derived through, under, or in privity with the mortgagor, and any person holding either a legal or equitable lien on the premises, or any part thereof, under, or in privity with the mortgagor's estate, may redeem from a prior mortgage;¹ but a mere volunteer has no right to make redemption from a mortgage or any other lien.² A mortgagor may redeem in all cases except where he has conveyed the lands to a third person,³ or the equity of redemption has been sold under execution.⁴ Redemption may also be made by an administrator;⁵ by an assignee of a lienor,⁶ or the assignee or grantee of a mortgagor; by an attachment creditor;⁷ by the devisee

- Rogan *v.* Walker, 1 Wis. 527;
 Peugh *v.* Davis, 96 U. S. 332; bk. 24 L. ed. 775;
 Villa *v.* Rodriguez, 79 U. S. (12 Wall.) 323; bk. 20 L. ed. 406;
 Russell *v.* Southard, 53 U. S. (12 How.) 139; bk. 13 L. ed. 927;
 Morris *v.* Nixon, 42 U. S. (1 How.) 117, 126; bk. 11 L. ed. 69, 72.
¹ 1 Pom. Eq. Jur., § 280.
 See: Boarman *v.* Catlett, 21 Miss. (13 Smed. & M.) 149;
 Grant *v.* Duane, 9 John. (N. Y.) 589, 611;
 James *v.* Biou, 3 Swanst. 237;
 Lomax *v.* Bird, 1 Vern. 182.
² Butts *v.* Broughton, 72 Ala. 294;
 Rapier *v.* Gulf City Paper Co., 64 Ala. 330;
 Union Mut. L. Ins. Co. *v.* White, 107 Ill. 67;
 Rogers *v.* Meyers, 68 Ill. 92;
 Beach *v.* Shaw, 57 Ill. 17;
 Skinner *v.* Young, 80 Iowa 234; s.c. 45 N. W. Rep. 889;
 Penn *v.* Clemans, 19 Iowa 372;
 Byington *v.* Backwalter, 7 Iowa 512; s.c. 74 Am. Dec. 279;
 Powers *v.* Golden Lumber Co., 43 Mich. 468; s.c. 5 N. W. Rep. 656;
 Harwood *v.* Underwood, 28 Mich. 427;
 Moore *v.* Beasom, 44 N. H. 215;
 Meehan *v.* Forrester, 52 N. Y. 277;
 Cousins *v.* Allen, 28 Wis. 232.
³ American Freehold Land Mortg. Co. *v.* Sewell, 92 Ala. 163; s.c. 9 So. Rep. 143; 13 L. R. A. 299, 300;
 True *v.* Haley, 24 Me. 297.
⁴ Ingersoll *v.* Sawyer, 19 Mass. (2 Pick.) 276.
⁵ Enos *v.* Sutherland, 11 Mich. 538;
 Merriam *v.* Barton, 14 Vt. 501.
⁶ Powers *v.* Andrews, 84 Ala. 289; s.c. 4 So. Rep. 263;
 Paulling *v.* Barron, 32 Ala. 9;
 Beach *v.* Shaw, 57 Ill. 17;
 Gilbert *v.* Husman, 76 Iowa 241; s.c. 41 N. W. Rep. 3;
 Skinner *v.* Miller, 5 Litt. (Ky.) 84;
 Wilkins *v.* French, 20 Me. 111;
 Phye *v.* Riley, 15 Wend. (N. Y.) 248; s.c. 30 Am. Dec. 55;
 Hepburn *v.* Kerr, 9 Humph. (Tenn.) 726; s.c. 51 Am. Dec. 685.
⁷ Butts *v.* Broughton, 72 Ala. 294;
 Bridgeport *v.* Blinn, 43 Conn. 274;
 Briggs *v.* Davis, 108 Mass. 322;
 Lamson *v.* Drake, 105 Mass. 564;
 Bacon *v.* Bowdoin, 39 Mass. (22 Pick.) 401, 405;
 Atwater *v.* Manchester Sav. Bank, 45 Minn. 341; s.c. 48 N. W. Rep. 187; 12 L. R. A. 741;
 Fisher *v.* Tallman, 74 Mo. 39;
 Hamilton *v.* Dobbs, 19 N. J. Eq. (4 C. E. Gr.) 227;
 Ellsworth *v.* Lockwood, 42 N. Y. 89;
 Averill *v.* Taylor, 8 N. Y. 44;
 Denton *v.* Nanny, 8 Barb. (N. Y.) 618;
 Haines *v.* Beach, 3 John. Ch. (N. Y.) 459, 460;

of a mortgagor;¹ by a guardian;² by the heirs of the mortgagor;³ by the holder of an easement;⁴ by the holder of an equity of redemption, or a portion thereof;⁵ by the holder of a homestead;⁶ by a judgment creditor of a mortgagor,⁷ but not by a general creditor;⁸ by

Chandler v. Dyer, 37 Vt. 345;

Stone v. Godfrey, 18 Jur. 162.

An attaching creditor who has not yet obtained judgment has a lien on the real estate attached, within the meaning of Minn. Gen. Stat. 1878, chap. 66, § 323, and chap. 81, § 16, relating to the redemption of real estate.

Atwater v. Manchester Sav. Bank, 45 Minn. 341; s.c. 48 N. W. Rep. 187; 12 L. R. A. 741.

¹ *Denton v. Nanny*, 8 Barb. (N. Y.) 618;

Stokes v. Solomans, 9 Hare 199;

Faulker v. Daniels, 3 Hare 199;

Finch v. Newnham, 2 Vern. 216.

² *Marvin v. Schilling*, 12 Mich. 356; *Pardee v. Van Auken*, 3 Barb. (N. Y.) 534.

³ *Butts v. Broughton*, 72 Ala. 294; *Sheldon v. Bird*, 2 Root (Conn.) 509;

Hunter v. Dennis, 112 Ill. 568;

Stover v. Bounds, 1 Ohio St. 108;

Zaegel v. Kuster, 51 Wis. 31; s.c.

7 N. W. Rep. 781;

Chew v. Hyman, 10 Biss. C. C. 240; s.c. 7 Fed. Rep. 7;

Pym v. Bowerman, 3 Swanst. 241n;

Lewis v. Naugh, 2 Ves. Sr. 431.

⁴ *Bacon v. Bowdoin*, 39 Mass. (22 Pick.) 401, 405.

⁵ *Randall v. Duff*, 79 Cal. 115, 123; s.c. 19 Pac. Rep. 532; 21 Pac. Rep. 610; 3 L. R. A. 754;

Taylor v. Porter, 7 Mass. 355;

In re Willard, 5 Wend. (N. Y.)

94, 95;

Pearce v. Morris, L. R. 8 Eq. 217; s.c. 5 Ch. App. 227.

See: *Wood v. Goodwin*, 49 Me. 260; s.c. 77 Am. Dec. 259.

Where land has been conveyed without consideration, though by conveyance purporting to be for a valuable consideration, under a power of attorney to sell and convey, and the grantee gives a mortgage upon it, parties who have succeeded to the right of the original owner upon his death are entitled to redeem from the mortgage.

Randall v. Duff, 79 Cal. 123; s.c. 19 Pac. Rep. 532; 21 Pac. Rep. 610; 3 L. R. A. 754.

⁶ *Butts v. Broughton*, 72 Ala. 294;

Kirby v. Reese, 69 Ga. 452;

Erwin v. Blanks, 60 Tex. 583.

⁷ *Robertson v. Vancleave*, 129 Ind. 217, 231; s.c. 26 N. E. Rep. 899; 29 N. E. Rep. 781; 15 L. R. A. 68;

Hill v. Holliday, 2 Litt. (Ky.) 332;

Atwater v. Manchester Sav. Bank, 45 Minn. 341; s.c. 48 N.

W. Rep. 187; 12 L. R. A. 741;

Willard v. Finnegan, 42 Minn. 476; s.c. 44 N. W. Rep. 985; 8

L. R. A. 50;

Brainard v. Cooper, 10 N. Y. 356;

Bank of Niagara v. Rosevelt, 9 Cow. (N. Y.) 409;

Dauchy v. Bennett, 7 How. (N. Y.) Pr. 375;

⁸ *Grob v. Cushman*, 45 Ill. 119;

Lamb v. Richards, 43 Ill. 312;

White v. Bond, 16 Mass. 400;

Berryhill v. Potter, 42 Minn. 279; s.c. 44 N. W. Rep. 251;

Mallalieu v. Wickham, 42 N. J. Eq. 297; s.c. 10 Atl. Rep. 880;

Brainard v. Cooper, 10 N. Y. 356;

Belden v. Slade, 26 Hun (N. Y.) 635, 638;

Lance v. Gorman, 136 Pa. St. 200; s.c. 20 Atl. Rep. 792;

Jackson v. Lawrence, 117 U. S. 679; bk. 29 L. ed. 1024;

United States v. Sturges, 1 Paine C. C. 525; s.c. Fed. Cas. No. 16414;

Connecticut Mut. L. Ins. Co. v. Crawford, 21 Fed. Rep. 281;

Neate v. Marlborough, 3 Myl. & C. 407;

Mildred v. Austin, L. R. 8 Eq. 220; s.c. 20 L. T. 939; 17 W. R.

638.

a junior incumbrancer ;¹ by a legatee of the mortgagor ;² by a part owner of the mortgaged premises ;³ by a per-

Benedict v. Gilman, 4 Paige Ch. (N. Y.) 58 ;

Stainback v. Geddy, 1 Dev. & B. (N. C.) Eq. 479 ;

Stonehewer v. Thompson, 2 Atk. 240.

A redemption by a judgment creditor from a mortgage which is good on its face, and at most is merely voidable at the election of the purchaser at the mortgage sale, cannot be attacked in a suit between him and a vendee of the mortgagor, whose rights have been cut off by the foreclosure.
Willard v. Finnegan, 42 Minn. 476 ; s.c. 44 N. W. Rep. 985 ; 8 L. R. A. 50.

Confession of judgment to enable an attorney to redeem land from a mortgage, and thereby secure compensation for his services, is not a fraud on purchasers at the mortgage sale.

Atwater v. Manchester Sav. Bank, 45 Minn. 341 ; s.c. 48 N. W. Rep. 187 ; 12 L. R. A. 741.

The holder of a sheriff's certificate given on an execution sale has a right to redeem from a foreclosure sale as a lienholder, but not as an owner, although no express provision is made therefor by statute. His right is essentially that of a judgment creditor.

Robertson v. Vancleave, 129 Ind. 217, 231 ; s.c. 26 N. E. Rep. 899 ; 29 N. E. Rep. 781 ; 15 L. R. A. 68.

A statement by the holder of a sheriff's certificate, in order to give him the right to redeem from a mortgage sale, must, under Ind. Rev. Stat., § 772, state the amount and date of the judgment, as well as the amount due and unpaid ; and a mere reference to the sheriff's certificate is not sufficient.

Robertson v. Vancleave, 129 Ind. 217, 231 ; s.c. 26 N. E. Rep. 899 ; 29 N. E. Rep. 781 ; 15 L. R. A. 68.

¹ See : *Commercial Real Estate*

Assoc. v. Parker, 84 Ala. 298 ; s.c. 4 So. Rep. 268 ;

Aiken v. Bridgeford, 84 Ala. 295 ; s.c. 4 So. Rep. 266 ;

Powers v. Andrews, 84 Ala. 289 ; s.c. 4 So. Rep. 263 ;

Bailey v. Timberlake, 74 Ala. 321 ;

Wiley v. Ewing, 47 Ala. 418 ;

Black v. Gerichten, 58 Cal. 56, 58 ;

Horn v. Jones, 28 Cal. 194 ;

Frink v. Murphy, 21 Cal. 108 ; s.c. 81 Am. Dec. 149 ;

Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515, 516 ;

Gamble v. Voll, 15 Cal. 507 ;

Kirkham v. Dupont, 14 Cal. 559 ; *Kalscheuer v. Upton*, 6 Dak. 449 ;

s.c. 43 N. W. Rep. 816 ;

Bigelow v. Stringfellow, 25 Fla. 366 ; s.c. So. Rep. 816 ;

Rogers v. Herron, 92 Ill. 583 ;

Morse v. Smith, 83 Ill. 396 ;

Hodgen v. Guttery, 58 Ill. 438 ;

Horn v. Indianapolis Nat. Bank, 125 Ind. 381 ; s.c. 25 N. E. Rep. 558 ; 9 L. R. A. 676 ;

Johnson v. Hosford, 110 Ind. 572 ; s.c. 10 N. E. Rep. 407 ;

Catterlin v. Armstrong, 79 Ind. 514 ;

Hasselman v. McKernan, 50 Ind. 441 ;

Dickerman v. Lust, 66 Iowa 444 ; s.c. 23 N. W. Rep. 751 ;

Spurgin v. Adamson, 62 Iowa 661 ; s.c. 18 N. W. Rep. 293 ;

Poole v. Johnson, 62 Iowa 611 ; s.c. 17 N. W. Rep. 900 ;

Smith v. Shay, 62 Iowa 119 ; s.c. 17 N. W. Rep. 444 ;

Bunce v. West, 62 Iowa 80 ; s.c. 17 N. W. Rep. 179 ;

Harms v. Palmer, 61 Iowa 483 ; s.c. 16 N. W. Rep. 574 ;

American Buttonhole Co. v. The Burlington Assoc., 61 Iowa 464 ;

s.c. 16 N. W. Rep. 97 ;

Knowles v. Rablin, 20 Iowa 101 ; *Street v. Beal*, 16 Iowa 68 ; s.c.

85 Am. Dec. 504 ;

White v. Hampton, 13 Iowa 259 ; *Heimstreet v. Winnie*, 10 Iowa

430 ;

² *Batcheler v. Middleton*, 6 Hare 75.

³ See : *Calkins v. Munsel*, 2 Root

(Conn.) 333 ;

Eiceman v. Finch, 79 Ind. 511.

son in possession under a contract of purchase ;¹ by a surety ;² by a tenant in common ;³ by a tenant in curtesy ;⁴ by a tenant in dower,⁵ although an assignment has not been made,⁶ even though her right to dower be

Cooper v. Martin, 1 Dana (Ky.) 23, 24 ;

Lamb v. Jeffery, 41 Mich. 419 ;

Gantz v. Toles, 40 Mich. 725 ;

Sager v. Tupper, 35 Mich. 134 ;

Avery v. Ryerson, 34 Mich. 362, 363 ;

Renard v. Brown, 7 Neb. 449 ;

Moore v. Beasom, 44 N. H. 215 ;

Brewer v. Hyndman, 18 N. H. 9 ;

Hill v. White, 1 N. J. Eq. (1 Saxt.) 435 ;

Benton v. Hatch, 122 N. Y. 322, 329 ; s.c. 25 N. E. Rep. 486 ;

Clark v. Mackin, 95 N. Y. 346, 351 ;

Twombly v. Cassidy, 83 N. Y. 155 ;

Frost v. Yonkers Sav. Bank, 70 N. Y. 553 ; s.c. 26 Am. Rep. 627 ;

Gage v. Brewster, 31 N. Y. 218 ;

Pardee v. Van Auken, 3 Barb. (N. Y.) 534 ;

Jenkins v. Continental Ins. Co., 12 How. (N. Y.) Pr. 66 ;

Haines v. Beach, 3 John. Ch. (N. Y.) 459 ;

Hovenden v. Knott, 12 Oreg. 267 ; s.c. 7 Pac. Rep. 30 ;

Chavener v. Wood, 2 Oreg. 182 ;

Walker v. King, 44 Vt. 601 ;

Downer v. Wilson, 33 Vt. 1 ;

McCormick v. Knox, 105 U. S. 122 ; bk. 26 L. ed. 940 ;

Lauriat v. Stratton, 6 Sawy. C. C. 339 ; s.c. 11 Fed. Rep. 107 ;

Lambertville Nat. Bank v. McCready Bag and Paper Co., 15 Atk. 388 ;

Smith v. Green, 1 Coll. 555 ;

Ramsbottom v. Wallis, 5 L. J. (N. S.) Ch. 92 ;

Palk v. Clinton, 12 Ves. 59 ; s.c. 8 Rev. Rep. 283.

A junior mortgagee, who is made defendant to a suit to foreclose the senior mortgage, and whose lien is provided for in the decree, which directs a sale of

the property and a distribution of the proceeds among all the lienholders in the order of priority, cannot redeem from the sale under statutes which do not permit a judgment creditor to redeem from his own sale.

Horn v. Indianapolis Nat. Bank, 125 Ind. 381 ; s.c. 25 N. E. Rep. 558 ; 9 L. R. A. 676.

¹ Keats v. Rector, 1 Ark. (1 Pike) 419 ;

2 Story Eq. Jur. (13th ed.) 731.

² Averill v. Taylor, 8 N. Y. 44 ;

Ex parte Crisp, 1 Atk. 133 ;

Green v. Wynn, L. R. 4 Ch. 204 ;

Wade v. Coope, 2 Sim. 155 ;

Mayhew v. Cricket, 2 Swanst. 185 ;

Wright v. Morley, 11 Ves. 12, 21 ; s.c. 8 Rev. Rep. 69.

³ Lyon v. Robbins, 45 Conn. 513 ;

Seymour v. Davis, 35 Conn. 264 ;

Young v. Williams, 17 Conn. 393, 398 ;

Kingsbury v. Buckner, 70 Ill. 514 ;

Carithers v. Stuart, 87 Ind. 424 ;

Crafts v. Crafts, 79 Mass. (13 Gray) 360 ;

Laylin v. Knox, 41 Mich. 40 ; s.c. 1 N. W. Rep. 913 ;

Wynne v. Styan, 2 Phill. (N. C.) Eq. 306 ;

McLaughlin v. Curts, 27 Wis. 644.

⁴ Swinnock v. Lyford, Ambl. 6 ;

Casborne v. English, 2 Jac. & W. 194.

⁵ Eaton v. Simonds, 31 Mass. (14 Pick.) 98 ;

Bell v. Mayor of N. Y., 10 Paige Ch. (N. Y.) 49.

⁶ Henry's Case, 58 Mass. (4 Cush.) 257 ;

Gibson v. Crehore, 22 Mass. (5 Pick.) 146 ;

Peabody v. Patten, 19 Mass. (2 Pick.) 517, 519.

simply inchoate ;¹ by a tenant in tail ;² by a tenant for life ;³ by a tenant for years.⁴

SEC. 2161. **Same—When redemption may be made.**—The right of redemption does not accrue and cannot be enforced against the mortgagee until the mortgage debt is due, even by a tender of payment of the principal and the interest for the life of the mortgagee.⁵ The reason for this is because, as it has been said, if mortgagors are allowed to pay off their mortgage at any time after the execution thereof, it might be attended with extreme inconvenience to mortgagees, who usually advance the money as an investment.⁶

SEC. 2162. **Same—When right barred.**—The time within which the mortgagor may exercise his right to redeem is governed by statute in various states ; and in the absence of any statute, it will be barred by an uninterrupted possession for twenty years by the mortgagee, under the rule in equity, adopted in analogy to the statute of limi-

¹ *Wilkins v. French*, 20 Me. 111 ;

Lamb v. Montague, 112 Mass. 352 ;

Davis v. Wetherell, 95 Mass. (13 Allen) 60 ; s.c. 90 Am. Dec. 177 ;

Gatewood v. Gatewood, 75 Va. 407.

The rights of the widow to redeem are the same whether the mortgage was executed before or after the marriage.

Opdyke v. Bartes, 11 N. J. Eq. (3 Stock.) 133 ;

Denton v. Nanny, 8 Barb. (N. Y.) 618.

Same—Will not be barred by a foreclosure in her husband's lifetime, of which she was not made a party thereof.

Mutual L. Ins. Co. v. Shipman, 119 N. Y. 331 ; s.c. 24 N. E. Rep. 177 ;

Mills v. Van Voorhies, 20 N. Y. 412 ; s.c. 10 Abb. (N. Y.) Pr. 152 ;

Denton v. Nanny, 8 Barb. (N. Y.) 618, 619 ;

Wheeler v. Morris, 2 Bosw. (N. Y.) 524 ;

McAthur v. Franklin, 16 Ohio St. 193 ; s.c. 15 Ohio St. 485.

² *Playford v. Playford*, 4 Hare 546.

³ *Lamson v. Drake*, 105 Mass. 564 ;

Aynsly v. Reed, 1 Dick. 249 ;

Wicks v. Scribens, 1 John. & H. 215 ;

Evans v. Jones, Kay 29.

⁴ *McDermott v. Burke*, 16 Cal. 580 ;

Bacon v. Bowdoin, 39 Mass. (22 Pick.) 401 ; s.c. 43 Mass. (24 Met.) 591 ;

Arnold v. Green, 116 N. Y. 572 ; s.c. 23 N. E. Rep. 1 ;

Welling v. Ryerson, 94 N. Y. 97, 103 ;

Averill v. Taylor, 8 N. Y. 44.

⁵ *Abbe v. Goodwin*, 7 Conn. 377 ;

Saunders v. Frost, 22 Mass. (5 Pick.) 267 ; s.c. 16 Am. Dec. 394 ;

Kingman v. Pierce, 17 Mass. 247 ;

Moore v. Cord, 14 Wis. 213 ;

Brown v. Cole, 14 Sim. 426.

⁶ *Brown v. Cole*, 14 L. J. Ch. (N. S.) 168.

tations,¹ unless the circumstances are such as to show an acknowledgment on the part of the mortgagee of title in the mortgagor within that period.² Under the various statutes above referred to, the period prescribed by the rule in equity has been changed ;³ but the parties by express agreement may extend the time within which redemption may be made over the time limited by the statute. But where this extension is made after the time limited by the statute for redemption has passed, it must be founded upon a new consideration.⁴

SEC. 2163. **Same—Same—How right of barred or lost.**—The privilege of exercising the right of redemption may be lost on the part of the mortgagor, or be barred, in various ways, among which are the following: Foreclosure, in which the person claiming the right to redeem has been made a party defendant ;⁵ by estoppel by acts on the part of the person claiming a right to redeem ;⁶ and by laches and lapse of time.⁷ In the absence of any disability the

¹ 21 Jac. I. c. 16.

² *Crawford v. Taylor*, 42 Iowa 260 ;
Randall v. Bradley, 65 Me. 43 ;
Hurd v. Coleman, 42 Me. 182 ;
Ayres v. Waite, 64 Mass. (10

Cush.) 72 ;

Jackson v. Wood, 12 John. (N. Y.) 242 ; s.c. 7 Am. Dec. 315 ;

Hughes v. Edwards, 22 U. S. (9 Wheat.) 489, 497 ; bk. 6 L. ed. 142 ;

Gordon v. Hobart, 2 Sum. C. C. 401 ; s.c. Fed. Cas. No. 5609 ;

Blake v. Foster, 2 Ball & B. 402 ;
Christopher v. Sparke, 2 Jac. & W. 235 ;

Barron v. Martin, 19 Ves. 327.

³ *Jarvis v. Woodruff*, 22 Conn. 548 ;
Parsons v. Noggle, 23 Minn. 328 ;
Miner v. Beekman, 50 N. Y. 337 ;
Peabody v. Roberts, 47 Barb. (N. Y.) 91, 102.

⁴ *Nickels v. Otto*, 132 Ill. 91 ; s.c. 23 N. E. Rep. 411 ;
Chase v. McLellan, 49 Me. 375 ;
McNew v. Booth, 42 Mo. 189 ;
Smalley v. Hickok, 12 Vt. 153.

⁵ Where a party claiming a right has not been made a defendant to the foreclosure proceedings, he will be entitled to redeem.

Wiley v. Ewing, 47 Ala. 418 ;

Hodgen v. Guttery, 58 Ill. 431 ;

Strang v. Allen, 44 Ill. 428 ;

Smith v. Sinclair, 10 Ill. (5 Gil.) 108 ;

Nesbit v. Hanway, 87 Ind. 400 ;

Murdock v. Ford, 17 Ind. 52 ;

Bunce v. West, 62 Iowa 80 ; s.c. 17 N. W. Rep. 179 ;

Gower v. Winchester, 33 Iowa 301, 303 ;

Johnson v. Harmon, 19 Iowa 56 ;

Bates v. Ruddick, 2 Iowa 423 ;
s.c. 65 Am. Dec. 774 ;

Miner v. Beekman, 50 N. Y. 337 ;

Sellwood v. Gray, 11 Oreg. 534 ;
s.c. 5 Pac. Rep. 196 ;

Pratt v. Frear, 13 Wis. 462 ;

Murphy v. Farwell, 9 Wis. 102 ;

Farwell v. Murphy, 2 Wis. 533.

⁶ *Fay v. Valentine*, 29 Mass. (12 Pick.) 40, 45 ; s.c. 22 Am. Dec. 397 ;

Parkhurst v. Van Cortland, 14 John. (N. Y.) 15, 43 ; s.c. 7 Am. Dec. 427 ;

Niven v. Belknap, 2 John. (N. Y.) 572, 573 ;

Wright v. Whitehead, 14 Vt. 268 ;

Savage v. Foster, 9 Mod. 35 ;

1 Fonbl. Eq. 161.

⁷ **Barrring redemption—Absence of stat-**

statute begins to run at the time when the right of redemption accrues.¹ The disabilities which will prevent the statute of limitations from running, and keep alive the right of redemption, are the usual disabilities to bring a suit or transact business; such as absence from the state,² fraud on the part of the mortgagee,³

- ute.—In the absence of any statutory provision upon the subject, by analogy to the statute of limitations, the period that will bar the right to redeem is twenty years.
- Coyle v. Wilkins, 57 Ala. 108;
 Byrd v. McDaniel, 33 Ala. 18;
 Gunn v. Brantley, 21 Ala. 633, 644;
 Maury v. Mason, 8 Port. (Ala.) 211;
 Guthrie v. Field, 21 Ark. 379;
 Taylor v. McClain, 60 Cal. 651;
 Arrington v. Liscom, 34 Cal. 365, 366; s.c. 94 Am. Dec. 722;
 Grattan v. Wiggins, 23 Cal. 16;
 Jarvis v. Woodruff, 22 Conn. 548;
 Davidson v. Lawrence, 49 Ga. 335;
 Morgan v. Morgan, 10 Ga. 297;
 Locke v. Caldwell, 91 Ill. 417, 419;
 Hallesy v. Jackson, 66 Ill. 139;
 Lindsey v. Delano, 78 Iowa 350; s.c. 43 N. W. Rep. 218;
 Crawford v. Taylor, 42 Iowa 260;
 McPherson v. Hayward, 81 Me. 329; s.c. 17 Atl. Rep. 164;
 Randall v. Bradley, 65 Me. 43;
 Roberts v. Littlefield, 48 Me. 61;
 Blethen v. Dwinal, 35 Me. 556;
 Crook v. Glenn, 30 Md. 55, 70;
 Hertle v. McDonald, 2 Md. Ch. 128; s.c. 3 Md. 366;
 Stevens v. Dedham Institution, 129 Mass. 547;
 Ayres v. Waite, 64 Mass. (10 Cush.) 72;
 Hoffman v. Harrington, 33 Mich. 392;
 Reynolds v. Green, 10 Mich. 355;
 Cook v. Finkler, 9 Mich. 131;
 McNair v. Lot, 34 Mo. 285; s.c. 84 Am. Dec. 78;
 Tripe v. Marcy, 39 N. H. 439;
 Chapin v. Wright, 41 N. J. Eq. (14 Stew.) 438; s.c. 5 Atl. Rep. 775;
 Miner v. Beekman, 50 N. Y. 337;
 Demarest v. Wypkoop, 3 John. Ch. (N. Y.) 129; s.c. 8 Am. Dec. 467, 468;
 Moore v. Cable, 1 John. Ch. (N. Y.) 385;
 Bailey v. Carter, 7 Ired. (N. C.) Eq. 282;
 Yarborough v. Newell, 10 Yerg. (Tenn.) 376;
 Ross v. Norvell, 1 Wash. (Va.) 14; s.c. 1 Am. Dec. 422;
 Knowlton v. Walker, 13 Wis. 264.
¹ Knowlton v. Walker, 13 Wis. 264. See: Warder v. Enslin, 73 Cal. 291; s.c. 14 Pac. Rep. 874;
 Frink v. Le Roy, 49 Cal. 314;
 Crawford v. Taylor, 42 Iowa 260;
 Green v. Turner, 38 Iowa 112, 118;
 Montgomery v. Chadwick, 7 Iowa 114;
 Bird v. Keller, 77 Me. 270;
 Auding v. Davis, 38 Miss. s.c. 77 Am. Dec. 658;
 Kohlheim v. Harrison, 34 Miss. 457;
 Hubbell v. Sibley, 50 N. Y. 468;
 Miner v. Beekman, 14 Abb. (N. Y.) Pr. N. S. 1; s.c. 50 N. Y. 337, rev'g 11 Abb. (N. Y.) Pr. 147; s.c. 33 Super. Ct. (J. & S.) N. Y. 67;
 Bailey v. Carter, 7 Ired. (N. C.) Eq. 282;
 Waldo v. Rice, 14 Wis. 286;
 Babcock v. Wyman, 60 U. S. (19 How.) 289; bk. 15 L. ed. 644.
² Clinton Co. v. Cox, 37 Iowa 570;
 Waterson v. Kirkwood, 17 Kan. 9;
 Phillips v. Sinclair, 20 Mo. 269;
 Whalley v. Eldridge, 24 Minn. 358;
 Parsons v. Noggle, 23 Minn. 328.
³ Hunt v. Ellison, 32 Ala. 173;
 George v. Gardner, 49 Ga. 441;
 Acker v. Acker, 81 N. Y. 143;
 Depew v. Dewey, 56 N. Y. 657;
 Marks v. Pell, 1 John. Ch. (N. Y.) 594;
 Reynolds v. Baker, 6 Coldw. (Tenn.) 221;
 Guinn v. Locke, 1 Head (Tenn.) 110;

infancy and coverture,¹ and the existence of civil war.²

SEC. 2164. **Same—Contributions on redemption.**—It is a doctrine well established that when land is charged with a burden, the burden of the charge ought to be disseminated equally, and one part ought not to bear more than its due proportion; and equity will preserve this equality by compelling the owner of each part to a just contribution.³ Where two or more persons are jointly liable for the payment of a debt, and one of them pays the whole amount, he will be entitled to be reimbursed by the repayment to them of their just proportion of such debt. Likewise where a person entitled to redeem mortgaged premises is interested in only a portion thereof, but pays the entire debt, he thereby becomes the equitable assignee of the mortgage, which he may enforce against those jointly interested with him to the amount of their *pro rata* share of the mortgage debt. The liability to contribution attaches to land only; no personal liability attaches to those interested in the mortgaged premises, and they may elect to contribute their share, or surrender the premises on foreclosure.⁴

Kinsman v. Rouse, L. R. 17 Ch. Div. 104; s.c. 50 L. J. Ch. 486; 44 L. T. 597; 29 W. R. 627.

¹ Hanford v. Fitch, 41 Conn. 486; Barr v. Vanalstine, 120 Ind. 590; s.c. 22 N. E. Rep. 965;

Hertle v. McDonald, 2 Md. Ch. 128;

Eager v. Commonwealth, 4 Mass. 182;

Auding v. Davis, 38 Miss. 574; s.c. 77 Am. Dec. 658;

Demarest v. Wynkoop, 3 John. Ch. (N. Y.) 129; s.c. 8 Am. Dec. 467;

Wells v. Morse, 11 Vt. 9;

Snively v. Pickle, 29 Gratt. (Va.) 27, 39;

Fitzhugh v. Anderson, 2 Hen. & M. (Va.) 289; s.c. 3 Am. Dec. 625;

Parsons v. McCracken, 9 Leigh (Va.) 495;

Hall v. Caldwell, 7 Can. L. J. 42;

Proctor v. Cowper, 2 Vern. 377;

Beckford v. Wade, 17 Ves. 99; s.c. 11 Rev. Rep. 20;

Genner v. Tracey, 3 Pr. Wms. 389n;

Belch v. Harvey, 3 Pr. Wms. 287.

² Reynolds v. Baker, 6 Coldw. (Tenn.) 221;

Dean v. Nelson, 77 U. S. (10 Wall.) 158; bk. 19 L. ed. 926.

³ Stevens v. Cooper, 1 John. Ch. (N. Y.) 425; s.c. 7 Am. Dec. 499;

Hobert's Case, 3 Co. 14;

Harris v. Ingleden, 3 Pr. Wms. 98, 99.

⁴ Briscoe v. Power, 47 Ill. 447, 449; Johnson v. Rice, 8 Me. (8 Greenl.) 157;

Chase v. Woodbury, 60 Mass. (6 Cush.) 143;

Gibson v. Crehore, 22 Mass. (5 Pick.) 146;

Salem v. Edgerly, 33 N. H. 46;

Lawrence v. Cornell, 4 John. Ch. (N. Y.) 542;

Stevens v. Cooper, 1 John. Ch. (N. Y.) 425; s.c. 7 Am. Dec. 499;

Cheesebrough v. Millard, 1 John;

SEC. 2165. Same—Same—Between sureties of the mortgagor.—The principle of contribution applies in favor of a surety who has paid more than his proportion of the debt to enforce contribution out of securities given by the mortgagor and his co-sureties ;¹ and under the doctrine of subrogation, adopted by courts of equity, he will be subrogated to all rights and remedies of the creditor against the principal and others liable for the debt.² On the payment of the mortgage debt by a surety, because of his personal obligation for such payment, it will operate as an assignment in equity of the mortgage, and he may enforce it against the mortgagor, his heirs and assigns, for its full value. The reason for this is the fact that the surety is only secondarily liable, and the mortgaged premises are to be treated as the primary fund out of which the debt is to be realized, and until such premises are exhausted the surety cannot be called upon to pay the debt.³

Ch. (N. Y.) 409 ; s.c. 7 Am. Dec. 494 ;

Stroud v. Casey, 27 Pa. St. 471.

¹ Felton v. Bissell, 25 Minn. 15, 20 ;

Elwood v. Deifendorf, 5 Barb. (N. Y.) 398, 406 ;

Cheesebrough v. Millard, 1 John. Ch. (N. Y.) 409 ; s.c. 7 Am. Dec. 494.

See : Scribner v. Hockok, 4 John. Ch. (N. Y.) 530, 531 ;

Hess's Estate, 69 Pa. 272 ;

Lidderdale v. Robinson, 2 Brock C. C. 159 ; s.c. Fed. Cas. No. 8337.

² Young v. Vough, 23 N. J. Eq. (8 C. E. Gr.) 325, 329.

See : Fawcetts v. Kimmey, 33 Ala. 261 ;

Talbot v. Wilkins, 31 Ark. 411 ;

Atwood v. Vincent, 17 Conn. 575 ;

Roulett v. Grieve's Syndic., 8 Mart. (La.) 483 ; s.c. 13 Am. Dec. 296 ;

Scott v. Featherston, 5 La. An. 313 ;

Swan v. Patterson, 7 Md. 164 ;

Grove v. Brien, 1 Md. 438 ;

Hollingsworth v. Floyd, 2 Har. & G. (Md.) 87 ;

Magee v. Leggett, 48 Miss. 139 ;

Stanwood v. Clappitt, 23 Miss. 371 ;

Allison v. Sutherlin, 50 Mo. 274 ;

Arnot v. Woodburn, 35 Mo. 99 ;

Gans v. Thieme, 93 N. Y. 225, 232 ;

Clason v. Morris, 10 John. (N. Y.) 524 ;

Hayes v. Ward, 4 John. Ch. (N. Y.) 123, 130 ;

Cuyler v. Ensworth, 6 Paige Ch. (N. Y.) 32, 33 ;

Ottman v. Moak, 3 Sandf. Ch. (N. Y.) 431 ;

Butler v. Birkey, 13 Ohio St. 514 ;

Mosier's Appeal, 56 Pa. St. 76, 80 ; s.c. 93 Am. Dec. 783 ;

McCormick v. Irwin, 35 Pa. 111 ;

Cottrell's Appeal, 23 Pa. St. 294 ;

Kyner v. Kyner, 6 Watts (Pa.) 221 ;

Kirkman v. Bank of America, 2 Coldw. (Tenn.) 397 ;

Henry v. Compton, 2 Head (Tenn.) 549 ;

Williams v. Tipton, 5 Humph. (Tenn.) 66 ; s.c. 42 Am. Dec. 420 ;

James v. Jacques, 26 Tex. 321 ;

Morrill v. Morrill, 53 Vt. 74 ; s.c. 38 Am. Rep. 659 ;

Watts v. Kinney, 3 Leigh (Va.) 272 ;

Neely v. Jones, 16 W. Va. 625 ; s.c. 37 Am. Rep. 794 ;

Story's Eq. Jur. (13th ed.), § 638.

³ Billings v. Sprague, 49 Ill. 509, 511 ;

SEC. 2166. **Same — Same — Between mortgagor and his grantees.**—The mortgagor being primarily liable for the payment of the mortgage debt, where he conveys a portion of the mortgaged premises by warranty deed, he cannot compel his grantee to contribute to the redemption of the mortgage,¹ unless the purchaser has assumed and agreed to pay the mortgage indebtedness, or a portion thereof, as a part of the consideration of the purchase, in which case the assignee becomes personally liable for the mortgage debt; and if the mortgagor is compelled to pay the whole of the mortgage debt, he will be subrogated to the rights of the mortgagee in so much thereof as his grantee was required by the terms of the contract to pay.² The reason for this is the fact that the agreement by the assignee to assume the mortgage debt as a part of the consideration for the conveyance, is an agreement to indemnify the mortgagor against the payment of the mortgage debt,³ and as between the mortgagor and his grantee the latter becomes the principal debtor and the

- McHenry v. Cooper, 27 Iowa 137, 146;
 Ohio Life Ins. Co. v. Winn, 4 Md. Ch. 253;
 Dearborne v. Taylor, 18 N. H. 153;
 Mathews v. Aiken, 1 N. Y. 595;
 Hayes v. Ward, 4 John. Ch. (N. Y.) 123; s.c. 8 Am. Dec. 554;
 Cheesebrough v. Millard, 1 John. Ch. (N. Y.) 409; s.c. 7 Am. Dec. 494;
 Ottman v. Moak, 3 Sandf. Ch. (N. Y.) 431;
 Burton v. Wheeler, 7 Ired. (N. C.) Eq. 217.
¹ George v. Wood, 91 Mass. (9 Allen) 80, 82; s.c. 85 Am. Dec. 741;
 Kilborn v. Robbins, 90 Mass. (8 Allen) 466;
 George v. Kent, 89 Mass. (7 Allen) 16;
 Bradley v. George, 84 Mass. (2 Allen) 392;
 Chase v. Woodbury, 60 Mass. (6 Cush.) 143;
 Allen v. Clark, 34 Mass. (17 Pick.) 47.
 See: Lock v. Fulford, 52 Ill. 166;
 Beard v. Fitzgerald, 105 Mass. 134;
 Johnson v. Williams, 4 Minn. 260, 268;
 Herbert's Case, 3 Co. 11.
² Russell v. Pistor, 7 N. Y. 171; s.c. 17 Am. Dec. 509;
 Hartley v. Tatham, 26 How. (N. Y.) Pr. 158, 162; s.c. 1 Robt. (N. Y.) 246;
 Halsey v. Reed, 9 Paige Ch. (N. Y.) 446;
 Jumel v. Jumel, 7 Paige Ch. (N. Y.) 591;
 Cox v. Wheeler, 7 Paige Ch. (N. Y.) 248, 257.
 See: Lilly v. Palmer, 51 Ill. 331, 333;
 Funk v. McReynolds, 33 Ill. 481;
 Kinnear v. Lowell, 34 Me. 299;
 Swett v. Sherman, 109 Mass. 231;
 Baker v. Terrell, 8 Minn. 195, 199;
 Fletcher v. Chase, 16 N. H. 38, 42;
 Robinson v. Leavitt, 7 N. H. 73;
 Morris v. Oakford, 9 Pa. St. 498;
 2 Pom. Eq. Jur. 254.
³ Biddel v. Brizzolara, 64 Cal. 354; s.c. 30 Pac. Rep. 609;
 Halsey v. Reed, 9 Paige Ch. (N. Y.) 446.

former the surety.¹ But where the land is simply conveyed subject to the mortgage debt, without an assumption thereof on the part of the grantee, the land becomes the primary fund for the payment of the debt, and the mortgagor will be personally liable only after the property is exhausted.² In such a case the mortgagor stands, with respect to the land, as a surety for the mortgage debt.³ Where the mortgagor has sold a portion of the mortgaged premises, and retains another portion, the portion in his hands is primarily liable for the whole mortgage debt, and must be exhausted before recourse can be had to the portions disposed of; and if not sufficient, the portions disposed of should be sold in the inverse order of alienation.⁴

SEC. 2167. **Same—Same—Between mortgagor's grantees.**—Where the mortgagor has disposed of the mortgaged premises in parcels by successive deeds at different times, as between the persons in succession of the different parts there is no right of contribution, as they do not

- ¹ *Higman v. Stewart*, 38 Mich. 513, 523;
Halsey v. Reed, 9 Paige Ch. (N. Y.) 446.
- ² *Cox v. Wheeler*, 7 Paige Ch. (N. Y.) 248.
- ³ *Cox v. Wheeler*, 7 Paige Ch. (N. Y.) 248;
Brewer v. Staples, 3 Sandf. Ch. (N. Y.) 579, 584.
- ⁴ *Jumel v. Jumel*, 8 Paige Ch. (N. Y.) 591.
 See: *Hiles v. Coult*, 30 N. J. Eq. (3 Stew.) 40;
Hill v. McCarter, 27 N. J. Eq. (12 C. E. Gr.) 41;
New York Mut. L. Ins. Co. v. Boughrum, 24 N. J. Eq. (9 C. E. Gr.) 44;
Mount v. Potts, 23 N. J. Eq. (8 C. E. Gr.) 188;
Weatherby v. Slack, 16 N. J. Eq. (1 C. E. Gr.) 491;
Keene v. Munn, 16 N. J. Eq. (1 C. E. Gr.) 398;
Gaskill v. Sine, 13 N. J. Eq. (2 Beas.) 400; s.c. 78 Am. Dec. 105;
Black v. Morse, 7 N. J. Eq. (3 Halst.) 509;
Winters v. Henderson, 6 N. J. Eq. (2 Halst.) 31;
Wikoff v. Davis, 4 N. J. Eq. (3 H. W. Gr.) 224;
Britton v. Updyke, 3 N. J. Eq. (2 H. W. Gr.) 125;
Coles v. Appleby, 87 N. Y. 114, 121, aff'g 22 Hun (N. Y.) 72;
Hopkins v. Wolley, 81 N. Y. 77;
Zabriskie v. Salter, 80 N. Y. 555;
Belmont v. Coman, 22 N. Y. 438; s.c. 78 Am. Dec. 213;
Ingalls v. Morgan, 10 N. Y. 178;
Howard Ins. Co. v. Halsey, 8 N. Y. 271;
Crafts v. Aspinwall, 2 N. Y. 289;
Le Farge F. Ins. Co. v. Bell, 22 Barb. (N. Y.) 54;
Ex parte Merriam, 4 Den. (N. Y.) 254;
Kendall v. Niebuhr, 58 How. (N. Y.) Pr. 156; s.c. 13 J. & S. (N. Y. Super. Ct.) 542;
Howard Ins. Co. v. Halsey, 4 Sandf. Ch. (N. Y.) 565;
Carpenter v. Koons, 20 Pa. St. 222;
Cowden's Estate, 1 Pa. St. 267;
 3 Pom. Eq. Jur. 216.

stand *æquali jure*.¹ The reason for this doctrine is the fact that when a portion of mortgaged premises is conveyed, that which remains is the primary fund for the satisfaction of the mortgage debt, and subsequent purchasers of the whole or a portion thereof take it charged with that liability, their parcels being liable for the mortgage debt in the inverse order of alienation.² But

- ¹ *Allen v. Clark*, 34 Mass. (17 Pick.) 47, 56;
Clowes v. Dickenson, 5 John. Ch. (N. Y.) 235, 240;
Gill v. Lyon, 1 John. Ch. (N. Y.) 447.
 See: *Hiles v. Coult*, 30 N. J. Eq. (3 Stew.) 40;
Hill v. McCarter, 27 N. J. Eq. (12 C. E. Gr.) 41;
New York Mut. L. Ins. Co. v. Boughrum, 24 N. J. Eq. (9 C. E. Gr.) 44;
Mount v. Potts, 23 N. J. Eq. (8 C. E. Gr.) 188;
Weatherby v. Slack, 16 N. J. Eq. (1 C. E. Gr.) 491;
Keene v. Munn, 16 N. J. Eq. (1 C. E. Gr.) 398;
Gaskill v. Sine, 13 N. J. Eq. (2 Beas.) 400; s.c. 78 Am. Dec. 105;
Black v. Morse, 7 N. J. Eq. (3 Halst.) 509;
Winters v. Henderson, 6 N. J. Eq. (2 Halst.) 31;
Wikoff v. Davis, 4 N. J. Eq. (3 H. W. Gr.) 224;
Britton v. Updyke, 3 N. J. Eq. (2 H. W. Gr.) 125;
Coles v. Appleby, 87 N. Y. 114, 121, aff'g 22 Hun (N. Y.) 72;
Hopkins v. Wolley, 81 N. Y. 77;
Zabriskie v. Salter, 80 N. Y. 555;
Belmont v. Coman, 22 N. Y. 438; s.c. 78 Am. Dec. 213;
Ingalls v. Morgan, 10 N. Y. 178;
Howard Ins. Co. v. Halsey, 8 N. Y. 271;
Crafts v. Aspinwall, 2 N. Y. 289;
Le Farge F. Ins. Co. v. Bell, 22 Barb. (N. Y.) 54;
Ex parte Merriam, 4 Den. (N. Y.) 254;
Kendall v. Niebuhr, 58 How. (N. Y.) Pr. 156; s.c. 13 J. & S. (N. Y. Super. Ct.) 542;
Howard Ins. Co. v. Halsey, 4 Sandf. Ch. (N. Y.) 565;
Carpenter v. Koons, 20 Pa. St. 222;
Cowden's Estate, 1 Pa. St. 267;
3 Pom. Eq. Jur. 216.
² *Mobile Marine Dock Co. v. Huder*, 35 Ala. 713, 717;
Ritchie v. Eichelberger, 13 Fla. 169;
Cumming v. Cumming, 3 Ga. 460;
Niles v. Harmon, 80 Ill. 396;
Iglehart v. Crane, 42 Ill. 261;
McCullom v. Turpie, 32 Ind. 146;
Aiken v. Bruen, 21 Ind. 137, 139;
Sheperd v. Adams, 32 Me. 63, 64;
Cushing v. Ayer, 25 Me. 383;
Beard v. Fitzgerald, 105 Mass. 134;
Bradley v. George, 84 Mass. (2 Allen) 392;
McKinney v. Miller, 19 Mich. 142;
Mason v. Payne, Walk. (Mich.) 459;
Johnson v. Williams, 4 Minn. 260, 268;
Brown v. Simons, 44 N. H. 475;
Aiken v. Gale, 37 N. H. 501;
Gaskill v. Sine, 13 N. J. Eq. (2 Beas.) 400; s.c. 78 Am. Dec. 105;
Shannon v. Marselis, 1 N. J. Eq. (1 Saxt.) 413;
Gill v. Lyon, 1 John. Ch. (N. Y.) 447;
Patty v. Pease, 8 Paige Ch. (N. Y.) 277; s.c. 35 Am. Dec. 683;
Jumel v. Jumel, 7 Paige Ch. (N. Y.) 591;
Cowden's Estate, 1 Pa. St. 267;
Nailer v. Stanley, 10 Serg. & R. (Pa.) 450; s.c. 13 Am. Dec. 691;
Norton v. Lewis, 3 S. C. 25;
Stoney v. Shultz, 1 Hill (S. C.) Eq. 465, 500; s.c. 27 Am. Dec. 429;
Lyman v. Lyman, 32 Vt. 79; s.c. 76 Am. Dec. 151;
Gates v. Adams, 24 Vt. 70;
Jones v. Myrick, 8 Gratt. (Va.) 179;
Henkle v. Allstadt, 4 Gratt. (Va.) 284;

where mortgaged property is conveyed in different parcels, but deeds are executed and delivered simultaneously, the inequality of equities occasioned by successive alienations does not arise, and the holder of the different parcels will be liable to contribute *pro rata* their share of the mortgage debt.¹ In some of the states, however, it is held that the equities between the assignees of mortgaged premises are equal, whether the alienations are simultaneous or successive.²

SEC. 2168. Same—Same—Between mortgagor's personal property and pledged estate.—In a case where the mortgagor dies during the life of the mortgagee, the mortgaged premises are the primary fund from which the mortgage debt must be paid, and the personal property left by the deceased mortgagor can be resorted to only after the mortgaged premises have been exhausted.³ The reason for this rule is the protection of the personal estate for the benefit of the heirs, and can be enforced only by the heirs⁴ against the personal representatives and residuary legatees. From this it follows that where

- Worth v. Hill, 14 Wis. 559.
 * Briscoe v. Power, 47 Ill. 447, 448;
 Bates v. Ruddock, 2 Iowa 423;
 s.c. 65 Am. Dec. 774;
 Bailey v. Myrick, 50 Me. 171;
 Pike v. Goodnow, 94 Mass. (12
 Allen) 472, 474;
 George v. Wood, 91 Mass. (9
 Allen) 80; s.c. 85 Am. Dec.
 741;
 Welch v. Beers, 90 Mass. (8 Allen)
 151;
 Bradley v. George, 84 Mass. (2
 Allen) 392;
 Chase v. Woodbury, 60 Mass. (6
 Cush.) 143;
 Aiken v. Gale, 37 N. H. 501;
 Stevens v. Cooper, 1 John. Ch.
 (N. Y.) 425, 525; s.c. 7 Am.
 Dec. 499.
 ° Barney v. Myers, 28 Iowa 472;
 Bates v. Ruddick, 2 Iowa 423;
 s.c. 65 Am. Dec. 774;
 Dickey v. Thompson, 8 B. Mon.
 (Ky.) 312;
 Stanly v. Stocks, 1 Dev. (N. C.)
 Eq. 314;
 Green v. Ramage, 18 Ohio 428;
 s.c. 51 Am. Dec. 458;
 Jobe v. O'Brien, 2 Humph.
 (Tenn.) 34;
 2 Story's Eq. Jur. (13th ed.), §
 1233b.
 * Trustees, etc., v. Dickson, 1
 Freem. Ch. (Miss.) 474;
 Henagan v. Harlee, 10 Rich. (S.
 C.) Eq. 285;
 Patton v. Page, 4 Hen. & M.
 (Va.) 449;
 Cope v. Cope, 2 Salk. 449.
 4 Purchasers from the mortgagor or his
 heirs cannot claim to have the per-
 sonal property exonerated in this
 matter, and neither can the
 heirs after they have parted
 with their interest in the equity
 of redemption.
 See: Goodburn v. Stevens, 1 Md.
 Ch. 42;
 Haven v. Foster, 26 Mass. (9
 Pick.) 112; s.c. 19 Am. Dec.
 353;
 Cumberland v. Codrington, 3
 John. Ch. (N. Y.) 229;
 Lupton v. Lupton, 2 John. Ch.
 (N. Y.) 614;
 Lockhardt v. Hardy, 9 Beav.
 379.

the personal property has been bequeathed as general or specific legacies to other parties, the right of such property to exoneration will be lost.¹

SEC. 2169. Same—Same—Between mortgagor's devisees, heirs and widow.—It is a familiar principle in the courts of equity that every person interested in an estate mortgaged is entitled to redeem the same;² consequently, the devisee, heir, or widow of the deceased mortgagor will be entitled to redeem,³ but the redemption of the mortgaged estate is an entirely voluntary act, and the party redeeming cannot require those who are interested therein to unite with him in such redemption. If he elects to redeem, he must pay the whole amount due on the mortgage, and hold the same to his own use, unless those holding the other portions of the equity seek to come in and share with him, paying their proper contributory shares, which they will have the right to do.⁴ Consequently, where the heirs, devisees, or widow of the deceased mortgagor redeems the mortgaged premises, there will be a right in favor of either of the others to participate in such redemption on contributing their *pro rata* share of the money required.⁵

SEC. 2170. Same—Same—Agreements affecting rights of.—

¹ Gibson v. McCormick, 10 Gill & J. (Md.) 65;

Mansell's Estate, 1 Pars. Sel. Cas. (Pa.) 367;

Torr's Estate, 2 Rawle (Pa.) 250; Cope v. Cope, 2 Salk. 449.

² Gibson v. Crehore, 22 Mass. (5 Pick.) 146.

³ Gibson v. Crehore, 22 Mass. (5 Pick.) 146.

A widow being dowable in an equity has such an interest in the mortgaged estate as will entitle her to redeem.

Fish v. Fish, 1 Conn. 559; Carll v. Butnam, 7 Me. (7 Greenl.) 102

Smith v. Eustis, 7 Me. (7 Greenl.) 41;

Walker v. Griswold, 23 Mass. (6 Pick.) 416;

Cass v. Martin, 6 N. H. 25;

Southerin v. Mendum, 5 N. H. 420, 431, 432;

Jackson v. De Witt, 6 Cow. (N. Y.) 316;

4 Kent Com. (13th ed.) 44.

⁴ Merritt v. Hosmer, 77 Mass. (11 Gray) 276; s.c. 71 Am. Dec. 713;

Gibson v. Crehore, 22 Mass. (5 Pick.) 146, 152.

⁵ Carll v. Butnam, 7 Me. (7 Greenl.) 102;

Eaton v. Simonds, 31 Mass. (14 Pick.) 98;

Drew v. Rust, 36 N. H. 335, 343;

Bell v. Mayor of N. Y., 10 Paige Ch. (N. Y.) 49;

Swaine v. Parine, 5 John. Ch. (N. Y.) 472, 490; s.c. 9 Am. Dec. 318;

Jones v. Sherrard, 2 Dev. & B. Eq. (N. C.) 179;

Foster v. Hilliard, 1 Story C. C. 77; s.c. 3 Law Rep. 175; Fed. Cas. No. 4972.

The parties interested in the equity of redemption of the mortgaged premises may by special agreement change the relative equities of the parties in relation thereto. We have already seen¹ that under the general rule, where a portion of the mortgaged premises is conveyed, that which remains is a primary fund liable for the mortgage debt; and that where there have been successive alienations, the persons will be liable for the payment of the mortgage debt in the inverse order of alienation. The parties may by contract relieve the portion alienated by the mortgagor from liability to pay the mortgage debt, and impose that burden upon the portion conveyed.² Such a contract will be recognized and enforced in equity, and will be binding upon any subsequent purchaser who acquires title with knowledge of the grantor's agreement.³ The reason for this is the fact that the grantee of such grantee will take the property with no better title against the mortgagee and his assignee than the original grantee had.⁴ The mortgagee may also by agreement change the relative equities between owners of the mortgaged premises, either by apportionment of the mortgage debt and agreement that each particular parcel of land shall bear a specified portion of the mortgage debt, or relieve certain parcels from any portion thereof.⁵

¹ See: *Ante*, §§ 2167, 2168.

² Thus in the case of *Welch v. Beers*, 90 Mass. (8 Allen) 90, 151, it was said that if the owner of land which is subject to a mortgage conveys a portion thereof, the value of which is more than sufficient to pay the mortgage debt, with a provision in the deed that the purchaser shall assume and pay the whole of the same, and afterwards conveys the residue of the lot with the understanding that the mortgage is to be paid by the former purchaser, and the mortgagee subsequently takes a new mortgage upon the portion of the lot first conveyed, with notice, the purchaser of the second lot may maintain a bill in equity

to redeem the same without contribution towards the debt secured by the first mortgage.

³ *Welch v. Beers*, 90 Mass. (8 Allen) 151, 153; *George v. Kent*, 89 Mass. (7 Allen) 16.

See: *Chase v. Woodbury*, 60 Mass. (6 Cush.) 143; *Brown v. Simons*, 44 N. H. 475.

⁴ *George v. Wood*, 93 Mass. (11 Allen) 41; *Welch v. Beers*, 90 Mass. (8 Allen) 151.

See: *Chase v. Woodbury*, 60 Mass. (6 Cush.) 143; *Bradley v. George*, 84 Mass. (2 Allen) 392.

⁵ *Iglehart v. Crane*, 42 Ill. 261; *Taylor v. Short*, 27 Iowa 361; s.c. 1 Am. Rep. 280;

SEC. 2171. **Same—Accounting by mortgagee.**—Where the mortgagee takes possession of the mortgaged premises and collects the rents and profits thereof, he thereby assumes the character of a *quasi*-trustee of the mortgagor, and is liable to account for the rents and profits to the mortgagor.¹ This rule is founded in sound policy, for the reason that the particular items of expenditure, in labor or otherwise, as well as the profits received, are wholly within the knowledge of the mortgagee; and if he is not disposed to render a full and honest account, it would be impossible for the mortgagor to show them, or to establish errors in the mortgagee's account.² But this accounting must be had in the manner and for the purposes specified in the statute providing for the redemption.³ In the absence of an agreement between the parties there is no legal satisfaction of the mortgage by the receipt of rents and profits by the mortgagee in possession to an amount sufficient to satisfy the mortgage debt, and his character of mortgagee in possession is not divested until the rents and profits are applied by judgment of the court in satisfaction of the mortgage debt.⁴ The right of the mortgagor to an account of the rents and profits of the land received by the mortgagee is

Johnson v. Rice, 8 Me. (8 Greenl.) 157;

Parkman v. Welch, 36 Mass. (19 Pick.) 231;

Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151;

Stevens v. Cooper, 1 John. (N. Y.) 425; s.c. 7 Am. Dec. 499;

Paxton v. Harrier, 11 Pa. St. 312.

¹ Barnett v. Nelson, 54 Iowa 41; s.c. 37 Am. Rep. 183; 6 N. W. Rep. 49;

Hunt v. Maynard, 23 Mass. (6 Pick.) 489, 491.

See: George v. Wood, 93 Mass. (11 Allen) 41;

Clark v. Sibley, 54 Mass. (13 Met.) 210, 214;

Putnam v. Putnam, 21 Mass. (4 Pick.) 139.

² Kellogg v. Rockwell, 19 Conn. 446;

Barnett v. Nelson, 54 Iowa 41; s.c. 37 Am. Rep. 183; 6 N. W. Rep. 49;

Bainbridge v. Owen, 2 J. J. Marsh. (Ky.) 643, 645;

Strong v. Blanchard, 86 Mass. (4 Allen) 538;

Van Buren v. Olmstead, 5 Paige Ch. (N. Y.) 9;

Gordon v. Lewis, 2 Sumn. C. C. 143; s.c. Fed. Cas. No. 5613;

Trimpston v. Hamill, 1 Ball & B. 379.

³ Hunt v. Maynard, 23 Mass. (6 Pick.) 489, 491;

Cholmondeley v. Clinton, 2 Jac. & W. 1182;

2 Story Eq. Jur. (13th ed.) 278, 283.

⁴ Hubbell v. Moulson, 53 N. Y. 225; s.c. 13 Am. Rep. 519.

See: Harrison v. Wyse, 24 Conn. 1; s.c. 63 Am. Dec. 151;

Chapman v. Porter, 69 N. Y. 276;

Ruckman v. Astor, 9 Paige Ch. (N. Y.) 517, rev'g 3 Edw. Ch. (N. Y.) 373;

Reitenbaugh v. Ludwick, 31 Pa. St. 131.

purely of equitable cognizance;¹ and in the courts of equity the mortgagee will be charged with rents and profits he might have received, if his failure to recover them is attributable to his fraud or willful default.² But if the mortgagee has judiciously rented the premises to a third person, he will be chargeable only with the amount of rent received.³ The general rule is that the mortgagee in possession is not only bound to account for the reasonable rental value of the premises, without regard to the net profit,⁴ but is also bound to keep the premises in ordinary repair.⁵ While it is true that the mortgagee in accounting for the rents and profits will not be entitled to any allowance for improvements upon the mortgaged premises,⁶ yet where improvements are made in the belief that he was the absolute owner, the increased value by reason thereof may be allowed him.⁷

SEC. 2172. **Waste—Action for damages.**—The general rule is that any party in possession of the mortgaged premises who does an act tending to impair the security of the mortgage, will be liable to the holder of such

- ¹ *Parsons v. Welles*, 17 Mass. 419;
Bell v. Mayor of New York, 10 Paige Ch. (N. Y.) 49;
Givens v. McCalmont, 4 Watts (Pa.) 460, 464;
Seaver v. Durant, 39 Vt. 103;
Gordon v. Hobart, 2 Story C. C. 243; s.c. Fed. Cas. No. 5608;
Farrant v. Lovel, 3 Atk. 723.
- ² *Hubbells v. Moulson*, 53 N. Y. 225; s.c. 13 Am. Rep. 519.
 See: *Mickles v. Dillaye*, 17 N. Y. 80;
Cameron v. Irwin, 5 Hill (N. Y.) 272;
 4 Kent Com. (13th ed.) 185;
 2 Powell on Mort. 957.
- ³ *Barnett v. Nelson*, 54 Iowa 41; s.c. 37 Am. Rep. 183; 6 N. W. Rep. 49.
- ⁴ *Kellogg v. Rockwell*, 19 Conn. 446;
Barnett v. Nelson, 54 Iowa 41; s.c. 37 Am. Rep. 183; 6 N. W. Rep. 49;
Montgomery v. Chadwick, 7 Iowa 114;
Boston Iron Co. v. King, 56 Mass. (2 Cush.) 400;
- Sanders v. Wilson*, 34 Vt. 218.
- ⁵ *McCumber v. Gilman*, 15 Ill. 381;
Barnett v. Nelson, 54 Iowa 41; s.c. 37 Am. Rep. 183; 6 N. W. Rep. 49;
Shaeffer v. Chambers, 6 N. J. Eq. (2 Halst.) 548; s.c. 47 Am. Dec. 211;
Godfrey v. Watson, 3 Atk. 517.
 See: *Campbell v. Macomb*, 4 John. Ch. (N. Y.) 534;
Rowe v. Wood, 2 Jacob & W. 553.
- ⁶ *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381; s.c. 25 N. E. Rep. 558.
- ⁷ *Roberts v. Fleming*, 53 Ill. 196, 204;
Reed v. Reed, 27 Mass. (10 Pick.) 398, 400;
Bacon v. Cottrell, 13 Minn. 194;
Miner v. Beekman, 50 N. Y. 337;
Putnam v. Ritchie, 6 Paige Ch. (N. Y.) 390;
Benedict v. Gilman, 4 Paige Ch. (N. Y.) 58;
Gillis v. Martin, 2 Dev. (N. C.) Eq. 470; s.c. 25 Am. Dec. 729.

mortgage, or other parties interested in the premises, in an action for damages for such waste.¹ Thus it has been

¹ *Frothingham v. McKusick*, 24 Me. 403 ;

Goddard v. Bolster, 6 Me. (6 Greenl.) 427 ; s.c. 30 Am. Dec. 320 ;

Stowell v. Pike, 2 Me. (2 Greenl.) 387 ;

Smith v. Goodwin, 2 Me. (2 Greenl.) 173 ;

Wilmarth v. Bancroft, 92 Mass. (10 Allen) 348 ;

Cole v. Stewart, 65 Mass. (11 Cush.) 181 ;

Page v. Robinson, 64 Mass. (10 Cush.) 99 ;

Mayo v. Fletcher, 31 Mass. (14 Pick.) 525 ;

Burnside v. Twitchell, 43 N. H. 390 ;

Sanders v. Reed, 12 N. H. 558 ;

Van Pelt v. McGraw, 4 N. Y. 110 ;

Gardner v. Heartt, 3 Den. (N. Y.) 232 ;

Lane v. Hitchcock, 14 John. Ch. (N. Y.) 213 ;

Rogers v. Gillinger, 30 Pa. St. 185, 188 ; s.c. 72 Am. Dec. 694 ;

Waterman v. Matteson, 4 R. I. 539 ;

Mitchell v. Bogan, 11 Rich. (S. C.) Eq. 686 ;

Hagar v. Brainard, 44 Vt. 294, 302.

Action for waste—Massachusetts doctrine—*Wilmarth v. Bancroft*.—Thus it is held in *Wilmarth v. Bancroft*, 92 Mass. (10 Allen) 348, that “ if a building which stands upon mortgaged land is partly destroyed by fire, the mortgagor has no right, without the mortgagee’s consent, to sell such parts of the building as are saved ; and if the same have been sold by a third person to whom he has delivered the same for that purpose, he cannot maintain an action against such third person to recover the sum received as the price thereof, if meanwhile the mortgagee has entered upon the premises for breach of condition, and has forbidden the payment to the mortgagor, and the value of the land is less than the amount of the debt

secured by the mortgage. The courts say the articles in question having been annexed to and made part of the real estate mortgaged, the mortgagee had the same title in them as in the rest of the mortgaged estate, and, even before entering into possession, could have maintained an action against the mortgagor if he had severed and removed them. (*Cole v. Stewart*, 65 Mass. (11 Cush.) 131.) The mortgagee never assented to their severance or conversion into personalty. The fire did not affect her title in them. When fixtures annexed to a mortgaged estate are severed without the mortgagee’s consent, it makes no difference as against the mortgagee whether it is by act of the mortgagor, or of a third person, or by accident. (*Rogers v. Gillinger*, 30 Pa. St. 188 ; s.c. 72 Am. Dec. 694 ; *Bowles’s Case*, 11 Co. 81b ; s.c. *sub nom.* *Bowles v. Berrie*, 1 Rol. R. 181.) The fact that the old buildings were destroyed, so that the fixtures could not be again used in connection with them, did not terminate or affect the mortgagee’s interest in the fixtures. (*Goddard v. Bolster*, 6 Me. (6 Greenl.) 427 ; s.c. 30 Am. Dec. 320 ; *Rogers v. Gillinger*, 30 Pa. St. 188 ; s.c. 72 Am. Dec. 694.) If the mortgagor had rebuilt the house, he might doubtless have re-affixed them to it. If he had affixed them to a new house upon other land belonging to a third person, and so made them part of that land, the mortgagee might not have been able to recover the specific articles, or maintain an action against that person for their value, and might have been left to his remedy against the mortgagor.”

Citing : *Pierce v. Goddard*, 39 Mass. (22 Pick.) 559 ;

Fryatt v. Sullivan Co., 5 Hill (N. Y.) 116 ; s.c. 7 Hill (N. Y.) 529.

said that an action may be maintained by an assignee of a mortgagee against a purchaser from the mortgagor subsequent to the execution of the mortgage, for removing buildings from the premises, after they had been advertised for sale, under the power in the mortgage, and before the sale, whereby the premises were rendered inadequate to pay the money due, and were sold for a less sum than they otherwise would have brought.¹ While the mortgagee, who has not entered, cannot maintain trespass *quare clausum fregit* against a person entering and occupying by permission of the mortgagor before condition broken, and holding over after a breach,² yet after condition broken, the mortgagee, not in actual possession, may maintain trespass for injury to the mortgaged premises.³

SEC. 2173. Same—Injunction against.—The most effective remedy against waste is an action by a bill in equity for an injunction to prevent any act by the mortgagor, or any person in possession, that will tend to diminish the value of the mortgage security ; such as the cutting of trees, pulling down of houses, and the like ; or for the appointment of a receiver to take charge of and manage the mortgaged property. Such a bill may be filed by any person interested in the mortgaged premises, or in the mortgage debt.⁴

- ¹ Lane v. Hitchcock, 14 John. (N. Y.) 213 ;
Yates v. Joyce, 11 John. (N. Y.) 136, 140.
² Mayo v. Fletcher, 31 Mass. (14 Pick.) 525.
³ Page v. Robinson, 64 Mass. (10 Cush.) 99.
See : Kimball v. Lewiston, etc., Co., 55 Me. 494 ;
Frothingham v. McKusick, 24 Me. 403 ;
Gore v. Jennison, 19 Me. 53 ;
Adams v. Corriston, 7 Minn. 456 ;
Kennerly v. Burgess, 38 Mo. 440 ;
Waterman v. Matteson, 4 R.I. 539 ;
Langdon v. Paul, 22 Vt. 205.
Compare : Cooper v. Davis, 15 Conn. 556 ;
Clark v. Reyburn, 1 Kan. 281 ;
Wilson v. Maltby, 59 N. Y. 126 ;
Peterson v. Clark, 15 John. (N. Y.) 205.
⁴ Mooney v. Brinkley, 17 Ark. 340 ;
Robinson v. Russell, 24 Cal. 467 ;
Cooper v. Davis, 15 Conn. 556 ;
Nelson v. Pinegar, 30 Ill. 473 ;
McCaslin v. The State, 44 Ind. 151 ;
Gray v. Baldwin, 8 Blackf. (Ind.) 164 ;
Parsons v. Hughes, 12 Md. 1 ;
Salmon v. Claggett, 3 Bland Ch. (Md.) 125, 126 ;
Adams v. Corriston, 7 Minn. 456 ;
Capner v. Flemington Mining Co., 3 N. J. Eq. (2 H. W. Gr.) 467 ;
Brick v. Getsinger, 5 N. J. Eq. (1 Halst.) 391 ;
Johnson v. White, 11 Barb. (N. Y.) 194 ;
Brady v. Waldron, 2 John. Ch. (N. Y.) 148 ;

BOOK IV.

INCORPOREAL HEREDITAMENTS.

CHAPTER I.

INTRODUCTORY.

SEC. 2174. Incorporeal hereditaments—Definition.

SEC. 2175. Same—Kinds of.

SEC. 2176. Same—How created.

SEC. 2177. Same—How lost.

SECTION 2174. Incorporeal hereditaments—Definition.—An incorporeal hereditament is the object of sensation existing in contemplation of law only,¹ and consists of certain inheritable rights which arise out of land, or by use annexed to or concerning land, and pass without livery of seisin, because they are not tangible;² such as an annuity to a man and his heirs, commons, franchises, rents, and ways.³ All incorporeal hereditaments have their foundation in the nature of things.⁴

SEC. 2175. Same—Kinds of.—Incorporeal hereditaments are of two kinds, to wit: pure hereditaments and mixed hereditaments. A pure incorporeal hereditament is one which at no time can become a corporeal hereditament;

Ensign v. Colburn, 11 Paige Ch. (N. Y.) 503;

Scott v. Wharton, 2 Hen. & M. (Va.) 25;

Bunker v. Locke, 15 Wis. 635;

Fairbank v. Cudworth, 33 Wis. 358;

Morrison v. Buckner, 1 Hempst. C. C. 442; s.c. Fed. Cas. No. 9844;

Robinson v. Litton, 2 Atk. 210;

Goodman v. Kine, 8 Beav. 379;

Hampton v. Hodges, 8 Ves. 105.

¹ 2 Bl. Com. 17, 18.

² Bract. ii. 18;

1 Co. Litt. (19th ed.) 20a, 49a.

³ 2 Bl. Com. 20.

⁴ 2 Just. 2.

See: *Canal Co. v. Railroad Co.*,

4 Gill & J. (Md.) 1.

while a mixed incorporeal hereditament is one which, though incorporeal in its nature, is capable of becoming corporeal upon the happening of certain events. Purely incorporeal hereditaments are subdivided into three classes, namely: (1) Such as are appendant to the land; (2) such as are appurtenant to the land; and (3) such as are in gross, or exist as separate and independent property, and which accordingly lie in grant and require a deed for their transfer.¹

SEC. 2176. **Same—How created.**—All interest in or arising out of or connected with lands, whether corporeal or incorporeal, must lie in grant.² A grant of an incorporeal hereditament is not exclusive in the grantee, but is to be enjoyed in common with the grantor, his heirs and assigns.³

SEC. 2177. **Same—How lost.**—An incorporeal hereditament, unlike the land out of which it arises, is not divisible, and the grantee by dividing it by his own act thereby extinguishes it.⁴ An incorporeal hereditament may also be lost by release or by a union in the holder of the possession of the hereditament and the title to the land.

¹ Shep. Touch. 228;
Williams' Real Prop. (6th ed.)
322.

² Hoff v. McCauley, 53 Pa. St. 206;
s.c. 91 Am. Dec. 203.

³ *Johnstown Iron Co. v. Cambria
Iron Co.*, 29 Pa. St. 241; s.c.
72 Am. Dec. 783.

See: *Tinicum Fishing Co. v.
Carter*, 61 Pa. St. 39; s.c. 100
Am. Dec. 597;

Neumoyer v. Andreas, 57 Pa. St.
446, 451;

Gloninger v. Franklin Coal Co.,
55 Pa. St. 9, 16; s.c. 93 Am.
Dec. 720;

Funk v. Haldeman, 53 Pa. St.
229, 243;

Grubb v. Guilford, 4 Watts (Pa.)
223, 224; s.c. 28 Am. Dec. 700;

Grubb v. Bayard, 2 Wall. Jr. C.
C. 100; s.c. Fed Cas. No.
5849;

Chetham v. Williamson, 4 East
470.

It has been said in *Johnstown
Iron Co. v. Cambria Iron Co.*,
supra, that in all cases from
that of *Lord Mountjoy, Godb.*,
c. 24, down to *Grubb v. Gil-*
ford, 4 Watts (Pa.) 224; s.c. 28
Am. Dec. 700; and *Grubb v.*
Bayard, 2 Wall. Jr. C. C. 81,
100; s.c. Fed. Cas. No. 5849,
the right to an incorporeal
hereditament has been enjoyed
in common with the grantor,
his heirs and assigns.

⁴ *Caldwell v. Fulton*, 31 Pa. St. 475;
s.c. 72 Am. Dec. 760.

CHAPTER II.

RIGHTS OF COMMON.

- SEC. 2178. Definition.
- SEC. 2179. Kinds of.
- SEC. 2180. Common of pasture.
- SEC. 2181. Same—Common appendant.
- SEC. 2182. Same—Common appurtenant.
- SEC. 2183. Same—Common of vicinage.
- SEC. 2184. Same—Common in gross.
- SEC. 2185. Common of estovers.
- SEC. 2186. Same—Not severable or apportionable.
- SEC. 2187. Common of turbary.
- SEC. 2188. Common of piscary.
- SEC. 2189. Divesting right of common.
- SEC. 2190. Apportionment of common.
- SEC. 2191. Same—Common of pasture.
- SEC. 2192. Same—Common of estovers and piscary.
- SEC. 2193. Extinguishment of common—By release.
- SEC. 2194. Same—By conveyance.
- SEC. 2195. Same—Unity of possession.
- SEC. 2196. Same—By severance.

SECTION 2178. *Definition.*—A common, or a right of common, is a right or privilege which several persons have to take and use some part or portion of that which is the product of the lands, waters, wood, etc., of another person. This right commenced in some agreement between the lords of manors and their tenants for valuable purposes, and being continued by usage is good and valid at the present, though there be no deed or instrument in writing to prove the original grant.¹ Thus, common of pasture is a right of feeding the beasts of one person on the lands of another ; common of estovers is the right a tenant has of taking necessary wood and

¹ *Van Rennselaer v. Radcliff*, 10 Wend. (N. Y.) 639 ; s.c. 25 Am. Dec. 582.

timber from the woods of the lord, for fuel, fencing, etc. ; common of turbary and piscary are, in like manner, rights which tenants have to cut turf or take fish in the grounds or waters of the lord. All these rights of common were originally intended for the benefit of agriculture, and for the support of the families and cattle of the cultivators of the soil. They are in general either appendant or appurtenant to houses and lands. There is much learning in the books relative to the creation, apportionment, suspension, and extinguishment of these rights, which, fortunately, in this country, we have but little occasion to explain ; but few manors exist among us as remnants of aristocracy not yet entirely eradicated. These common rights, which were at one time thought to be essential to the prosperity of agriculture, subsequent experience, even in England, has shown to be prejudicial. In this country such rights are uncongenial with the genius of our government, and with the spirit of independence which animates our cultivators of the soil.¹ At the time of the foundation of many of the cities and towns of Massachusetts, certain tracts of land were set apart for general use of the inhabitants in common, which are variously designated as “general fields,” “common lands,” or “commons,” and which correspond very closely to the commons at common law.² In portions of the territory acquired by the United States by the Louisiana Purchase, the inhabitants resided in villages almost exclusively, and cultivated common fields enclosed by a single fence, each person cultivating a portion of the soil which was assigned for that purpose by a

¹ *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639 ; s.c. 25 Am. Dec. 582.

See : *Thomas v. Marshfield*, 27 Mass. (10 Pick.) 364 ;

Smith v. Floyd, 18 Barb. (N. Y.) 522 ;

Leyman v. Abeel, 16 John. (N. Y.) 30 ;

Livingston v. Ten Broeck, 16 John. (N. Y.) 14 ; s.c. 8 Am. Dec. 287 ;

Watts v. Coffin, 11 John. (N. Y.) 495 ;

Rogers v. Jones, 1 Wend. (N. Y.)

237 ; s.c. 19 Am. Dec. 493 ;

Alleghany v. Ohio & P. R. Co., 26 Pa. St. 355 ;

Bell v. Ohio & P. R. Co., 25 Pa. St. 161 ; s. c. 64 Am. Dec. 687 ;

Westn. Univ. v. Robinson, 12 Serg. & R. (Pa.) 29 ;

Carr v. Wallace, 7 Watts (Pa.) 394.

² *Folger v. Mitchell*, 20 Mass. (3 Pick.) 396 ;

Mansfield v. Hawkes, 14 Mass. 440 ;

Rogers v. Goodman, 2 Mass. 475.

committee, or syndicate of town. These common fields of the French and Spanish villages of the Louisiana Territory were confirmed to the villages by the Act of Congress June 13, 1812.¹

SEC. 2179. **Kinds of.**—Commons consist of several kinds, known respectively as common of pastures,² common of estovers,³ common of turbary,⁴ and common of piscary.⁵ All these commons are either appendant to corporeal hereditaments or appurtenant thereto, and may be transferred by whatever means the corporeal hereditament to which they belong may be transferred.

SEC. 2180. **Common of pasture.**—The most valuable of the various kinds of commons known to the common law was common of pasture, appendant, and possibly appurtenant,—which is the right of feeding one's beasts on another's land; for at common law, in those waste grounds which were called commons, the property of the soil was generally in the lord of the manor. But a commoner of right to take herbage by mouths of his cattle has no incidental right to keep the common open as an ornament to his dwelling, or as contributing to his own personal pleasure or convenience; and he is a mere trespasser, except when in necessary attendance on his depasturing cattle.⁶

SEC. 2181. **Same—Common appendant.**—The most important of these commons is common of pasture, and is the common appendant founded on prescription and regularly annexed to the land by which the person in possession thereof is entitled to feed his beasts on the

¹ *State v. McReynolds*, 61 Mo. 210;
Vasquez v. Ewing, 42 Mo. 247;
Robbins v. Eckler, 36 Mo. 494;
Harrison v. Page, 16 Mo. 182;
Swartz v. Page, 13 Mo. 603;
Dent v. Emmeger, 81 U. S. (14
 Wall.) 308, 358; bk. 20 L. ed.
 838;
Glasgow v. Hortiz, 66 U. S. (1
 Black.) 595; bk. 17 L. ed. 110;
Carondelet v. St. Louis, 66 U. S.

(1 Black.) 179; bk. 17 L. ed. 102;
Mackay v. Dillon, 45 U. S. (4
 How.) 421; bk. 11 L. ed. 1038;
Chouteau v. Eckhart, 43 U. S. (2
 How.) 344; bk. 11 L. ed. 293.

² See: *Post*, §§ 2180–2184.

³ See: *Post*, §§ 2185, 2186.

⁴ See: *Post*, § 2187.

⁵ See: *Post*, § 2188.

⁶ *Bell v. Ohio & P. R. Co.*, 25 Pa.
 St. 161; s.c. 64 Am. Dec. 687.

waste land of the manor, from the necessity of the case, and to encourage agriculture.¹ At common law a common appendant to be valid must have existed for time out of mind, and can be claimed only by prescription. Where a person alleges a custom that every inhabitant of a certain town has common of pasture in a particular place, such custom was against the law and for that reason held void.² A common appendant is regularly annexed to arable land only, though it may be claimed as appendant to a manor or farm, notwithstanding it contain pasture, meadow, and wood ; but a prescription to a common appendant to a house, meadow, or pasture is void.³

SEC. 2182. **Same—Common appurtenant.**—A common appurtenant does not necessarily arise from any connection of tenure, but must be claimed by grant or prescription. It may be created by grant, and may be annexed to any kind of land whether arable or non-arable,⁴ even to lands lying in different manors from those in which it is claimed. This species of common, though frequently confounded with a common appendant, differs from it in many circumstances. It may be created by grant, whereas common appendant can only arise from prescription. It may be claimed as annexed to any kind of land, whereas common appendant can only be claimed on account of ancient arable land. It may be not only for beasts usually commonable, such as horses, oxen, and sheep, but also for goats, swine, and the like.⁵ An important distinction between these two classes of commons is that if he who has common appurtenant purchases a parcel of the land subject to the easement, all his right of common is extinguished ; or if he takes a lease of part of the land, all the common is suspended, because it is the folly of the commoner to intermeddle with the land ; his common appurtenant was against common right, and he cannot common in his own land which he has pur-

¹ *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639 ; s.c. 25 Am. Dec. 582.

² *Gateward's Case*, 6 Co. 59 ; s.c. 1 Rol. Abr. 396.

³ 3 Cruise Dig. (4th ed.) 65.

⁴ *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639 ; s.c. 25 Am. Dec. 582.

⁵ 3 Cruise Dig. (4th ed.) 67.

chased.¹ It has been said that the right of common, annexed to town lots under a survey by the state laying out the town into lots, and reserving certain land therefrom for a common pasture, is a common appurtenant as distinguished from a common appendant.²

SEC. 2183. **Same—Common of vicinage.**—At common law the inhabitants of contiguous townships usually intercommoned with one another; that is, the beasts one each straying mutually into the other's fields without molestation from either. This species of common is only a permissive right, intended to excuse what in strictness would be a trespass, and to prevent a multiplicity of suits, and exists only between two townships or manors adjoining one another, and not where there is intermediate lands.³ Common because of vicinage cannot be claimed as matter of customary right by the owner of a farm against the owner of an adjoining farm, though there is no fence or inclosure between them. Such a right could only have its origin in a grant, or in manorial custom.⁴ Common because of vicinage can only be used by cattle levant and couchant upon the lands to which such right of common is annexed; and if the commons of the towns of A and B are adjoining, and there are fifty acres of common in the town of A and one hundred acres in the town of B, the inhabitants of the town of A cannot put more cattle on their common than it will feed, without any respect to the extent of the common in the town of B, *nec e converso*.⁵

SEC. 2184. **Same—Common in gross.**—A common in gross has no relation to the tenure of lands, but is annexed by

¹ Bell v. Ohio & P. R. Co., 25 Pa. St. 161; s.c. 64 Am. Dec. 687.

This principle was expressly decided in Kimpton's Case, 4 Leon. 43; in Tyrringham's Case, 2 Co. 379; in Wyat Wild's Case, 8 Co. 79, and in numerous other cases.

It was said in Tyrringham's Case, *supra*, that common appurtenant cannot be extinct in part

and be *in esse* for part, by the act of the parties.

² Bell v. Ohio & P. R. Co., 25 Pa. St. 161; s.c. 64 Am. Dec. 687.

³ 1 Co. Inst. 122a.

See: Smith v. Floyd, 18 Barb. (N. Y.) 522, 523.

⁴ Jones v. Robin, 12 L. J. N. S. 15.

See: Clark v. Tinker, 10 Jur. 263.

⁵ Corbett's Case, 7 Co. 5;

3 Cruise Dig. (4th ed.) 68.

deed of prescription to a man's possession.¹ It is a right which must be claimed by deed or prescription, and has no relation to land, but is annexed to a man's person, and may be for a certain or an indefinite number of cattle. Where a person has common of this kind, either for a certain or an indefinite number of cattle, he may put in the cattle of a stranger and use the common with them.² Neither common appendant nor common appurtenant for cattle levant and couchant can be turned into common in gross; but common appurtenant for a limited number of cattle may be granted over, and by such grant becomes a common in gross.³ Right in gross and not right appurtenant is created by an agreement on the part of one tenant in common of a tract of land, who is also several owner of an adjoining tract, that he will give his co-tenant the privilege of purchasing his undivided moiety of the common land within a certain time at a certain price, and that if such purchase is made, he, his heirs and assigns shall have an equal privilege with the co-tenants of taking sea-weed on said tract, and this right does not inure to the benefit of one who, after the agreement but before any purchase of such undivided moiety by the co-tenant, purchases the adjoining tract from the other tenant in common.⁴

SEC. 2185. **Common of estovers.**—Common of estovers is the right the tenant has to take necessary wood and timber from the woods of the lord of the manor for fencing, fuel, and the like, and may be either appendant or appurtenant,⁵ without waiting for an assignment thereof.⁶ We have already seen that every tenant for life,⁷ or years,⁸ has the right to take reasonable estovers; a right which must be claimed by deed or prescription, and has no relation to land, but is annexed to a man's

¹ *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639; s.c. 25 Am. Dec. 582. ⁴ *Hall v. Lawrence*, 2 R. I. 218; s.c. 57 Am. Dec. 715.

² 1 Co. Inst. 122a;
1 Rol. Abr. 401, 402.

⁵ *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639; s.c. 25 Am. Dec. 582.

³ *Bunn v. Channen*, 5 Taunt. 244; s.c. 1 Eng. C. L. 133;
1 Co. Inst. 122a;
1 Rol. Abr. 401, 402. ⁶ 3 Cruise Dig. (4th ed.) 69.

⁷ See: *Ante*, §§ 582, 783.

⁸ See: *Ante*, § 1353.

person. This right may be either for a certain or an indefinite number of cattle; and where a person has common of this kind, either for a certain or indefinite number of cattle, he may put in the cattle of a stranger, and use the common with them.¹ The right of estovers simply allows the taking of timber for necessary repairs and not for the purpose of erecting new buildings; but the erection of new buildings, or of new additions to old buildings, will not destroy the common of estovers annexed to the premises, whether by grant or prescription; but none of the estovers can be employed in the parts newly added.² Where a common of estovers descends upon several, although they cannot enjoy it severally, they may convey it to one who might enjoy it in severalty as an entirety.³

SEC. 2186. **Same—Not severable or apportionable.**—Where a person has common of estovers appurtenant to a house, and he grants the estovers to another, reserving the house to himself; or grants the house to another, reserving the estovers to himself; in either of those cases the estovers shall not be severed from the house, because they must be spent on the house.⁴ Neither is the common of estovers apportionable. The common belongs to the entire tract as an entirety, and if the owner of such tract conveys to different persons, the common is extinguished, and cannot be revived except by a new grant.⁵

SEC. 2187. **Common of turbary.**—At common law there was a right to dig turf upon another's land, or upon the lord's waste land, and was known as the common of turbary. This kind of common was only attendant to the house, not to land; for the turfs cut were to be burned in the house. This common was essentially the same in nature as the common of estovers, so far as re-

¹ 3 Cruise Dig. (4th ed.) 70.

² *Arundel v. Steere*, Cro. Jac. 25;

3 Cruise Dig. (4th ed.) 70.

³ *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639; s.c. 25 Am.

Dec. 582.

⁴ 3 Cruise Dig. (4th ed.) 70.

⁵ *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639; s.c. 25 Am. Dec. 582.

lated to house-bote,¹ and could not be extended to the right to dig turf or soil any more than the right to cut wood for fire purposes in a household can be extended to the right to cut wood for sale.² Where the common of turbary appurtenant to the house passed with the grant of such house with the appurtenances.³

SEC. 2188. **Common of piscary.**—The common of piscary is a right to fish in the water covering the soil of another person, or in the river running through another man's land. This right is not an exclusive right, but one that is to be enjoyed in common with certain other persons in any particular stream.⁴ The common of fishery is distinguished from the right of common fishery in that the first is a right in common with other persons in a certain stream, whereas the latter may mean for all mankind, as in the sea, a general right which cannot be traversed.⁵ The right of fishery may be divided into that of free fishery, which is a franchise obtained by grant or prescription, and is distinct from the ownership of the soil;⁶ and into several fishery, which is a private exclusive right of fishery in a navigable river or arm of the sea, accompanied with the ownership of the soil.⁷ The right

¹ See: *Ante*, § 2185.

² 3 Cruise Dig. (4th ed.) 70.

See: *Ante*, § 582.

³ *Solme v. Bullock*, 3 Lev. 165;

3 Cruise Dig. (4th ed.) 71.

⁴ *Melvin v. Whiting*, 24 Mass. (7 Pick.) 79; s.c. 27 Mass. (10 Pick.) 295;

2 Bl. Com. 34;

1 Co. Inst. 122a;

3 Cruise Dig. (4th ed.) 71.

Piscatory right—Prescription—Massachusetts doctrine.—In *Melvin v. Whiting*, 27 Mass. (10 Pick.) 295, it was held that the exclusive, uninterrupted use and enjoyment for a period of forty years of a right of fishing in the Merrimac River on the lands of another person is sufficient to establish in Massachusetts a right and title by prescription.

In *Coolidge v. Learned*, 25 Mass. (8 Pick.) 504, it was decided

that the time of legal memory or prescription in Massachusetts does not extend further back than sixty years. This period was fixed on as the limit of the time of legal memory, in analogy to the statute 1786, c. 13, limiting the time for bringing actions by writ of right. By the same principle of analogy the time of legal memory was limited by the courts of England to the reign of Richard I., that being the limitation to a writ of right by statute Westminster I.

⁵ *Benett v. Costar*, 8 Taunt. 182; s.c. 2 Moore 83; 4 Eng. C. L. 100.

⁶ 3 Kent Com. (13th ed.) 410.

See: *Melvin v. Whiting*, 24 Mass. (7 Pick.) 79; s.c. 27 Mass. (10 Pick.) 295.

⁷ 3 Kent Com. (13th ed.) 410.

of fishery is appurtenant to the soil, every riparian proprietor having the exclusive right to take the fish in any waters not navigable within his territorial limits, and where a non-navigable river runs continuously between lands of two proprietors, each will have the exclusive right of fishing on his side extending *ad filum medium aque*.¹ This right is not necessarily accompanied by the ownership of the soil, it being competent for the owner of the soil to grant and convey to another the exclusive right of fishing in his waters, the same as he may grant to another the exclusive right to pasture upon his lands. Such a right, however, can be obtained only by grant or prescription, and, in the absence of proof to the contrary, the exclusive right of fishing is presumed to belong to the owner of the soil, it being appurtenant thereto.² But neither prescription, nor custom, nor dedication raises a general right in the public to enter upon private lands to fish in the waters covering the same.³

SEC. 2189. **Divesting right of common.**—The right to common being an incorporeal hereditament and collateral to the land, cannot be divested. Where a person entitled to a right of common is not in actual enjoyment of it, his non-user does not deprive him of his right thereto, neither does he cease to have a vested estate or interest therein.⁴

SEC. 2190. **Apportionment of common.**—It has been said that a right of common is apportionable whenever it is admeasurable.⁵ But this is to be taken with limitations, and applies only to common appurtenant for sea-weed, gravel, pasturage, and the like. Where apportionable, the common will pass by conveyance of a part of the dominant estate with “appurtenances,” except in those

¹ 2 Bl. Com. 39.

See: *Adams v. Pease*, 2 Conn.

481; s.c. 1 Lonax Dig. 517;

Smith v. Miller, 5 Mas. C. C. 191;

s.c. Fed. Cas. No. 13080;

Carter v. Murcot, 4 Burr. 2164.

² *Somerset v. Fogwell*, 5 Barn. & C. 875; s.c. 11 Eng. C. L. 719.

³ *Cole v. Easthan*, 134 Mass. 65, 67;

Cobb v. Davenport, 33 N. J. L. (4 Vr.) 223, 226; s.c. 97 Am. Dec. 718.

⁴ 3 Cruise Dig. (4th ed.) 72.

⁵ *Hall v. Lawrence*, 2 R. I. 218; s.c. 57 Am. Dec. 715.

cases where the effect would be to surcharge the servient estate, in which event the whole right will be extinguished.¹

SEC. 2191. **Same—Common of pasture.**—Where common of pasture is appendant it may be apportioned, because it is a common right; consequently, where the commoner purchases a part of the land in which is a right of common, the common shall be apportioned the same as where the landlord purchases a portion of the tenancy the rent is to be apportioned, because in such a case no prejudice is done to the tenant of the land where the common is to be had, for he will not be charged for more upon the part than he was before the severance.² Where a common of pasturage is appurtenant, if the person entitled to it purchases a portion of the land, there can be no apportionment, for the reason that a common appurtenant is against common right. Yet this kind of common is apportioned by alienation of a part of the land to which it is appurtenant. The principle on which this doctrine rests is that where part of the land is alienated to a person entitled to the common, injustice shall not be done to the owners of the land subject to the common. For this reason it is that land which gives the right of common to the owner cannot be so alienated as to increase the charge or burden on the land out of which the common is to be taken. When the right is extinguished or gone as to a portion of the title to the common, it is extinguished as to the whole; because in such case common appurtenant cannot be extinct in part and be *in esse* in part by the act of the parties. Consequently, where the owner of a right of common appurtenant purchases a part of the land out of which the common was to be taken, his right of common becomes extinct in the whole.³

¹ Hall v. Lawrence, 2 R. L. 218; s.c. 57 Am. Dec. 715; Wile's Case, 8 Co. 78; Tyrringham's Case, 4 Co. 35; Rotherham v. Green, Cro. Eliz. 593; Kimpton v. Ballaymy, 1 Leon. 43,

See: Livingston v. Tenbroeck, 16 John. (N. Y.) 14; s.c. 8 Am. Dec. 287.

² Tyrringham's Case, 4 Co. 35.

³ Livingston v. Tenbroeck, 10 John. (N. Y.) 14, 26; s.c. 8 Am. Dec. 287;

SEC. 2192. **Same—Common of estovers and piscary.**—The common of estovers and piscary belonging to the entire tract of land as an entirety, if the owner of such tract conveys to different persons, the common is extinguished and cannot be revived, except by a new grant.¹ If he conveys part of the lands entitled to common, granting the right, it cannot be enjoyed for the reason that it would enlarge such right to the prejudice of the land out of which the common was taken. As no one portion of the land entitled to the common could enjoy it, it is necessarily extinguished; and, being extinguished, it can be revived only by a new grant.²

SEC. 2193. **Extinguishment of common—By release.**—A right of common being in the nature of an easement, at common law it may be extinguished: (1) by a release of it to the owner of the land, (2) by unity of possession of the right and of the land, (3) by severance of the right of common, and (4) by enfranchisement of a copyhold to which the right of common is annexed. Every right of common may be extinguished by a release of it to the owner of the soil wherein such right is exercisable. And as a right to common is entire throughout the whole of the land subject to it, if the commoner releases any part of the land from his right of common, it will operate as an extinguishment of the right in every other part.

SEC. 2194. **Same—By conveyance.**—Where a right of common is indivisible, it will be extinguished by a conveyance of a part of the dominant estate; but it will be otherwise where it is apportioned.³ Thus it has been held that a conveyance of part of the dominant estate

Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 639; s.c. 25 Am. Dec. 582;

Hall v. Lawrence, 2 R. I. 218; s.c. 57 Am. Dec. 715.

¹ Leyman v. Abeel, 16 John. (N. Y.) 30;

Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 639; s.c. 25 Am.

Dec. 582.

² Leyman v. Abeel, 16 John. (N. Y.) 30;

Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 639; s.c. 25 Am. Dec. 582.

³ Hall v. Lawrence, 2 R. I. 218; s.c. 57 Am. Dec. 715.

to the owner of the servient estate extinguishes a common appurtenant for taking sea-weed, gravel, and the like, as respects the part so conveyed, leaving it intact as to the residue ;¹ but a common appurtenant for sea-weed, gravel, etc., not being severable from the land to which it is appurtenant, a reservation of such right to the grantor in a conveyance apart from the dominant estate will be void.²

SEC. 2195. **Same—Unity of possession.**—A right of common appendant and appurtenant becomes extinguished by a unity of the possession of the land to which the right of common is annexed with the land in which the common existed,³ and can be revived only by a new grant.⁴ Thus a person having a right of common appurtenant, who becomes the purchaser or disseisor of part of the land subject to the easement, he thereby loses all his right of common therein.⁵ But to constitute such a unity of possession as will extinguish a right of common, the person must have an estate in the lands to which the common is annexed, and in those where the right of common exists, equal in duration, and all other circumstances of right.⁶

SEC. 2196. **Same—By severance.**—A common appendant or appurtenant for cattle levant and couchant may be extinguished by severance ; as where a person having a common of this character annexed to a messuage or tenement conveys the messuage or tenement, excepting and reserving the common.⁷ At common law where a right of common is annexed to a copyhold estate, and the lord grants the land to the copyholder and his heirs, *cum pertinentiis*, the common is extinguished ; because

¹ Hall v. Lawrence, 2 R. I. 218 ; s.c. 57 Am. Dec. 715.

² Hall v. Lawrence, 2 R. I. 218 ; s.c. 57 Am. Dec. 715.

³ Livingston v. Tenbroeck, 16 John. (N. Y.) 14 ; s.c. 8 Am. Dec. 287 ; Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 639 ; s.c. 25 Am. Dec. 582 ;

3 Kent Com. (13th ed.) 410.

See : Pearce v. McClenaghan, 5

Rich. (S. C.) L. 178 ; s.c. 55 Am. Dec. 710 ;

Ritger v. Parker, 62 Mass. (8 Cush.) 145 ; s.c. 54 Am. Dec. 744.

⁴ 3 Cruise Dig. (4th ed.) 84.

⁵ Bell v. Ohio & P. R. Co., 25 Pa. St. 161 ; s.c. 64 Am. Dec. 687.

⁶ 3 Cruise Dig. (4th ed.) 82.

⁷ 3 Cruise Dig. (4th ed.) 83 ;

1 Rol. Abr. 401 ;

4 Vin. Abr. 594, pl. 1.

it was annexed to the customary estate, which being destroyed, the right of common is gone. And the words *cum pertinentiis* cannot have the effect of continuing it, because the right of common was not appurtenant to the freehold estate granted by the lord.¹

¹ *Marshall v. Hunter*, Cro. Jac. 3 Cruise Dig. (4th ed.) 83.
253;

CHAPTER III.

WAYS.

- SEC. 2197. Introductory.
- SEC. 2198. Kinds of ways.
- SEC. 2199. How acquired.
- SEC. 2200. Same—By prescription.
- SEC. 2201. Same—By dedication and condemnation.
- SEC. 2202. Same—By grant.
- SEC. 2203. Same—From necessity.
- SEC. 2204. Divesting ways.
- SEC. 2205. Repairing ways.
- SEC. 2206. Extinguishing right of way.
- SEC. 2207. How revived.

SECTION 2197. *Introductory.*—Ways are of two kinds : public ways and private ways. A public way is a highway, or public highway, and applies to all the great roads leading from town to town, to markets, and to public places, and is a way that is common to all persons who wish to travel thereon,¹—corresponding to the “king’s highway” of the common law,—and is said not to be an easement.² A private way is the privilege which an individual, or a particular description of persons, as the inhabitants of a village, or the owner or occupier of a particular tract of land, may have of going over another person’s grounds, and includes the right to the use of the surface for passing and repassing, with a right to enter upon and prepare for such use by leveling, ploughing, macadamizing, paving, and the like, according to the nature of the way granted or reserved.

¹ *Harding v. Medway*, 51 Mass. (10 Met.) 465, 469 ;
Flint & P. M. R. Co. v. Gordon,
41 Mich. 428, 429 ; s.c. 2 N. W.
Rep. 648 ;
Vantilbergh v. Shann, 24 N. J. L.

(4 Zab.) 740, 744 ;
State v. Harden, 11 S. C. 360, 368.
² *Rangleley v. Midland R. Co.*, L.
R. 3 Ch. 396 ;
Queen v. Inhabitants of Green-
boro, 1 Q. B. Div. 703.

It is an incorporeal hereditament of a real nature.¹ An easement is said to be entirely different and distinct from a public way or highway, being established by law not for the public in general, but for the particular benefit or accommodation of a particular class of individuals,² and to constitute which there must be a dominant tenement.³

SEC. 2198. **Kinds of way.**—At common law ways are of three kinds, to wit: first, a footway, which is said to be *iter eundi ambulandi homines non etiam jumentum agendi vehiculum*;⁴ the second is a footway and highway combined, which is called *actus ab agendo*, otherwise known as a pack or prime way, because it is both a foot and a pack or drift way; and the third, which combines the qualities of the two preceding, and contains in addition a cartway, and was known as a *via* or *aditus*; for this is *jus eundi vehendi, et vehiculum et jumentum*

¹ *Atkins v. Bordman*, 43 Mass. (2 Met.) 457, 467.

² *Jones v. Andover*, 23 Mass. (6 Pick.) 59;

Flagg v. Flagg, 82 Mass. (16 Gray) 175, 179.

³ See: *Shuttleworth v. Le Fleming*, 19 C. B. N. S. (19 J. Scott N. S.) 687, 710; s.c. 115 Eng. C. L. 687, 710;

Mounsey v. Ismay, 3 Hurl. & C. 486, 497;

Güterb. Bract., c. 15.

Private way—Massachusetts doctrine

—*Flagg v. Flagg*.—In *Flagg v. Flagg*, 82 Mass. (16 Gray) 175, 179, the Supreme Judicial Court of Massachusetts say: "The term 'private or particular way' is there used not to designate or define the use or purpose for which it was laid out, or the nature or extent of the easement which it created, but in contradistinction to a highway or public road, which was not confined within the boundaries or territory of a town, but extended from town to town or place to place, and which could be laid out only by court of sessions. Nor was it intended by the phrases 'for the use of such town only,' or

'for the use of one or more individuals thereof or proprietors therein,' to limit the easement or rights created by the way to the inhabitants of the town or the owners of land therein, or to particular individuals, but to describe it as a road for local accommodation and convenience, which the selectmen were empowered to lay out at the expense of the town or to the persons who would receive the greatest benefit from the establishment of the way. This view of the construction of the language of the statute was taken in the early case of *Cragie v. Mellen*, 6 Mass. 6, 13, in which the court say that it is evident that the intention of the Legislature in using these words was only to distinguish the cases within the authority of towns by their selectmen from those committed to the court of sessions."

⁴ A right of going or walking, not including a right of driving a beast of burden or a carriage.

1 Co. Litt. (19th ed.) 56a;

1 Co. Inst. 2;

3 Cruise Dig. (4th ed.) 85;

1 Mack. Law, 433, § 14.

ducendi. This class is of twofold character—the king's way, for all men, and the private way belonging to a city, or town, or between neighbors.¹

SEC. 2199. **How acquired.**—At common law a right of way over another person's grounds might be acquired in three ways, to wit: (1) by prescription and immemorial usage; ² (2) by grant; ³ (3) from necessity.⁴

SEC. 2200. **Same—By prescription.**—Rights of ways by prescriptions and immemorial usage were acquired at common law where inhabitants of a village had time out of mind traversed a particular close or field for the purpose of going to their parish church and the like.⁵ In the same way a person might secure a way by prescription from his house through a close to the church, even though he himself had lands next adjoining to his house through which he must of necessity first pass.⁶ While a person will not be permitted to claim a way through the land of another from one part thereof to another part, yet he may claim a way over the ground from one part of his own land to another.⁷

SEC. 2201. **Same—By dedication and condemnation.**—Public rights of way are usually created either by dedication of the owners of the land or by appropriation by the state under the exercise of the power of eminent domain. In the first case no formal act is necessary, provided only a clear intention to dedicate the land to public use is manifested.⁸ A dedication by the owner of land as a public highway will not be binding upon the public unless there has been an acceptance of such dedication.

¹ 1 Co. Inst. 56a;

3 Cruise Dig. (4th ed.) 85, § 2.

² See: *Post*, §§ 2200, 2216.

³ See: *Post*, §§ 2201, 2215.

⁴ See: *Post*, §§ 2203, 2217.

⁵ *Jones v. Percival*, 22 Mass. (5 Pick.) 485; s.c. 16 Am. Dec. 415.

See: *Post*, § 2216.

⁶ 3 Cruise Dig. (4th ed.) 86, § 4.

See: *Gayetty v. Bethone*, 14 Mass. 49, 53;

Codling v. Johnson, 9 Barn. & C. 933; s.c. 17 Eng. C. L. 411.

⁷ 3 Cruise Dig. (4th ed.) 86.

⁸ *Mayor of Macon v. Franklin*, 12 Ga. 239;

Trickey v. Schlader, 52 Ill. 78;

Haynes v. Thomas, 7 Ind. 38;

Hawley v. City of Baltimore, 33 Md. 270;

Missouri Inst. for Blind v. How, 27 Mo. 211;

Pope v. Town of Union, 18 N. J. Eq. (3 C. E. Gr.) 282;

Buchanan v. Curtis, 25 Wis. 99; s.c. 3 Am. Rep. 23.

No formal act is necessary to constitute an acceptance, a continuous use of the land in conformity with the dedication being sufficient.¹ A public highway may also be created by long use by the public without either a dedication by the owner of the land or condemnation by the state.²

SEC. 2202. **Same—By grant.**—A way may be acquired over the lands of another by grant, as where the owner of a piece of land grants to another the liberty of passing over his land in a particular direction or for a particular purpose, in which case the grantee will thereby acquire a right of way over those lands, as effectually as though he held it by prescription.³ Where a way granted by another across his land is confined to a particular land or tract, the grantee has no right to deviate from the designated course even though the way becomes impassable by flood or otherwise;⁴ unless the owner of the land was instrumental in causing the condition.⁵ Where the way is originally granted without particular designation as to course or tract, it may by usage become definitely located, and cannot be changed by act of the grantor without consent of the grantee.⁶

¹ *Curtis v. Hoyt*, 19 Conn. 154 ;
Rees v. Chicago, 38 Ill. 322 ;
Gentleman v. Soule, 32 Ill. 271 ;
Manderschild v. Dubuque, 29
 Iowa 73 ; s.c. 4 Am. Rep. 196 ;
Pickett v. Brown, 18 La. An. 560 ;
Muzzey v. Davis, 54 Me. 361 ;
Cole v. Sprowle, 35 Me. 161 ; s.c.
 56 Am. Dec. 696 ;
Day v. Allender, 22 Md. 511 ;
New Orleans R. Co. v. Moye, 39
 Mo. 374 ;
Stevens v. Nashua, 46 N. H. 192 ;
State v. Atherton, 16 N. H. 203 ;
Pope v. Town of Union, 18 N. J.
 Eq. (3 C. E. Gr.) 282 ;
Requa v. City of Rochester, 45 N.
 Y. 129 ; s.c. 6 Am. Rep. 52 ;
Remington v. Millard, 1 R. I. 93 ;
State v. Carver, 5 Strob. (S. C.)
 L. 217 ;
Dodge v. Stacy, 39 Vt. 558 ;
Beach v. Frankenberger, 4 W.
 Va. 712 ;
Buchanan v. Curtis, 25 Wis. 99 ;
 s.c. 3 Am. Rep. 23 ;

Bartean v. West, 23 Wis. 416.
² *Lewiston v. Proctor*, 27 Ill. 414 ;
Louk v. Woods, 15 Ill. 256 ;
Holcraft v. King, 25 Ind. 352 ;
Holt v. Sargent, 81 Mass. (15
 Gray) 97 ;
Compton's Petition, 41 N. H. 197 ;
Devenpeck v. Lambert, 44 Barb.
 (N. Y.) 596 ;
Parrish v. Stevens, 1 Oreg. 59 ;
Hughes v. Providence & W. R.
Co., 2 R. I. 493 ;
Lemon v. Hayden, 13 Wis. 159.
³ *Stafford v. Coyney*, 7 Barn. & C.
 257 ; s.c. 14 Eng. C. L. 120.
 See : *Roberts v. Karr*, 1 Campb.
 262n ; s.c. 10 Rev. Rep. 676n ;
Rex v. Inhabitants of North-
amptonshire, 2 Maule & S. 262 ;
Post, § 2215.
⁴ *Miller v. Bristol*, 29 Mass. (12
 Pick.) 550, 553.
⁵ *Farnum v. Platt*, 25 Mass. (8
 Pick.) 339.
⁶ *Wyncoop v. Burger*, 12 John. (N.
 Y.) 222.

SEC. 2203. **Same—From necessity.**—At common law a person might claim a right of way over the lands of another from necessity.¹ This doctrine was founded upon the consent of the parties, which the law conclusively presumed in all cases where the way was indispensably necessary to the beneficial enjoyment of the estate. But mere convenience is not sufficient to raise such a presumption on the one hand, nor an absolute physical necessity requisite on the other.² The right of way is presumed to grow out of transactions between the owners of respective closes in the alienation of the land, a way necessary for the proper enjoyment of the land being regarded by the law as tacitly granted or reserved, whenever from the nature of the case such a necessity is created. In such a case, the way is incident to the grant; and to convey or reserve it by express words being regarded as merely *expressio eorum quæ tacite insunt*.³ Ways from necessity frequently arise by implication. Thus in a case where the owner of two houses conveyed one of them, and the house thus conveyed was drained by a drain that ran under the other house, the purchaser was held to have an easement in the right of way for such drain by implication.⁴ But no implied easement or right of way will arise by implication, where not in possession before the unity of possession, unless necessary in the strict sense.⁵

¹ See: *Post*, § 2217.

² *Ramirez v. McCormick*, 4 Cal. 245;

Brice v. Randall, 7 Gill & J. (Md.) 349;

Pettinghill v. Porter, 90 Mass. (8 Allen) 1; s.c. 85 Am. Dec. 671;

Carbery v. Willis, 89 Mass. (7 Allen) 364; s.c. 83 Am. Dec. 688;

Brigham v. Smith, 70 Mass. (4 Gray) 297; s.c. 64 Am. Dec. 76;

Johnson v. Jordan, 43 Mass. (2 Met.) 234; s.c. 37 Am. Dec. 85;

Nichols v. Luce, 41 Mass. (24 Pick.) 102, 104;

Bartlett v. Prescott, 41 N. H. 493;

Ogden v. Grove, 38 Pa. St. 487;

McDonald v. Lindall, 3 Rawle

(Pa.) 492;

O'Rorke v. Smith, 11 R. I. 259; s.c. 23 Am. Rep. 440;

Seabrook v. King, 1 Serg. & R. (Pa.) 140;

Turnbull v. Rivers, 3 McC. (S. C.) L. 131; s.c. 15 Am. Dec. 622;

Screven v. Gregorie, 8 Rich. (S. C.) L. 158; s.c. 64 Am. Dec. 747;

Plimpton v. Converse, 42 Vt. 712.

³ *Ballard v. Harrison*, 4 Maule & S. 396;

Pomfret v. Ricraft, 1 Saund. 323; 3 Kent Com. (13th ed.) 424.

⁴ *Pyer v. Carter*, 1 Hurl. & W. 916.

⁵ *Warren v. Blake*, 54 Me. 276;

Oliver v. Pitman, 98 Mass. 46;

Carbery v. Willis, 89 Mass. (7 Allen) 364; s.c. 83 Am. Dec. 671;

SEC. 2204. **Divesting ways.**—A right of way being, as we have already seen, an incorporeal hereditament of a real nature,¹ similar in many respects to a right of common, cannot be divested.²

SEC. 2205. **Repairing ways.**—At common law when one person granted a right of way across his land, in the absence of a special agreement the grantee was bound to put and keep it in repair; yet the grantor of a private way may be bound to repair it either by prescription, or by the express stipulation of the grant; in which case, if the grantor violates the agreement, the grantee of the way may, if it is necessary, pass over the adjoining land of the servient estate.³

SEC. 2206. **Extinguishing right of way.**—Where one person has granted to another a right of way across his lands and afterward sells such lands to the party to whom the right of way was previously granted, such right of way will be extinguished by the unity of seisin and possession, where the right of way is only an easement;⁴ but if it is of necessity it will not be extinguished by the unity of possession,⁵ or, as Chief Justice POPHAM puts it, “if the way be a way of ease or pleasure, there it shall be extinguished by unity; but if it be a way of necessity, there it is otherwise.”⁶ Thus it has been said that a

Brakely v. Sharp, 9 N. J. Eq. (1 Stock.) 9, 18;

Eno v. Del Vecchio, 6 Duer (N. Y.) 17;

Crossley v. Lightowler, L. R. 2 Ch. 478, 486;

Davis v. Sear, L. R. 7 Eq. 427;

Potts v. Smith, L. R. 6 Eq. 311;

Richards v. Rose, 9 Exch. 218;

White v. Bass, 7 Hurl. & N. 722;

Scuffield v. Brown, 10 Jur. N. S. 111; s.c. 33 L. J. (N. S.) Ch. 249.

¹ *Miller v. Bristol*, 29 Mass. (12 Pick.) 550;

Farnum v. Platt, 25 Mass. (8 Pick.) 339;

Taylor v. Whitehead, 2 Doug. 745.

See: *Ante*, § 2189.

² *White v. Crawford*, 10 Mass. 183;

3 Cruise Dig. (4th ed.) 89;

Shep. Touch. 23.

³ *Jones v. Percival*, 22 Mass. (5 Pick.) 485; s.c. 16 Am. Dec. 415;

Doane v. Badger, 12 Mass. 65;

Hamilton v. White, 5 N. Y. 9, aff'g 4 Barb. (N. Y.) 60;

Rider v. Smith, 3 Durnf. & E. (3 T. R.) 766;

Bullard v. Harrison, 4 Maule & S. 387;

Pomfret v. Ricraft, 1 Saund. 323.

See: *Wynkook v. Burger*, 12

John. (N. Y.) 222.

⁴ See: *Post*, § 2232.

⁵ *Shury v. Piggott*, 3 Bulst. 340;

Heigate v. Williams, Noy 119;

Jordan v. Atwood, Owen 121;

Buckby v. Coles, 5 Taunt. 311;

s.c. 1 Eng. C. L. 166.

⁶ *Jordan v. Atwood*, Owen 121.

right of way to a church is a way of necessity and will not be extinguished by a unity of possession.¹

SEC. 2207. **How revived.**—At common law where a right of way was extinguished, it was held in some of the cases that a severance worked a revival thereof,² but this doctrine did not meet with general acceptance.³ But where a right of way was extinguished, a subsequent use thereof for thirty years was held to raise a presumption of a new grant or license from the owner of the land.⁴

¹ *Jordan v. Atwood*, 1 Rol. Abr. 936; s.c. *Owen* 121; ³ 2 Bro. Abr., tit. Extinguishment, pl. 15.

³ *Cruise Dig.* (4th ed.) 90, § 25.

² See : *Jac. Cent*, 1 Ca. 37. ⁴ *Keymer v. Summer*, Bull N. P. 74.

CHAPTER IV.

EASEMENTS AND SERVITUDE.

- SEC. 2208. Definition.
- SEC. 2209. Distinguished from license.
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SECTION 2208. **Definition.**—An easement is an interest in land created by grant or agreement, either express or implied from long usure, which confers a right upon the public or upon the owner of a neighboring tenement to some profit, benefit, dominion, or lawful use out of

or over the estate of another,¹ which profit, benefit, dominion, or use is not inconsistent with his general right of property.² It is said that to constitute an easement there must be two distinct tenements—a dominant tenement to which the right belongs, and a servient tenement upon which the obligation devolves.³ Easements are among the most important of incorporeal hereditaments; but they confer upon the recipients no other rights in the land, such as a right to participate in the profits arising from the property upon which they are imposed.⁴

- ¹ *Huyck v. Andrews*, 113 N. Y. 81; s.c. 20 N. E. Rep. 581; 3 L. R. A. 789.
 See: *Wagner v. Hanna*, 38 Cal. 111; s.c. 99 Am. Dec. 154;
Jamaica Pond Aqueduct Corp. v. Chandler, 91 Mass. (9 Allen) 159, 165;
Ritger v. Parker, 62 Mass. (8 Cush.) 145; s.c. 54 Am. Dec. 744;
Boston Water Power Co. v. Boston & W. R. Co., 33 Mass. (16 Pick.) 512, 522;
Fetters v. Humphrey, 19 N. J. Eq. (4 C. E. Gr.) 471;
Scriven v. Smith, 100 N. Y. 471; s.c. 3 N. E. Rep. 675;
Pierce v. Keator, 70 N. Y. 419, 421; s.c. 26 Am. Rep. 612;
Parson v. Johnson, 68 N. Y. 42; s.c. 23 Am. Rep. 149;
Lampman v. Milks, 21 N. Y. 505;
Tabor v. Bradley, 18 N. Y. 109; s.c. 72 Am. Dec. 49;
Jackson v. Trullinger, 89 Oreg. 397;
Kieffer v. Imhof, 26 Pa. St. 438;
Pomeroy v. Mills, 3 Vt. 279; s.c. 23 Am. Dec. 207;
Hazelton v. Putnam, 3 Pinn. (Wis.) 107; s.c. 3 Chand. (Wis.) 117; 54 Am. Dec. 158;
Pearson v. Spencer, Best & S. 571; s.c. 7 Jur. N. S. 1195; 4 L. T. 769;
Worthington v. Gimson, 2 Ellis & E. (Q. B.) 618; s.c. 105 Eng. C. L. 616;
Thomson v. Waterloo, L. R. 6 Eq. Cas. 36; s.c. 37 L. J. Ch. 495; 18 L. T. 545; 16 W. R. 686;
Langley v. Hammond, L. R. 3 Exch. 161; s.c. 37 L. J. Ex. 118; 18 L. T. 858; 16 W. R. 937;
Doda v. Burchell, 1 Hurl. & C. ; s.c. 31 L. J. Ex. 364; 8 Jur. N. S. 1180;
 3 Kent Com. (13th ed.) 452.
² *Boston Water Power Co. v. Boston & Worcester R. Co.*, 33 Mass. (16 Pick.) 512, 525.
 See: *Cook County v. Railroad Co.*, 35 Ill. 454;
Cary v. Daniels, 46 Mass. (5 Met.) 236;
Pierce v. Keator, 70 N. Y. 419; s.c. 26 Am. Rep. 612;
Wolfe v. Frost, 4 Sandf. Ch. (N. Y.) 72, 89;
Phillips v. Phillips, 48 Pa. St. 178; s.c. 86 Am. Dec. 577;
Case of Private Road, 1 Ashm. (Pa.) 417;
Hewlins v. Shippam, 5 Barn. & C. 221, 229; s.c. 11 Eng. C. L. 437;
Mounsey v. Ismay, 3 Hurl. & C. 497; s.c. 32 L. J. Ex. 94; 9 Jur. N. S. 806; 7 L. T. 717; 11 W. R. 964.
³ *Wagner v. Hanna*, 38 Cal. 111, 116; s.c. 99 Am. Dec. 354;
Smith v. Wiggin, 48 N. H. 105, 109;
Child v. Chappell, 9 N. Y. 246;
Hills v. Miller, 3 Paige Ch. (N. Y.) 254; s.c. 24 Am. Dec. 218;
Wolfe v. Frost, 4 Sandf. Ch. (N. Y.) 72, 89;
Dark v. Johnston, 55 Pa. St. 164; s.c. 93 Am. Dec. 732;
Rangle v. Midland Railway, L. R. 3 Ch. 306, 310; s.c. 37 L. J. Ch. 313; 18 L. T. 69; 16 W. R. 547.
⁴ *Wagner v. Hanna*, 38 Cal. 111, 116; s.c. 99 Am. Dec. 354;
Wolfe v. Frost, 4 Sandf. Ch. (N. Y.) 72;
Bowen v. Team, 6 Rich. (S. C.) L. 298; s.c. 60 Am. Dec. 127;

SEC. 2209. *Distinguished from license.*—Though an interest in land, an easement is an incorporeal hereditament which can be created only by grant or prescription.¹ Where created by grant, a deed in writing is essential.² Such an interest is a permanent one in the premises; it cannot be revoked at pleasure,³ and will pass by assignment.⁴ A license is a mere personal privilege or authority to enter on the lands of another and do some act or series of acts,⁵ and is not an interest involving title.⁶ A license is usually created by parol;⁷ and if created by deed will confer no greater right or more stable interest than if created by parol.⁸ A license is a mere power or authority founded upon personal confidence,⁹ is not assignable,¹⁰ and may be revoked at any time,¹¹

Hewlins v. Shippam, 5 Barn. & C. 221; s.c. 11 Eng. C. L. 437.

See: *Post*, § 2210.

¹ See: *Post*, § 2231.

² Wiseman v. Lucksinger, 84 N. Y. 31; s.c. 38 Am. Rep. 497.

See: Bell v. Woodward, 47 N. H. 332;

Bonyhurt v. Flummerfelt, 43 N. J. L. (14 Vr.) 28.

³ See: Huntington v. Asher, 96 N. Y. 604, 606.

⁴ Id.

⁵ Wolfe v. Frost, 4 Sandf. Ch. (N. Y.) 72.

See: Prince v. Case, 10 Conn. 375;

Cook v. Stearns, 11 Mass. 533;

Morrill v. Mackman, 24 Mich. 282;

Desloge v. Pearce, 38 Mo. 599;

Woodbury v. Parshley, 7 N. H. 237.

⁶ *Ex parte* Coburn, 1 Cow. (N. Y.) 568.

⁷ Hill v. Hill, 113 Mass. 103; s.c. 18 Am. Rep. 455;

Cheever v. Pearson, 33 Mass. (16 Pick.) 273;

Batchelder v. Sanborn, 24 N. H. 479.

⁸ San Francisco v. Canavan, 42 Cal. 543.

⁹ See: Curtis v. Galpin, 83 Mass. (1 Allen) 217;

Sterling v. Warden, 51 N. H. 217.

¹⁰ Foot v. New Haven, etc., R. Co., 23 Conn. 214;

Hill v. Cutting, 113 Mass. 107;

Harris v. Gillingham, 6 N. H. 11; Mendenhall v. Klinck, 51 N. Y. 246;

Jackson ex d. Hull v. Babcock, 4 John. (N. Y.) 418;

Foster v. Browning, 4 R. I. 47;

Hazellton v. Putnam, 3 Chand. (Wis.) 117.

¹¹ Desloge v. Pearce, 38 Mo. 599.

See: Fargis v. Walton, 107 N. Y. 398, 403;

Wiseman v. Lucksinger, 84 N. Y. 31; s.c. 43 Am. Rep. 497;

Foster v. Browning, 4 R. I. 47; s.c. 67 Am. Dec. 505;

Hazellton v. Putnam, 3 Pinn. (Wis.) 107; s.c. 3 Chand. (Wis.) 117; 54 Am. Dec. 158;

Woodward v. Seeley, 11 Ill. 157; s.c. 50 Am. Dec. 445;

Bush v. Sullivan, 3 G. Green (Iowa) 344; s.c. 54 Am. Dec. 506;

Emerson v. Fiske, 6 Me. (6 Greenl.) 200; s.c. 19 Am. Dec. 206;

Ricker v. Kelly, 1 Me. (1 Greenl.) 117; s.c. 10 Am. Dec. 38;

Addison v. Hack, 2 Gill (Md.) 221; s.c. 41 Am. Dec. 421;

Hill v. Hill, 113 Mass. 103; s.c. 18 Am. Rep. 455;

Hitchens v. Shaller, 32 Mich. 496;

Desloge v. Pierce, 38 Mo. 588;

Houston v. Laffes, 46 N. H. 505;

Mumford v. Whitney, 15 Wend. (N. Y.) 380; s.c. 30 Am. Dec. 60;

Wilson v. Chalfant, 15 Ohio 248; s.c. 45 Am. Dec. 574;

even after entry thereunder and the expenditure of money because thereof, unless the license is subsidiary to a valid grant, to the beneficial enjoyment of which its existence is necessary ; in which case it is irrevocable to the extent necessary to protect the licensee ;¹ or unless executed under such circumstances as to warrant the interposition of a court of equity.² A license is limited to the parties, but can operate for or against the interest of a third person in the land.³ A mere license cannot ripen into a right by lapse of time ;⁴ but, when acted upon, may become an easement.⁵

SEC. 2210. **Distinguished from profits a prendre.**—The strict and technical definition of an easement excludes a right to the products or proceeds of land or the materials which compose it, or, as they are generally termed, profits *a prendre*.⁶ But such right is in the nature of an

- Lowe v. Miler, 3 Gratt. (Va.) 205 ;
s.c. 46 Am. Dec. 188.
- ¹ Johnson v. Skillman, 29 Minn.
95 ; s.c. 43 Am. Rep. 192.
See : Heath v. Randall, 53 Mass.
(4 Cush.) 195 ;
Nettleton v. Sikes, 49 Mass. 34 ;
Wood v. Leadbitter, 13 Mees. &
W. 838.
- ² Wolfe v. Frost, 4 Sandf. Ch. (N.
Y.) 72.
- ³ Wolfe v. Frost, 4 Sandf. Ch. (N.
Y.) 72, 74.
See : Foot v. N. H. & N. R. Co.,
23 Conn. 214 ;
Prince v. Case, 10 Conn. 375 ;
s.c. 27 Am. Dec. 675 ;
Forbes v. Balenseifer, 74 Ill. 183 ;
Seidensparger v. Spear, 17 Me.
123 ; s.c. 35 Am. Dec. 234 ;
Oliver v. Hook, 47 Md. 301 ;
Stevens v. Stevens, 52 Mass. (1
Met.) 251 ; s.c. 45 Am. Dec.
203 ;
Desloge v. Peace, 38 Mo. 588 ;
Fuhr v. Deane, 26 Mo. 116 ; s.c.
69 Am. Dec. 484 ;
Harris v. Gillingham, 6 N. H. 9 ;
s.c. 23 Am. Dec. 701 ;
Veghte v. The Raritan Water
Power Co., 19 N. J. Eq. (4 C.
E. Gr.) 142 ;
Wiseman v. Lucksinger, 84 N. Y.
- 31 ; s.c. 38 Am. Rep. 479 ;
Banks v. American Tract Soc., 4
Sandf. Ch. (N. Y.) 438 ;
Mumford v. Whitney, 15 Wend.
(N. Y.) 380, 384 ; s.c. 30 Am.
Dec. 60.
- ⁴ See : Prince v. Case, 10 Conn.
375 ;
Partridge v. First Independent
Church, 39 Md. 49 ;
Coalter v. Hunter, 4 Rand. (Va.)
58 ; s.c. 15 Am. Dec. 726.
- ⁵ Dark v. Johnston, 55 Pa. St. 164 ;
s.c. 93 Am. Dec. 732 ;
Foster v. Browning, 4 R. I. 47 ;
s.c. 67 Am. Dec. 505 ;
Hazelton v. Putnam, 3 Pinn.
(Wis.) 107 ; s.c. 3 Chand. (Wis.)
117 ; 54 Am. Dec. 158 ;
De Haro v. United States, 72 U.
S. (5 Wall.) 599 ; bk. 18 L. ed.
681.
- ⁶ See : Hill v. Lord, 48 Me. 83, 99 ;
Waters v. Lilley, 21 Mass. (4
Pick.) 145 ; s.c. 16 Am. Dec.
333 ;
Pierce v. Keator, 70 N. Y. 419 ;
s.c. 26 Am. Rep. 612 ;
Tinicum Fishing Co. v. Carter, 61
Pa. St. 21, 39 ; s.c. 100 Am.
Dec. 597 ;
Huff v. McCauley, 53 Pa. St.
206, 209 ; s.c. 91 Am. Dec. 203 ;

easement, and although capable of being transferred in gross, may also be attached to land as an appurtenance and pass as such ; for a profit *a prendre* in the land of another, when not granted in favor of some dominant tenement, cannot properly be said to be an easement, but an interest or estate in the land itself.¹ Such a right is in its nature corporeal, and capable of livery, while easements are not, and may exist independently of, or without being connected with or appendant to, other property.² Such a privilege can be created only by an instrument in writing, or acquired by prescription.³

SEC. 2211. **Distinguished from covenants.**—There is a distinction to be observed between an easement or servitude imposed upon the land and a covenant real running with the land, which distinction is not always kept in view.⁴ Easements are annexed to the estate of the owner of the dominant tenement, and pass to the grantee of such estate. They are also a charge upon the estate of the

Manning v. Wasdale, 5 Ad. & E.
758 ; s.c. 31 Eng. C. L. 814 ;

Bland v. Lipscombe, 30 Eng. L.
& Eq. 189.

¹ Huntington v. Asher, 96 N. Y.
604, 610 ; s.c. 48 Am. Rep. 652 ;
Post v. Pearsall, 22 Wend. (N. Y.)
425.

² Pierce v. Keator, 70 N. Y. 419,
421 ; s.c. 26 Am. Rep. 612 ;
Post v. Pearsall, 22 Wend. (N.
Y.) 425, 433.

“Profit *a prendre* in the land of another,” the court say, in the case of Post v. Pearsall, *supra*, “when not granted in favor of some dominant tenement, cannot properly be said to be an easement, but an interest or estate in the land itself. The three personal servitudes of the Roman law—use, usufruct, and habitation—and which are still retained in the laws of France and of Spain and of Holland, were not, strictly speaking, servitudes, but limited estates in the land ; and they are now separately provided for as such by the Napo-

leon Code, one article of which expressly declares that servitudes cannot be personal, and that they can only exist when imposed upon an estate and for the benefit of an estate. Art. 686.”

³ Morse v. Copeland, 68 Mass. (2
Gray) 302 ;

Sargent v. Ballard, 26 Mass. (9
Pick.) 255.

⁴ Brewer v. Marshall, 18 N. J. Eq.
(3 C. E. Gr.) 537 ; s.c. 97 Am.
Dec. 679 ;

Woodruff v. Trenton Water
Power Co., 10 N. J. Eq. (2
Stockt.) 489 ;

Barrow v. Richard, 8 Paige Ch.
(N. Y.) 350, 351 ; s.c. 35 Am.
Dec. 713 ;

Hills v. Miller, 3 Paige Ch. (N.
Y.) 254 ; s.c. 24 Am. Dec. 218 ;

Tulk v. Moxhay, 2 Phil. (Pa.)
774 ;

West Virginia Transportation
Co. v. Ohio R. P. L. Co., 22
W. Va. 600 ; s.c. 46 Am. Rep.
543 ;

Schreiber v. Creed, 10 Sim. 35 ;
Whatman v. Gibson, 9 Sim. 196.

owner of the servient tenement, and follow such estate into the hands of those to whom the whole, or any part thereof, is conveyed.¹

SEC. 2212. **Nature and incidents of.**—Easements are interests in land created by grant or agreement, express or implied, or by prescription, or custom, which confer a right upon the owner to some profit, benefit, dominion, or lawful use over the estate of another,² and have the following essentials, to wit: first, they are incorporeal; second, they are imposed only on corporeal property; third, they are imposed for the benefit of corporeal property only; fourth, they confer no right to participate in the profits arising from the property on which they are imposed; fifth, there must be two distinct tenements—a dominant tenement, to which the right belongs, and a servient tenement, upon which the obligation rests,³ owned by several proprietors. A right to pass and repass over the land of another to reach one's own property furnishes a good illustration. Where there is a conveyance of property which cannot be used without the privileges attached thereto, they will of necessity pass with the property to which they are attached,⁴ either with or without the word “appurtenances,” or anything equivalent thereto;⁵ but in all other cases the word “appurtenances,” or the phrase “appertaining thereto,” is important in giving full effect to a deed, as in a conveyance of a manor or other large real estate, and all other lots or lands or rights appertaining or belonging thereto—new additional property or rights will pass by means of the words.⁶ Easements are either

¹ *Hills v. Miller*, 3 Paige Ch. (N. Y.) 254; s.c. 24 Am. Dec. 218.

² *Huyck v. Andrews*, 113 N. Y. 81; s.c. 20 N. E. Rep. 581; 3 L. R. A. 789.

³ *Wagner v. Hanna*, 38 Cal. 111, 116; s.c. 99 Am. Dec. 354; *Pierce v. Keator*, 70 N. Y. 419, 421; s.c. 26 Am. Rep. 612; *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72;

Cadwalader v. Bailey, 17 R. I. 495; s.c. 22 Atl. Rep. 20; 14 L. R. A. 300.

⁴ *Stuyvesant v. Woodruff*, 21 N. J. L. (1 Zab.) 133; s.c. 47 Am. Dec. 156, 161;

Oakley v. Stanley, 5 Wend. (N. Y.) 523;

Buckley v. Coles, 5 Taunt. 34; s.c. 1 Eng. C. L. 166; 15 Rev. Rep. 508.

⁵ *Stuyvesant v. Woodruff*, 21 N. J. L. (1 Zab.) 133; s.c. 47 Am. Dec. 156, 161;

Barlow v. Rhodes, 3 Tyrw. 280.

⁶ *Stuyvesant v. Woodruff*, 21 N. J.

continuous, as a drain or sewer ; or non-continuous, as a right of way.¹ The former pass with the estate ; the latter pass only on words sufficient to create the estate and annex it to the dominant estate.²

SEC. 2213. **Kinds of easements—Introductory.**—All easements are either appurtenant, or appendant, or in gross. Those easements which are appurtenant run with the land, regardless of any change in the ownership.³ Easements appurtenant are either positive or negative in their nature. A negative easement appurtenant is a restriction preventing the doing of certain acts. Thus a restriction on building to obstruct a view from certain premises, and the like, cannot be reserved on conveyance of such premises, but is extinguished if severed therefrom by an attempted reservation.⁴ An easement in gross is a mere personal interest in the real

L. (1 Zab.) 133 ; s.c. 47 Am. Dec. 156, 161.

Citing : *Ongley v. Chambers*, 1 Bing. 483 ; s.c. 8 Eng. C. L. 604 ;

Gennings v. Lake, Cro. Car. 169 ; *Bryan v. Wetherhead*, Cro. Car. 17 ;

Higham v. Baker, Cro. Eliz. 16 ; *Hill v. Grange*, Dyer, 130.

¹ *Fetters v. Humphreys*, 19 N. J. Eq. (4 C. E. Gr.) 471 ;

Parsons v. Johnson, 68 N. Y. 62 ; s.c. 23 Am. Rep. 149 ;

Lampman v. Milks, 21 N. Y. 505 ; *Poedon v. Boston*, L. R. 1 Q. B. 156.

² *Fetters v. Humphreys*, 19 N. J. Eq. (4 C. E. Gr.) 471 ;

Parsons v. Johnson, 68 N. Y. 62 ; s.c. 23 Am. Rep. 149 ;

Lampman v. Milks, 21 N. Y. 505 ; *Pearson v. Spencer*, 1 Best & S.

571 ; s.c. 7 Jur. N. S. 1195 ; 4 L. T. 769 ;

Worthington v. Gimson, 2 El. & E. (2 Q. B.) 618 ; s.c. 105 Eng. C. L. 616 ;

Dodd v. Burchall, 1 Hurl. & C. 113 ; s.c. 31 L. J. Ex. 364 ; 8 Jur. N. S. 1180 ;

Thomson v. Waterlow, L. R. 6 Eq. Cas. 36 ; s.c. 37 L. J. Ch. 495 ; 18 L. T. 545 ; 16 W. R.

636 ;

Russell v. Harford, L. R. 2 Eq.

507 ; s.c. 15 L. T. 171 ; 14 W. R. 982 ;

Langley v. Hammond, L. R. 3 Exch. 161 ; s.c. 37 L. J. Eq. 118 ; 18 L. T. 858 ; 16 W. R. 937 ;

Goddard on Easem. 70-86.

Continuous and non-continuous appurtenant easements.—In *Fetters v. Humphreys*, *supra*, the rule is laid down as follows : "The distinction between easements which are appurtenant and continuous and those which are not appurtenant and non-continuous is completely established by adjudicated cases. The former pass on the severance of the two tenements as appurtenant without the use of the word 'appurtenances,' but the latter do not pass unless the grantor uses language in the conveyance sufficient to create the easement *de novo*."

³ *Hills v. Miller*, 3 Paige Ch. (N. Y.) 254 ; s.c. 24 Am. Dec. 218 ; *Manderbach v. Bethany's Orphans' Home*, 109 Pa. St., 231 ; s.c. 2 Atl. Rep. 422 ; 1 Cent. Rep. 402.

See : *Streaper v. Fisher*, 1 Rawle (Pa.) 155 ; s.c. 18 Am. Dec. 604.

⁴ *Cadwalader v. Bailey*, 17 R. I. 495 ; s.c. 22 Atl. Rep. 20 ; 14 L. R. A. 300.

estate of another, and is not assignable or inheritable.¹ Whether an easement in a given case is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it.² Where in its nature an appropriate and useful adjunct to the land conveyed, and there is nothing to show the parties intended it to be a mere personal right, it should be held to be an easement appurtenant to the land and not in gross.³ Easements most commonly known are right of way, right to light and air,⁴ right to water,⁵ right to support,⁶ and party walls.⁷ Many other servitudes may be imposed upon land by grant.

SEC. 2214. **Same—Private ways.**—Rights of way are divided into two classes, the first being those which are used and enjoyed by the public generally, and known as public ways; and those in which the right is in favor of one or more private individuals, and is appurtenant to an estate owned by him or them, and known as a private way. Public ways have already been sufficiently treated.⁸ Private ways over the land of another may be created or acquired by grant,⁹ by prescription,¹⁰ or by necessity.¹¹ A private way, no matter how acquired, is usually appurtenant to the land, and passes with it to the grantee.¹²

¹ *Cadwalader v. Bailey*, 17 R. I. 495; s.c. 22 Atl. Rep. 20; 14 L. R. A. 300.

See: *McMahon v. Williams*, 79 Ala. 288;

Garrison v. Rudd, 19 Ill. 558;

Post v. Pearsall, 22 Wend. (N. Y.) 425, 432;

Boatman v. Lasley, 23 Ohio St. 614;

Spencesly v. Valentine, 34 Wis. 154;

Ackroyd v. Smith, 10 C. B. (1 J. Scott) 164; s.c. 70 Eng. C. L. 164.

² *Cadwalader v. Bailey*, 17 R. I. 495; s.c. 22 Atl. Rep. 20; 14 L. R. A. 300.

See: *Kramer v. Knauff*, 12 Ill. App. 115, 118;

White v. Crawford, 10 Mass. 183.

³ *Cadwalader v. Bailey*, 17 R. I. 495; s.c. 22 Atl. Rep. 20; 14 L. R. A. 300.

⁴ See: *Post*, § 2218.

⁵ See: *Post*, § 2220.

⁶ See: *Post*, § 2225.

⁷ See: *Post*, § 2227.

⁸ See: *Ante*, §§ 2197, 2207.

⁹ See: *Post*, § 2215.

¹⁰ See: *Post*, § 2216.

¹¹ *Lawton v. Rivers*, 2 McC. (S. C.) L. 445; s.c. 13 Am. Dec. 741.

See: *Post*, § 2217.

¹² *Taylor v. Warnaky*, 55 Cal. 350; *Simmons v. Sines*, 4 Keyes (N. Y.) 153;

Wissler v. Hershey, 23 Pa. St. 333;

Reise v. Enos, 76 Wis. 634; s.c. 45 N. W. Rep. 414; 8 L. R. A. 617.

See: *Kuhlman v. Hecht*, 77 Ill. 570; *Anderson v. Buchanan*, 8 Ind. 132;

Brice v. Randall, 7 Gill & J. 349;

Reise v. Enos, 76 Wis. 634; s.c. 45 N. W. Rep. 414; 8 L. R. A. 617.

An easement of a right of way is not presumed to be personal, where it can fairly be construed to be appurtenant to some other estate.¹ A right in gross is a mere personal privilege, and dies with the grantee, although the instrument creating it conveys it to the grantee and his heirs and assigns forever.² Whether a grant of a right of way is appurtenant to some other estate or in gross must be determined from the grant itself and cannot be shown by matters *aliunde*.³ In those cases where the right of way is appurtenant to the estate, it pertains to the whole and every part thereof, and if the land be divided and conveyed in separate parcels, the right of way will pass to each of the grantees.⁴

SEC. 2215. **Same—Same—By grant.**—A private right of way may be acquired by grant, either express or implied, on the part of the owner of the servient estate, and is usually made by deed,⁵ or devise, and derives no strength from lapse of time or occupation.⁶ Where a private way has once been granted and been laid out it cannot be charged by either party without the consent of the other.⁷

¹ *Louisville & N. R. Co. v. Koelle*, 104 Ill. 455 ;

Dennis v. Wilson, 107 Mass. 591 ;

Reise v. Enos, 76 Wis. 634 ; s.c. 45 N. W. Rep. 414 ; 8 L. R. A. 817.

^{*} *Boatman v. Lasley*, 23 Ohio St. 614 ; *Fisher v. Fair*, 34 S. C. 203 ; s.c. 13 S. E. Rep. 470 ; 14 L. R. A. 333 ;

2 Bl. Com. 35 ;

3 Kent Com. (4th ed.) 420.

² *Wagner v. Hanna*, 38 Cal. 111 ; s.c. 99 Am. Dec. 354.

See : *Sanxay v. Hunger*, 42 Ind. 44 ;

White v. Crawford, 10 Mass. 183 ; *Boatman v. Lasley*, 23 Ohio St. 614.

⁴ *Underwood v. Carney*, 55 Mass. (1 Cush.) 285 ;

Atkins v. Bordman, 43 Mass. (2 Met.) 464 ; s.c. 37 Am. Dec. 100 ;

Kent v. Waite, 27 Mass. (10 Pick.) 138 ;

Carlin v. Paul, 11 Mo. 32 ; s.c. 47 Am. Dec. 139 ;

Lansing v. Wiswall, 5 Den. (N. Y.) 213 ;

Watson v. Bioren, 1 Serg. & R. (Pa.) 227 ; s.c. 7 Am. Dec. 617 ; *Codling v. Johnson*, 9 Barn. & C. 933 ; s.c. 17 Eng. C. L. 411.

⁵ A right in the nature of an easement cannot be created by parol agreement for the partition of lands, because that involves something besides a severance of the unity of possession.

Taylor v. Millard, 118 N. Y. 244 ; s.c. 23 N. E. Rep. 376 ; 6 L. R. A. 667.

⁶ *Sanxay v. Hunger*, 42 Ind. 44 ; *Lawton v. Rivers*, 2 McC. (S. C.) L. 445 ; s.c. 13 Am. Dec. 741.

⁷ *Jennison v. Walker*, 77 Mass. (11 Gray) 423, 426 ;

Russell v. Jackson, 19 Mass. (2 Pick.) 573 ;

Holmes v. Seeley, 19 Wend. (N. Y.) 507 ;

Garritt v. Sharp, 3 Ad. & E. 325 ; s.c. 30 Eng. C. L. 163 ;

Northam v. Hurley, 1 El. & Bl. (1 Q. B.) 665 ; s.c. 72 Eng. C. L. 663 ;

Henning v. Burnett, 8 Exch. 187 ; s.c. 22 L. J. Ex. 79.

Where a grant of a right of way has been made but has been subsequently lost or destroyed, it may be established by secondary proof under the ordinary rules of evidence.¹

SEC. 2216. **Same—Same—By prescription.**—A private right of way over the lands of another for the length of time required by the statute² may be acquired by prescription; if the user has been interrupted, it must be shown that such interruptions were consistent with the title claimed.³ To establish a right of way by prescription there must be: (1) continued and uninterrupted use and enjoyment; (2) identity of the thing enjoyed;⁴ that is, the way must be used without change or variation;⁵ and must be (3) a right adverse to the owner.⁶ A right of way acquired by prescription for a special use or purpose cannot be used for another and different purpose;⁷ and any change or deviation from

¹ *Lawton v. Rivers*, 2 McC. (S. C.) L. 445; s.c. 13 Am. Dec. 741.

² *Blake v. Everett*, 83 Mass. (1 Allen) 248;

Hill v. Crosby, 19 Mass. (2 Pick.) 466; s.c. 13 Am. Dec. 448;

Krier's Private Road, 73 Pa. St. 109;

Tracy v. Atherton, 36 Vt. 503;

Campbell v. Wilson, 3 East 294; s.c. 7 Rev. Rep. 462.

³ *Puryear v. Clements*, 53 Ga. 233; *Plimpton v. Converse*, 42 Vt. 712.

⁴ *Lawton v. Rivers*, 2 McC. (S. C.) L. 445; s.c. 13 Am. Dec. 741.

⁵ The court say in *Lawton v. Rivers*, 13 McC. (S. C.) L. 445; s.c. 13 Am. Dec. 741, that to entitle a person to a right of way by prescription he must show that he has always used the same way without change or variation. "It must not, as is said in *Alban v. Browsal*, Yelv. 163, be in one place *hodie* and another *cras*; and that is one of the characteristic differences between a right of way arising from necessity, and one by prescription. In the former, the party may plead that he had assigned another, because the law only allows one in such a case a right of ingress and egress; but it need not always be by the same way."

⁶ *Lawton v. Rivers*, 2 McC. (S. C.)

L. 455; s.c. 13 Am. Dec. 741;

Campbell v. Wilson, 3 East 244; s.c. 7 Rev. Rep. 462.

⁷ *Atwater v. Bodfish*, 77 Mass. (11 Gray) 150;

French v. Marstin, 24 N. H. 440; s.c. 32 N. H. 316; 57 Am. Dec. 294;

Reise v. Enos, 76 Wis. 634; s.c. 45 N. W. Rep. 414; 8 L. R. A. 617;

Allen v. Gomme, 11 Ad. & E. 759; s.c. 39 Eng. C. L. 404;

Ballard v. Dyson, 1 Taunt. 279.

In *Reise v. Enos*, *supra*, the court say: "Where a man conveys a parcel out of a larger tract of land and grants a right of way to him and his heirs in his own land obviously useful and necessary to the beneficial enjoyment of the land granted, the grantee takes the right of way therein as appurtenant to the land granted only, and has no right to use it as appurtenant to other land afterwards acquired. This is substantially the language of Chief Justice SHAW in *Stearns v. Mullen*, 70 Mass. (4 Gray) 151."

To the same effect are the decisions in:

Smith v. Porter, 76 Mass. (10 Gray) 66;

Cotton v. Pocasset Mfg. Co., 54 Mass. (13 Met.) 429, 433;

the privilege or right as granted will amount to a trespass, and render the owner of the dominant estate liable in damages to the owner of the servient estate, even though the burden upon the servient estate is not materially changed.¹ If a right of way cannot be used for a different purpose than that for which it is granted, neither can it be used for a different estate than the one to which it is appurtenant.²

SEC. 2217. **Same—Same—By necessity.**—A private right of way by necessity may be acquired over the lands of another, and arises where the owner of several parcels of lands conveys one parcel, which is surrounded by the others, and the grantee has no way of ingress or egress except through one of those reserved ;³ or where he reserves the parcel surrounded by others for himself, and has no means of ingress or egress save through one of those transferred.⁴ To establish a way by necessity it is suffi-

Davenport v. Lamson, 38 Mass. (21 Pick.) 72 ;

French v. Marstin, 24 N. H. 440 ;
s.c. 32 N. H. 316 ; 57 Am. Dec. 294 ;

Gunson v. Healy, 100 Pa. St. 42 ;
Shroder v. Brennehan, 23 Pa. St. 348.

¹ French v. Marstin, 24 N. H. 440 ;
s.c. 32 N. H. 316 ; 57 Am. Dec. 294 ;

Kirkham v. Sharp, 1 Whart. (Pa.) 323 ; s.c. 29 Am. Dec. 57 ;

Allen v. Gomme, 11 Ad. & E. 759 ; s.c. 39 Eng. C. L. 404 ;

Brunton v. Hall, 1 G. & D. 207 ;
s.c. 1 Q. B. 792 ; 6 Jur. 340 ;

Cowling v. Higginson, 4 Mees. & W. 245 ; s.c. H. & H. 269 ;

Ballard v. Dyson, 1 Taunt. 279.

² Davenport v. Lamson, 38 Mass. (21 Pick.) 72 ;

Comstock v. Van Dusen, 22 Mass. (5 Pick.) 163 ;

Russell v. Jackson, 19 Mass. (2 Pick.) 573, 574 ;

French v. Marstin, 24 N. H. 440 ;
s.c. 32 N. H. 316 ; 57 Am. Dec. 294 ;

Garritt v. Sharp, 3 Ad. & E. 325 ;
s.c. 30 Eng. C. L. 163 ;

Senhouse v. Christian, 1 Durnf. & E. (1 T. R.) 560 ; s.c. 1 Rev. Rep. 300 ;

Northam v. Hurley, 1 El. & Bl. (1 Q. B.) 665 ; s.c. 72 Eng. C. L. 663 ;

Williams v. James, L. R. 2 C. P. 577, 580 ; s.c. L. J. 36 C. P. 256 ;
16 L. T. 664 ; 15 W. R. 928 ;

Colchester v. Roberts, 4 Mees. & W. 769.

³ Collins v. Prentice, 15 Conn. 39 ;
s.c. 38 Am. Dec. 61 ;

Hall v. McLeod, 2 Met. (Ky.) 98 ;
s.c. 74 Am. Dec. 400 ;

Bass v. Edwards, 126 Mass. 445 ;
Worrall v. Rhoads, 2 Whart. (Pa.)

427 ; s.c. 30 Am. Dec. 274 ;

Lawton v. Rivers, 2 McC. (S. C.)
L. 445 ; s.c. 13 Am. Dec. 741.

See : Stewart v. Hartman, 46 Ind. 331 ;

Proctor v. Hodgson, 10 Ex. 822 ;
s.c. 29 Eng. L. & Eq. 453.

⁴ Pingree v. McDuffie, 56 N. H. 306 ;
Lawton v. Rivers, 2 McC. (S. C.)

L. 445 ; s.c. 13 Am. Dec. 741 ;
Howton v. Frearson, 8 Durnf. &

E. (8 T. R.) 50 ; s.c. 4 Rev. Rep. 581.

See : Pernam v. Wead, 2 Mass. 203 ; s.c. 3 Am. Dec. 43 ; 6 Jac. L. Dict. 315.

Where a part of a man's land is taken from him by operation of law, as under a sale by execution, leaving him no way of egress, the

cient that the necessity exists. Its existence for any particular length of time is not required, but the actual necessity of the right, and not its mere convenience, must be shown. The necessity requisite to the creation of this easement need not be an absolute physical necessity,¹ but depends upon the facts in each particular case as to whether a way of necessity will arise.² A reasonable necessity, as distinguished from a mere convenience, will be sufficient;³ and there need not be an absolute and irresistible necessity.⁴ And where a right of way by necessity exists it devolves upon the owner of the land, in the first instance, to locate such right of way; and if he fails or refuses to do so, the owner of the easement

law will allow him one from necessity.

Pernam v. Wead, 3 Mass. 203, 208; s.c. 3 Am. Dec. 43;

Lawton v. Rivers, 2 McC. (S. C.) L. 445; s.c. 13 Am. Dec. 741.

Right of necessity—*Lawton v. Rivers*.

—The court say, in *Lawton v. Rivers*, *supra*: "It is indeed said that what is called a right of way from necessity is by grant; because where a thing is granted, the law implies a grant of everything necessary to the enjoyment of it: *Pomfrit v. Ricroft*, 1 Saund. 323; *Saunders' Case*, 5 Co. 12; *Howton v. Frearson*, 8 Durnf. & E. (8 T. R.) 50; s.c. 4 Rev. Rep. 581; 5 *Jacob's Law Dictionary* 465. But still I think the threefold distinction above mentioned may be preserved, because it is from the necessity of the thing that the law implies a grant. To establish such right, nothing is required but to show the necessity. Neither time nor occupation is necessary. If the necessity has existed but for a day, the claim is as well founded as where it has existed for half a century; and although the right may never have been enjoyed, yet its existence will be co-extensive with the necessity. But there must be an actual necessity, and not a mere inconvenience, to entitle a person to such right. One

man is not required to subject himself to an inconvenience, and much less to an actual loss, for the accommodation of another. I do not mean to say that there must be an absolute and irresistible necessity; as inconvenience may be so great as to amount to that kind of a necessity which the law requires, and it is difficult, and perhaps impossible, to lay down with exact precision the degree of inconvenience which will be required to constitute a legal necessity."

¹ *Pettingill v. Porter*, 90 Mass. (8 Allen) 1; s.c. 85 Am. Dec. 671.

² See: *Pettingill v. Porter*, 90 Mass. (8 Allen) 1; s.c. 85 Am. Dec. 671.

³ *Hollenbeck v. McDonald*, 112 Mass. 247, 250;

Oliver v. Pitman, 98 Mass. 46, 50; *O'Rorke v. Smith*, 11 R. I. 259,

264; s.c. 23 Am. Rep. 440;

Lawton v. Rivers, 2 McC. (S. C.) L. 445; s.c. 13 Am. Dec. 741;

Brown v. Berry, 6 Coldw. (Tenn.) 98;

Dillman v. Hoffman, 38 Wis. 575.

⁴ *Hollenbeck v. McDonald*, 112 Mass. 247, 250;

Oliver v. Pitman, 98 Mass. 46, 50; *O'Rorke v. Smith*, 11 R. I. 259,

264; s.c. 23 Am. Rep. 440;

Lawton v. Rivers, 2 McC. (S. C.) L. 445; s.c. 13 Am. Dec. 741;

Brown v. Berry, 6 Coldw. (Tenn.) 98;

Dillman v. Hoffman, 38 Wis. 575.

may select the place.¹ The reason for this is that the owner of the easement is entitled to a convenient way, and if this be allowed by the owner of the land he has no cause of complaint, it being immaterial to his right where the way is located.²

SEC. 2218. **Same—Air and light.**—The right to free access of air and light to one's windows is a species of easement, known as "light and air," and also as "ancient lights."³ The right to pure air is a right accompanying the possession of land, and to poison and materially change it is a nuisance.⁴ At common law light belongs to the first occupant during the time he holds possession, and this doctrine is still recognized in England, though repudiated in this country.⁵ An easement of air and light resembles the easement of private right of way in that the owner of the dominant estate cannot do anything which will increase the burden of the servient estate; such as closing old windows and opening new ones, or increasing the size of windows already in existence, when such acts change or increase the burden upon the servient estate; and any attempt to do so will destroy the easement.⁶

SEC. 2219. **Same—Same—How acquired.**—At common law a right to light and air could be acquired by prescription, and was presumed from long and continuous enjoyment.⁷ This doctrine is still recognized in England and

¹ *Russell v. Jackson*, 19 Mass. (2 Pick.) 574, 578;
Smiles v. Hastings, 24 Barb. (N. Y.) 44.

² *Russell v. Jackson*, 19 Mass. (2 Pick.) 574, 578.
See: *Farnum v. Platt*, 25 Mass. (8 Pick.) 339, 342; s.c. 19 Am. Dec. 330;
Horn v. Taylor, Noy 128;
Oldfield's Case, Noy 123;
Staple v. Heyden, 6 Mod. 3;
Morris v. Edgington, 3 Taunt. 24, 31; s.c. 12 Rev. Rep. 579;
2 Rol. Abr. 60, Z., pl. 17.

³ 2 Bl. Com. 14.

⁴ *Appeal of Pennsylvania Lead Co.*

96 Pa. St. 116, 123; s.c. 42 Am. Rep. 534;

2 Ld. Raym. 1163.

⁵ See: *Post*, § 2219.

⁶ *Blanchard v. Bridges*, 4 Ad. & E. 176; s.c. 31 Eng. C. L. 94;
Moore v. Rawson, 3 Barn. & C. 332; s.c. 10 Eng. C. L. 156;
Luttrell's Case, 4 Co. 87;
Cherrington v. Abney Mill, 2 Vern. 646;
Tud. Ld. Cas. 132, 133.

⁷ *Moore v. Rawson*, 3 Barn. & C. 332; s.c. 10 Eng. C. L. 156;
Martin v. Goble, 1 Camp. 322;
Clark v. Clark, L. R. 1 Ch. 16;
Roberts v. Macord, 1 Mo. & Rob. 230.

has been adopted by the courts of Alabama,¹ Kentucky,² Illinois,³ Louisiana,⁴ and New Jersey,⁵ but is repudiated elsewhere in the United States.⁶ In this country an easement of air and light may be acquired by an express⁷ or implied⁸ grant or covenant, although some of the courts reject the doctrine of implied grant or covenant,⁹ or limit

¹ *Ray v. Lynes*, 10 Ala. 63.

² *Manier v. Myers*, 4 B. Mon. (Ky.) 514, 520.

³ *Gerber v. Grabel*, 16 Ill. 217.

⁴ *Durel v. Boisblanc*, 1 La. An. 407.

⁵ *Barnett v. Johnson*, 15 N. J. Eq. (2 McCar.) 481;

Robeson v. Pittenger, 2 N. J. Eq. (1 H. W. Gr.) 57; s.c. 32 Am. Dec. 412.

⁶ *Ward v. Neal*, 37 Ala. 500, 501, overruling *Ray v. Lynes*, 10 Ala. 63;

Ingraham v. Hutchinson, 2 Conn. 584, 597;

Turner v. Thompson, 58 Ga. 268; s.c. 36 Am. Rep. 297;

Stein v. Hauck, 56 Ind. 65; s.c. 26 Am. Rep. 10;

Morrison v. Marquardt, 24 Iowa 35; s.c. 92 Am. Dec. 444;

Ray v. Sweeney, 14 Bush (Ky.) 1; s.c. 29 Am. Rep. 388;

Pierre v. Fernald, 26 Me. 436; s.c. 46 Am. Dec. 573;

Cherry v. Stein, 11 Md. 1;

Keats v. Hugo, 115 Mass. 204; s.c. 15 Am. Rep. 80;

Randall v. Sanderson, 111 Mass. 114;

Paine v. City of Boston, 86 Mass. (4 Allen) 168, 169;

Carrig v. Dee, 80 Mass. (14 Gray) 583;

Rogers v. Swain, 76 Mass. (10 Gray) 376;

Collier v. Pierce, 73 Mass. (7 Gray) 18; s.c. 46 Am. Dec. 453;

Story v. Odin, 12 Mass. 157, 160; s.c. 7 Am. Dec. 46;

Hayden v. Dutcher, 31 N. J. Eq. (4 Stew.) 218;

Babcock v. Montgomery Co. Mut. Ins. Co., 4 N. Y. 326, 331;

Banks v. American Tract Society, 4 Sandf. Ch. (N. Y.) 438;

Parker v. Foote, 19 Wend. (N. Y.) 309;

Mahan v. Brown, 13 Wend. (N. Y.) 261, 263; s.c. 28 Am. Dec. 461;

Mullen v. Stricker, 19 Ohio St.

135; s.c. 2 Am. Rep. 379;

Haverstick v. Sipe, 63 Pa. St. 368;

Hey v. Sterrett, 2 Watts (Pa.) 327, 331; s.c. 27 Am. Dec. 313;

Napier v. Bulwinkle, 5 Rich. (S. C.) 311, overruling *McCready v.*

Thompson, 1 Dudley (S. C.) L. 131;

Tunstall v. Christian, 80 Va. 4;

Hubbard v. Town, 33 Vt. 295;

Powell v. Sims, 5 W. Va. 1; s.c. 13 Am. Rep. 629;

Swansborough v. Coventry, 9 Bing. 304; s.c. 23 Eng. C. L. 592;

2 Bl. Com. 14;

3 Kent Com. (13th ed.) 466.

⁷ *Keats v. Hugo*, 115 Mass. 204, 216; s.c. 15 Am. Rep. 80;

Parker v. Foote, 19 Wend. (N. Y.) 309;

Mahan v. Brown, 13 Wend. (N. Y.) 261, 263; s.c. 28 Am. Dec. 461.

⁸ *Janes v. Jenkins*, 34 Md. 1; s.c. 6 Am. Rep. 300;

Story v. Odin, 12 Mass. 157; s.c. 7 Am. Dec. 46;

Oregon Iron Co. v. Trullinger, 3 Oreg. 1;

Maynard v. Esher, 17 Pa. St. 222;

United States v. Appleton, 1 Sum. C. C. 492; s.c. Fed. Cas. No. 14463.

⁹ See: *Morrison v. Marquardt*, 24 Iowa 35;

Keats v. Hugo, 115 Mass. 204; s.c. 15 Am. Rep. 80;

Doyle v. Lord, 64 N. Y. 432; s.c. 21 Am. Rep. 629;

Johnson v. Oppenheim, 55 N. Y. 280, 293;

Shipman v. Beers, 2 Abb. (N. Y.) N. C. 435;

Myers v. Gemmel, 10 Barb. (N. Y.) 537;

Palmer v. Wetmore, 2 Sandf. (N. Y.) 316;

Mullen v. Stricker, 19 Ohio St. 135; s.c. 2 Am. Rep. 379;

Haverstick v. Sipe, 33 Pa. St. 368;

it to cases of absolute necessity.¹ Where such an easement is acquired either by express or implied grant, the same rules of construction which govern prescriptive rights in such cases under the English law are applicable.²

SEC. 2220. **Same—In waters.**—Where water runs over or flows through or stands stagnant upon the land, the owner of the land has a temporary, transient, usufructuary property in it.³ This right of property in water is thought to be a corporeal hereditament, but not an easement proper,⁴ and is inseparably connected with the soil, being a part or parcel of it ;⁵ an owner of the soil may use such water for every useful purpose to which it can be applied, as it is wont to run, without diminution or alteration, but he cannot use it to the prejudice of any proprietor above or below him, unless he has acquired a right to do so by a grant, license, or prescription.⁶ To

Ante, § 2213.

The court say in *Keats v. Hugo*, *supra*, that with the single exception of *Janes v. Jenkins*, 34 Md. 1 ; s.c. 6 Am. Dec. 46, all the opinions of American judges, with which the learning and research of counsel have supplied us, in favor of the acquirement of such a right by mere implication from the conveyance of a house, have been either, as in *Lampman v. Milks*, 21 N. Y. 505, 512, *obiter dicta*, or, as in *Robeson v. Pitenger*, 16 N. J. Eq. (1 C. E. Gr.) 57 ; s.c. 32 Am. Dec. 412, in those states in which a like right is held to exist by prescription, and therefore of no weight as authority in this commonwealth.

¹ *Havens v. Klein*, 51 How. (N. Y.) Pr. 32 ;

Powell v. Sims, 5 W. Va. 1 ; s.c. 13 Am. Rep. 629.

² *Mahan v. Brown*, 13 Wend. (N. Y.) 261, 263 ; s.c. 28 Am. Dec. 461 ;

McCready v. Thompson, 1 Dudley (S. C.) L. 113.

³ 2 Bl. Com. 14, 18 ;
2 Conn. 518, 519.

⁴ *Hill v. Newman*, 5 Cal. 445 ; s.c.

63 Am. Dec. 140 ;

Wadsworth v. Tillotson, 15 Conn. 366 ; s.c. 39 Am. Dec. 391 ;

Johnson v. Jordon, 43 Mass. (2 Met.) 234, 239 ; s.c. 37 Am. Dec. 85 ;

Vansickle v. Haines, 7 Nev. 249 ;
Gardner v. Newburgh, 2 John.

Ch. (N. Y.) 161 ; s.c. 7 Am. Dec. 526 ;

Watkins v. Holman, 41 U. S. (16 Pet.) 25 ; bk. 10 L. ed. 873 ;

Tyler v. Wilkinson, 4 Mas. C. C. 397 ; s.c. Fed. Cas. No. 14312 ;

Sampson v. Hoddinott, 1 C. B. N. S. 608 ; s.c. 87 Eng. C. L. 590 ;

Stokee v. Singers, 8 El. & Bl. 31, 36 ; s.c. 92 Eng. C. L. 31.

⁵ *Wadsworth v. Tillotson*, 15 Conn. 366 ; s.c. 39 Am. Dec. 391 ;

Johnson v. Jordon, 43 Mass. (2 Met.) 234, 239 ; s.c. 37 Am. Dec. 85.

⁶ *Wadsworth v. Tillotson*, 15 Conn. 366 ; s.c. 39 Am. Dec. 391 ;

Washington Ice Co. v. Shortall, 101 Ill. 46, 54 ; s.c. 40 Am. Rep. 196 ;

Red River Rolling Mills v. Wright, 30 Minn. 249, 252 ; s.c.

15 N. W. Rep. 167 ; 44 Am. Rep. 194 ;

Merrifield v. City of Worcester,

what extent the owner of land may use water flowing through it depends upon the peculiar circumstances, the general rule being that he must so use it as not to produce a perceptible damage to others entitled to the use of the same,¹ unless he has acquired a right to the water in some peculiar manner which gives him an interest other than he would have as mere riparian owner.² The law does not lay down any fixed rule for determining what is a reasonable use of the water of a stream by a riparian owner. What constitutes a reasonable use of the water of a stream by a riparian owner is not a question of law, but of fact, to be determined by the jury or the court from all the circumstances of the case. But like any other finding of fact, it is subject to review, and will be set aside if against the evidence or not supported by it.³

SEC. 2221. **Same—Same—How acquired.**—An easement in and to water over and above the right naturally

- 110 Mass. 216; s.c. 14 Am. Rep. 592;
Palmer v. Mulligan, 3 Cai. (N. Y.) 307; s.c. 2 Am. Dec. 270;
Platt v. Johnson, 15 John. (N. Y.) 213; s.c. 8 Am. Dec. 233.
¹ *Bowman v. City of New Orleans*, 27 La. An. 501;
Washburn v. Gilman, 64 Me. 163; s.c. 18 Am. Rep. 246;
Davis v. Winslow, 51 Me. 264, 291; s.c. 81 Am. Dec. 573;
Gerrish v. Brown, 51 Me. 256; s.c. 81 Am. Dec. 569;
Blanchard v. Baker, 8 Me. 253; s.c. 23 Am. Dec. 504;
Brace v. Yale, 97 Mass. 18;
Anthony v. Lapham, 22 Mass. (5 Pick.) 175;
Weston v. Alden, 8 Mass. 136;
Dumont v. Kellogg, 29 Mich. 420; s.c. 18 Am. Rep. 102;
Holsman v. Boiling Spring Co., 14 N. J. Eq. (1 McC.) 335;
Clinton v. Myers, 46 N. Y. 511; s.c. 7 Am. Rep. 373;
Pollitt v. Long, 58 Barb. (N. Y.) 20;
Merritt v. Brinkerhoff, 17 John. (N. Y.) 306; s.c. 8 Am. Dec. 404;
Arnold v. Foot, 12 Wend. (N. Y.) 330;
Porter v. Durham, 74 N. C. 767;
Miller v. Miller, 9 Pa. St. 74; s.c. 49 Am. Dec. 545;
Hart v. Evans, 8 Pa. St. 13;
Howell v. McCoy, 3 Rawle (Pa.) 256;
Richmond Manuf. Co. v. Atlantic Delaine Co., 10 R. I. 106; s.c. 14 Am. Rep. 658;
Jacobs v. Allard, 42 Vt. 303; s.c. 1 Am. Rep. 331;
Webb v. Portland Co., 3 Sumn. C. C. 189; s.c. 3 Law Rep. 374; Fed. Cas. No. 17322;
Mason v. Hill, 5 Barn. & Ad. 1; s.c. 27 Eng. C. L. 11;
Embrey v. Owen, 6 Exch. 353; s.c. 20 L. J. Ex. 212; 15 Jur. 633;
Miner v. Gilmour, 12 Moore P. C. C. 131.
² *Wadsworth v. Tillotson*, 15 Conn. 366; s.c. 39 Am. Dec. 391;
Watkins v. Peck, 13 N. H. 360; s.c. 40 Am. Dec. 156.
³ *Red River Rolling Mills v. Wright*, 30 Minn. 249; s.c. 15 N. W. Rep. 167; 44 Am. Rep. 194;
Hayes v. Waldron, 44 N. H. 580;
Prentice v. Geiger, 74 N. Y. 341;
O'Riley v. McChesney, 49 N. Y. 672;
Merritt v. Brinkerhoff, 17 John. (N. Y.) 306;
Snow v. Parsons, 28 Vt. 459.

attaching to the owner of the soil may be acquired by actual grant or license from the proprietor affected by its operations,¹ or created by prescription, where there is an uninterrupted adverse enjoyment² for such a length of time as will raise a presumption of grant.³ This time is twenty years in England,⁴ and in this country varies in the different states. Thus in Louisiana⁵ and Texas⁶ the time required is ten years; in Connecticut,⁷ fifteen years; and in Pennsylvania,⁸ twenty-one years; while in the other states twenty years.⁹ The doctrine of prescription or presumption of grant from lapse of time does not apply to the cases of underground or percolating waters,¹⁰ respecting which no easement can be acquired, on the theory that the grant cannot be presumed of a right in a

¹ *Avon Mfg. Co. v. Andrews*, 30 Conn. 476;

Hines v. Robinson, 57 Me. 324; s.c. 99 Am. Dec. 772;

Houston v. Laffee, 46 N. H. 505; *Johnstown Cheese Mfg. Co. v. Veghte*, 69 N. Y. 15; s.c. 25 Am. Rep. 125;

Bobo v. Andrew, 18 Ohio St. 463;

Mason v. Hill, 5 Barn. & Ad. 1; s.c. 27 Eng. C. L. 11.

See: *Sargent v. Ballard*, 26 Mass. (9 Pick.) 251;

Law v. McDonald, 9 Hun (N. Y.) 23;

Manning v. Wasdale, 5 Ad. & E. 758; s.c. 31 Eng. C. L. 814;

Thomas v. Thomas, 2 Crompt. M. & R. 34; s.c. 1 Gale 61; 5 Tyr. 804.

² Employment need not be adverse in some of the states, as in Connecticut.

Parker v. Hotchkiss, 25 Conn. 321.

As to the rule in Vermont,

See: *Perrin v. Garfield*, 37 Vt. 304, 308.

³ *Wadsworth v. Tillotson*, 15 Conn. 366; s.c. 39 Am. Dec. 391;

White v. Chapin, 94 Mass. (12 Allen) 516;

Bucklin v. Truell, 54 N. H. 122; *Steffy v. Carpenter*, 37 Vt. 41.

⁴ *Magor v. Chadwick*, 11 Ad. & E. 571; s.c. 39 Eng. C. L. 310;

Mason v. Hill, 5 Barn. & Ad. 1; s.c. 27 Eng. C. L. 11;

Ivimey v. Stocker, L. R. 1 Ch. 396; s.c. 35 L. J. Ch. 467; 12 Jur. N. S. 419; 14 L. T. 427;

14 W. R. 743.

⁵ *Delahoussaye v. Judice*, 13 La. An. 587; s.c. 71 Am. Dec. 521.

⁶ *Hass v. Choussard*, 17 Tex. 588.

⁷ *Wadsworth v. Tillotson*, 15 Conn. 366; s.c. 39 Am. Dec. 391.

See: *Stillman v. White River Mfg. Co.*, 3 Woodb. & M. C. C. 549; s.c. Fed. Cas. No. 13446.

⁸ *Cooper v. Smith*, 9 Serg. & R. (Pa.) 26; s.c. 11 Am. Dec. 658.

⁹ *Pillsbury v. Moore*, 44 Me. 154; s.c. 69 Am. Dec. 91;

Crittenton v. Alger, 52 Mass. (11 Met.) 281;

Watkins v. Peck, 13 N. H. 360, 361; s.c. 40 Am. Dec. 156;

Campbell v. Smith, 8 N. J. L. (3 Halst.) 140; s.c. 14 Am. Dec. 400;

Townsend v. McDonald, 12 N. Y. 381; s.c. 64 Am. Dec. 508;

Law v. McDonald, 9 Hun (N. Y.) 23;

Cuthbert v. Lawton, 3 McC. (S. C.) L. 194.

¹⁰ *Greenleaf v. Francis*, 35 Mass. (18 Pick.) 117, 122;

Frazier v. Brown, 12 Ohio St. 294, 311;

Wheatley v. Baugh, 25 Pa. St. 528; s.c. 64 Am. Dec. 721;

Broadbent v. Ramsbotham, 11 Ex. 602; s.c. L. J. Ex. 115.

thing of the existence of which the parties were ignorant.¹

SEC. 2222. **Same—Same—In natural water-courses.**—The various rights mentioned in the preceding section are natural rights incident to riparian ownership, either implied or established by law and enjoyed independently of any contract or grant. Express grant may be made either enlarging, diminishing, or extinguishing these natural rights, the same as an express grant or prescription will alter an easement affecting rights of property in other cases.² In addition to these natural rights every riparian owner has in the waters of the stream flowing through his land, he may either by grant or prescription acquire a right to dam up and maintain the water at a given height in a mill-dam,³ and the like, and thus cause it to overflow on the lands above, or diminish the volume of the stream below;⁴ and where the detention of the water is for a reasonable use, there will be no liability for injuries caused to proprietors below; but it is thought that the rule will be otherwise where the use for which the water is detained is not a reasonable one.⁵ The right

¹ *Smith v. Kenrick*, 7 Mann. Gr. & S. (7 C. B.) 515, 546; s.c. 62 Eng. C. L. 515.

See: *Roath v. Driscoll*, 20 Conn. 533, 541; s.c. 52 Am. Dec. 352.

² *Stowell v. Lincoln*, 77 Mass. (11 Gray) 434;

Cook v. Hull, 20 Mass. (3 Pick.) 269; s.c. 15 Am. Dec. 208;

Watkins v. Peck, 13 N. H. 360; s.c. 40 Am. Dec. 156;

Manning v. Wasdale, 5 Ad. & E. 324; s.c. 31 Eng. C. L. 758;

Dudley Canal v. Grazebrook, 1 Barn. & Ald. 59; s.c. 20 Eng. C. L. 396;

Stockport Waterworks Co. v. Potter, 3 Hurl. & C. 300; s.c. 31 L. J. Ex. 9; 10 Jur. N. S. 1005; 10 L. T. 748;

Carlyon v. Lovering, 1 H. & N. 784; s.c. 26 L. J. Ex. 251;

Crossley v. Lightowler, L. R. 2 Ch. 478, 479; s.c. 36 L. J. Ch. 584;

Goldsmid v. Tunbridge Wells Improvement Commissioners, L. R. 1 Ch. 349; s.c. 35 L. J.

Ch. 382; 12 Jur. N. S. 308; 14 L. T. 154; 14 W. R. 562;

Nuttall v. Bracewell, L. R. 2 Ex. 1; s.c. 36 L. J. Ex. 1; 12 Jur.

N. S. 989; 15 L. T. 313; 4 H. & C. 714.

³ *Stiles v. Hooker*, 7 Cow. (N. Y.) 266.

⁴ *Anthony v. Lapham*, 22 Mass. (5 Pick.) 175;

Colburn v. Richards, 13 Mass. 430; s.c. 7 Am. Dec. 160;

Hodges v. Raymond, 9 Mass. 316; *Cowles v. Kidder*, 24 N. H. 364;

s.c. 57 Am. Dec. 287; *Stiles v. Hooker*, 7 Cow. (N. Y.) 266;

Sampson v. Hoddinott, 1 C. B. N. S. 590; s.c. 87 Eng. C. L. 590.

⁵ *Peel v. Lewis*, 41 Ga. 162; s.c. 5 Am. Rep. 526;

Springfield, City of v. Harris, 86 Mass. (4 Allen) 494; s.c. 81 Am. Dec. 715;

Gould v. Boston Duck Co., 79 Mass. (13 Gray) 443;

Clinton v. Myers, 46 N. Y. 511; s.c. 7 Am. Rep. 373.

may also be acquired to discharge the water impeded by such dam by means of a mill-race through the land of another.¹ A riparian owner may also acquire by grant or prescription an easement to foul or pollute the water of a stream by sewage or otherwise;² but this right will be lost by actual disuse for such a length of time as to be barred by the statute of limitations.³ But where a riparian owner acquires special rights in a stream of water flowing through his land, he cannot make such use of the water as will impose greater injuries upon other riparian owners affected than is expressly permitted by the terms of the grant; and where the right is acquired by prescription, it cannot be enlarged or extended to the injury of other riparian owners.⁴ Thus though a stream may be diverted from its channel for a reasonable use, it can only be detained as long as it is necessary and proper for that particular use, and must be returned to the channel before injury to the land of the riparian owner below,⁵ it being the general rule that a stream cannot be diverted from its channel to the injury of riparian owners above or below.⁶

SEC. 2223. Same — Same — In artificial water-courses. —

¹ *Prescott v. White*, 38 Mass. (21 Pick.) 341; s.c. 32 Am. Dec. 266.

See: *Davis v. Getchell*, 50 Me. 602; s.c. 79 Am. Dec. 636;

Prescott v. Williams, 46 Mass. (5 Met.) 429; s.c. 39 Am. Dec. 688;

Tillotson v. Smith, 32 N. H. 90; s.c. 64 Am. Dec. 355.

² *Merrifield v. Lombard*, 95 Mass. (13 Allen) 16; s.c. 90 Am. Dec. 172;

Moore v. Webb, 1 C. B. N. S. 673; s.c. 87 Eng. C. L. 673;

Crossley v. Lightowler, L. R. 2 Ch. 478; s.c. 3 Eq. Cas. 279; 36 L. J. Ch. 584.

³ *Merrifield v. Lombard*, 95 Mass. (13 Allen) 16; s.c. 90 Am. Dec. 172;

Moore v. Webb, 1 C. B. N. S. 673; s.c. 87 Eng. C. L. 673;

Crossley v. Lightowler, L. R. 2 Ch. 478; s.c. 3 Eq. Cas. 279; 36 L. J. Ch. 584.

⁴ *Jennison v. Walker*, 77 Mass. (11 Gray) 423;

Sampson v. Hoddinott, 1 C. B. N. S. 590; s.c. 87 Eng. C. L. 590;

Northam v. Hurley, 1 El. & Bl. 665; s.c. 72 Eng. C. L. 665;

Embrey v. Owen, 6 Exch. 353; s.c. 20 L. J. Ex. 212; 15 Jur. 633;

Bickett v. Morris, L. R. 1 H. L. Cas. 47; s.c. 12 Jur. N. S. 803; 14 L. T. 835.

⁵ *Pool v. Lewis*, 4 Ga. 162; s.c. 5 Am. Rep. 526;

Clinton v. Myers, 46 N. Y. 511; s.c. 7 Am. Rep. 373;

Arnold v. Foot, 12 Wend. (N. Y.) 330;

Miller v. Miller, 9 Pa. St. 74; s.c. 49 Am. Dec. 545.

⁶ *Macomber v. Godfrey*, 108 Mass. 219; s.c. 11 Am. Rep. 349;

Elliott v. Fitchburg R. Co., 64 Mass. (10 Cush.) 191;

Tuthill v. Scott, 43 Vt. 525; s.c. 5 Am. Rep. 301.

While the owner of land may not establish water-courses through the land of another, and can acquire no easement in water where he is permitted to construct such a water-course through the land of such other, or compel its perpetual maintenance whatever injury he may suffer from its discontinuance ; yet he may acquire an easement in such water-courses by grant or uninterrupted enjoyment for twenty years.¹ Thus a right to maintain an aqueduct through the land of another may be acquired by grant or user for twenty years or more.² So also may an easement to discharge water upon or through the land of another by means of an artificial channel as a race-way, by means of a pipe,³ or by drippings from the eaves of a roof.⁴

SEC. 2224. **Same—Same—Percolating waters and swamps.**—The rule laid down in the foregoing section in relation to the acquisition of the rights and easements through water does not apply to water standing on or percolating in the soil, but applies only to what are known in law as natural water-courses. Water standing upon or percolating through the soil forms a part of it, and constitutes one of the natural advantages of the land which each owner is entitled to use as fully and freely as he may be able by sinking a well, and the like. Prior occupancy of water percolating gives no exclusive right as against

¹ See : *Napier v. Bulwinkle*, 5 Rich. (S. C.) L. 317 ;

Magor v. Chadwick, 11 Ad. & E. 571 ; s.c. 39 Eng. C. L. 310 ;

Saunders v. Newman, 1 Barn. & Ald. 258 ;

Beeston v. Weate, 5 El. & Bl. 936 ; s.c. 85 Eng. C. L. 986 ;

Elliott v. Northeastern R. Co., 10 H. L. Cas. 332 ;

Arkwright v. Gell, 5 Mees. & W. 203 ; s.c. 2 H. & H. 17 ;

Wright v. Williams, 1 Mees. & W. 77 ; s.c. 1 Gale 410.

² *Watkins v. Peck*, 13 N. H. 360 ; s.c. 40 Am. Dec. 156 ;

Northam v. Hurley, 1 El. & Bl. 665 ; s.c. 72 Eng. C. L. 665.

See : *Ivimey v. Stocker*, L. R. 1 Ch. 396 ; s.c. 35 L. J. Ch. 467 ;

12 Jur. N. S. 419 ; 14 L. T. 427 ; 14 W. R. 743.

³ *Prescott v. White*, 38 Mass. (21 Pick.) 341 ; s.c. 32 Am. Dec. 266.

See : *Davis v. Getchell*, 50 Me. 602 ; s.c. 79 Am. Dec. 636 ;

Prescott v. Williams, 46 Mass. (5 Met.) 429 ; s.c. 39 Am. Dec. 688 ;

Tillotson v. Smith, 32 N. H. 90 ; s.c. 64 Am. Dec. 355.

⁴ *Cherry v. Stein*, 11 Md. 1 ;

Ashley v. Ashley, 60 Mass. (6 Cush.) 70 ;

Magor v. Chadwick, 11 Ad. & E. 571 ; s.c. 39 Eng. C. L. 310.

See : *Smith v. Smith*, 110 Mass. 302.

owners of adjacent lands.¹ The owner may draw off the water from a standing pool or swamp, or divert that percolating through the soil, notwithstanding its injurious results to an adjacent proprietor, except in those cases where he is actuated by malice, as where he cuts off the undercurrent, or pollutes the water, simply for the purpose of rendering a neighbor's spring or well useless.²

¹ *Brown v. Illius*, 25 Conn. 594; s.c. 27 Conn. 84, 94; 71 Am. Dec. 49;

Roath v. Driscoll, 20 Conn. 533; s.c. 52 Am. Dec. 352;

Emporia v. Sodan, 25 Kan. 588, 608; s.c. 37 Am. Rep. 265.

Water, combined with the earth, or passing through it, by percolation, or by filtration, or chemical attraction, has no distinctive character of ownership from the earth itself; not more than the metallic oxides of which the earth is composed. Water, whether moving or motionless in the earth, is not, in the eye of the law, distinct from the earth. The laws of its existence and progress, while there, are not uniform, and cannot be known or regulated. It rises to great heights, and moves collaterally, by influences beyond our apprehension. These influences are so secret, changeable, and uncontrollable, we cannot subject them to the regulations of law, nor build upon them a system of rules as has been done with streams upon the surface. Priority of enjoyment does not, in like cases, abridge the natural rights of adjoining proprietors. No one, building upon the line of his lot, can prevent his neighbor from digging a cellar, though thereby his building may be seriously endangered and injured. These principles are elaborately discussed and decided in *Greenleaf v. Francis*, 35 Mass. (18 Pick.) 117; *Callender v. Marsh*, 18 Mass. (1 Pick.) 417, 434; *Thurston v. Hancock*, 12 Mass. 220; s.c. 7 Am. Dec. 57; *Panton v. Holland*, 17 John. (N. Y.) 92; s.c. 8 Am. Dec. 369; *Lasala v. Holbrook*, 4

Paige (N. Y.) 169; s.c. 25 Am. Dec. 524; *Wyatt v. Harrison*, 3 Barn. & Ad. 871; s.c. 23 Eng. C. L. 380.

² See: *Hanson v. McCue*, 42 Cal. 303; s.c. 10 Am. Rep. 299;

Brown v. Illias, 25 Conn. 583;

Roath v. Driscoll, 20 Conn. 533; s.c. 52 Am. Dec. 352;

Hougan v. Milwaukee & St. P. R. Co., 35 Iowa 558; s.c. 14 Am. Rep. 502;

Chase v. Silverstone, 62 Me. 175; s.c. 16 Am. Rep. 419;

Wilson v. City of Bedford, 108 Mass. 261; s.c. 11 Am. Rep. 352;

Luther v. Winnisimmett Co., 63 Mass. (9 Cush.) 171;

Parker v. Boston & M. R. Co., 57 Mass. (3 Cush.) 107; s.c. 50 Am. Dec. 709;

Greenleaf v. Francis, 35 Mass. (18 Pick.) 117;

Village of Delhi v. Youmans, 45 N. Y. 362; s.c. 6 Am. Rep. 100;

Radcliff v. Mayor of Brooklyn, 4 N. Y. 195, 200; s.c. 53 Am. Dec. 357;

Ellis v. Duncan, 21 Barb. (N. Y.) 230;

Smith v. Adams, 6 Paige Ch. (N. Y.) 435;

Clark v. Lawrence, 6 Jones (N. C.) Eq. 183; s.c. 78 Am. Dec. 241;

Frazier v. Brown, 12 Ohio St. 311;

Wheatley v. Baugh, 25 Pa. St. 528; s.c. 64 Am. Dec. 657, 721;

Hodgkinson v. Ennor, 4 Best & S. 229; s.c. 116 Eng. C. L. 229;

Rawstron v. Taylor, 11 Exch. 369; 25 L. J. Ex. 33;

Dickinson v. Canal Co., 7 Exch. 282, 300; s.c. 21 L. J. Ex. 241; 16 Jur. 200;

Chasemore v. Richards, 5 Hurl. & N. 982;

SEC. 2225. **Same**—To lateral and subjacent support.—By lateral and subjacent support is meant the support proceeding from or connected with the side of any given property, and is the right which the owner of land has to have such land supported by the land or subsoil of the adjoining owners,¹ and is like the rights of the owner of land in a flowing stream over his soil.² Thus it has been said that the owner of land has the right to have it remain in its natural condition, unaffected by any acts of his adjoining proprietors.³ Every owner of land is entitled to have it supported in its natural condition by the land of the adjoining proprietor, and if the latter removes such support to the injury of the former he is liable for the damage so occasioned;⁴ consequently an adjoining

- Dudden v. Guardians, 1 Hurl. & N. 627; s.c. 26 L. J. Ex. 146; Smith v. Kendrick, 7 Man. Gr. & S. (7 C. B.) 546; s.c. 62 Eng. C. L. 515; Acton v. Blundell, 12 Mees. & W. 324; s.c. 13 L. J. Ex. 289; Morton v. Scholefield, 9 Mees. & W. 665.
- ¹ Foley v. Wyeth, 84 Mass. (2 Allen) 133; Lasala v. Holbrook, 4 Paige Ch. (N. Y.) 169; s.c. 25 Am. Dec. 524; Anderson's L. Dict. 599.
- ² Gilmore v. Driscoll, 122 Mass. 199; s.c. 23 Am. Rep. 312; Thurston v. Hancock, 12 Mass. 220, 226; s.c. 7 Am. Dec. 57; Farrand v. Marshall, 19 Barb. (N. Y.) 380; s.c. 21 Barb. (N. Y.) 409; Pantan v. Holland, 17 John. (N. Y.) 92; s.c. 8 Am. Dec. 369.
- ³ Gilmore v. Driscoll, 122 Mass. 199; s.c. 23 Am. Rep. 312; Thurston v. Hancock, 12 Mass. 220, 226; s.c. 7 Am. Dec. 57; Busby v. Holthaus, 46 Mo. 161; Charless v. Rankin, 22 Mo. 566; s.c. 66 Am. Dec. 642; Farrand v. Marshall, 19 Barb. (N. Y.) 380; s.c. 21 Barb. (N. Y.) 409; Pantan v. Holland, 17 John. (N. Y.) 92; s.c. 8 Am. Dec. 369; Lasala v. Holbrook, 4 Paige Ch. (N. Y.) 169; s.c. 25 Am. Dec. 524; Beard v. Murphy, 37 Vt. 99, 104; s.c. 86 Am. Dec. 693; Richardson v. Vermont Cent. R. Co., 25 Vt. 465; s.c. 60 Am. Dec. 283; Stevenson v. Wallace, 27 Gratt. (Va.) 86, 87; Humphries v. Brogden, 12 Ad. & E. N. S. (12 Q. B.) 739, 743; s.c. 64 Eng. C. L. 739, 743.
- The owner of land has a natural right to the use of it in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lot.**
- Busby v. Holthaus, 46 Mo. 161; Charless v. Rankin, 22 Mo. 566; s.c. 66 Am. Dec. 642; McGuire v. Grant, 25 N. J. L. (1 Dutch.) 356; s.c. 67 Am. Dec. 49; Hay v. Cohoes Co., 2 N. Y. 159, 162; s.c. 51 Am. Dec. 279; Lasala v. Holbrook, 4 Paige Ch. (N. Y.) 169; s.c. 25 Am. Dec. 524; Beard v. Murphy, 37 Vt. 99, 104; s.c. 86 Am. Dec. 693; Humphries v. Brogden, 12 Ad. & E. N. S. (12 Q. B.) 739, 743; s.c. 64 Eng. C. L. 739, 743; Wyatt v. Harrison, 3 Barn. & Ad. 871; s.c. 23 Eng. C. L. 380.
- ⁴ Dowling v. Hennings, 20 Md. 179; s.c. 83 Am. Dec. 545; Gilmore v. Driscoll, 122 Mass. 199; s.c. 23 Am. Rep. 312; Foley v. Wyeth, 84 Mass. (2 Allen) 131, 133; s.c. 79 Am. Dec. 771;

owner cannot make an excavation upon his own land even for the purpose of improving the same, where such excavation will deprive his neighbor's land of the lateral support necessary to sustain it.¹ This right of property, however, is only in the land in its natural condition. In case of injury the damages will be limited to the injury done to the land itself, and will not include the buildings thereon,² unless they have been standing for the period requisite to win for them a right to the necessary

- Charless v. Rankin*, 22 Mo. 566 ;
 s.c. 66 Am. Dec. 642 ;
McGuire v. Grant, 25 N. J. L. (1
 Dutch.) 356 ; s.c. 67 Am. Dec.
 49 ;
Marvin v. Brewster Iron Mining
Co., 55 N. Y. 538 ; s.c. 14 Am.
 Rep. 322 ;
Lampman v. Milks, 21 N. Y. 505,
 514 ;
Partridge v. Gilbert, 15 N. Y.
 601, 612 ; s.c. 69 Am. Dec. 632 ;
Auburn & C. Plank Road Co. v.
Douglass, 9 N. Y. 444, 448 ;
Radcliff v. Mayor of Brooklyn, 4
 N. Y. 195, 202 ; s.c. 53 Am.
 Dec. 357 ;
Bensen v. Suarez, 19 Abb. (N.
 Y.) Pr. 61, 65 ; s.c. 28 How. (N.
 Y.) Pr. 511, 513 ; 43 Barb. (N.
 Y.) 408, 409 ;
Pixley v. Clark, 32 Barb. (N. Y.)
 268, 273 ;
Farrand v. Marshall, 21 How.
 (N. Y.) Pr. 409, 414 ; s.c. 19
 How. (N. Y.) 380, 383 ;
Bellows v. Sackett, 15 Barb. (N.
 Y.) 96, 101 ;
Ludlow v. Hudson River R. Co.,
 6 Lans. (N. Y.) 128, 131 ;
People ex rel. Barlow v. Canal
Board, 2 N. Y. Supr. Ct. (T. &
 C.) 275, 277, 278, 279 ;
Beard v. Murphy, 37 Vt. 99, 104 ;
 s.c. 86 Am. Dec. 693 ;
Richardson v. Vermont Cent. R.
Co., 25 Vt. 465 ; s.c. 60 Am.
 Dec. 283 ;
Transportation Co. v. Chicago,
 99 U. S. 635 ; bk. 25 L. ed. 336 ;
Jones v. Bird, 5 Barn. & Ald. 837 ;
 s.c. 1 D. & R. 497 ;
Vaughan v. Menlove, 3 Bing. N.
 C. 468 ; s.c. 32 Eng. C. L. 219 ;
Trower v. Chadwick, 3 Bing. N.
 C. 334 ; s.c. 32 Eng. C. L. 160.
¹ *Foley v. Wyeth*, 84 Mass. (2 Allen)
 131 ; s.c. 79 Am. Dec. 771 ;
Callender v. Marsh, 18 Mass. (1
 Pick.) 417, 418 ;
Thurston v. Hancock, 12 Mass.
 220 ; s.c. 7 Am. Dec. 57 ;
Charless v. Rankin, 22 Mo. 566 ;
 s.c. 66 Am. Dec. 642 ;
McGuire v. Grant, 25 N. J. L. (1
 Dutch.) 356 ; s.c. 67 Am. Dec.
 49 ;
Austin v. Hudson River R. Co.,
 25 N. Y. 334 ;
Hay v. The Cohoes Co., 2 N. Y.
 159, 162 ; s.c. 51 Am. Dec. 279 ;
Panton v. Holland, 17 John. (N.
 Y.) 92 ; s.c. 8 Am. Dec. 369 ;
Lasala v. Holbrook, 4 Paige Ch.
 (N. Y.) 169 ; s.c. 25 Am. Dec.
 524 ;
Beard v. Murphy, 37 Vt. 99, 101 ;
 s.c. 86 Am. Dec. 693 ;
Richardson v. Vermont Central
R. Co., 25 Vt. 465 ; s.c. 60 Am.
 Dec. 283 ;
Humphries v. Brogden, 12 Ad. &
 E. N. S. (12 Q. B.) 739, 743 ; s.c.
 64 Eng. C. L. 739, 743 ;
Wyatt v. Harrison, 3 Barn. & Ald.
 871 ; s.c. 23 Eng. C. L. 380 ;
Elliott v. Northeastern R., 10 H.
 L. Cas. 333 ;
Backhouse v. Bonomi, 9 H. L.
 Cas. 503 ;
Bibby v. Carter, 3 H. & N. 153 ;
 s.c. 28 L. J. Ex. 182 ;
Partridge v. Scott, 3 Mees. & W.
 220 ; s.c. 1 H. & H. 31.
² *Gilmore v. Driscoll*, 122 Mass. 199 ;
 s.c. 23 Am. Rep. 312 ;
Charless v. Rankin, 22 Mo. 566 ;
 s.c. 66 Am. Dec. 642 ;
Smith v. Thackerah, L. R. 1 C.
 P. 564 ; s.c. 35 L. J. C. P. 276 ;
 12 Jur. N. S. 545 ; 14 L. T. 761 ;
 14 W. R. 832 ;
Partridge v. Scott, 3 Mees. & W.
 220 ; s.c. 1 H. & H. 31.

support by prescription.¹ In those cases where there has been a grant of minerals with the privilege of working, together with the rights incident and appurtenant thereto, this will not deprive the grantor of the right to support of the surface of the soil, but will deprive him of any right of action for damages occasioned by the loss of a spring by reason of the ordinary working of the mines.²

- ¹ *Shrieve v. Stokes*, 8 B. Mon. (Ky.) 453; s.c. 48 Am. Dec. 401;
Hay v. Cohoes Co., 2 N. Y. 159, 162; s.c. 51 Am. Dec. 279;
Lasala v. Holbrook, 4 Paige Ch. (N. Y.) 169, 173; s.c. 25 Am. Dec. 524;
Richart v. Scott, 7 Watts (Pa.) 460; s.c. 32 Am. Dec. 779;
Humphries v. Brogden, 12 Ad. & E. N. S. (12 Q. B.) 739; s.c. 64 Eng. C. L. 739;
Bonomi v. Backhouse, El. B. & E. 623; s.c. H. L. Cas. 503; 96 Eng. C. L. 622.
- ² *Coleman v. Chadwick*, 80 Pa. St. 81; s.c. 21 Am. Rep. 93.
Easement in support of surface, as to general doctrine of,
 See: *Myer v. Hobbs*, 57 Ala. 175;
Roath v. Driscoll, 20 Conn. 533; s.c. 52 Am. Dec. 352;
Wilms v. Jess, 94 Ill. 464; s.c. 34 Am. Rep. 242;
Nevins v. City of Peoria, 41 Ill. 502; s.c. 89 Am. Dec. 392;
Yandes v. Wright, 66 Ind. 319; s.c. 32 Am. Rep. 109;
O'Neil v. Harkins, 8 Bush (Ky.) 650;
Shafer v. Wilson, 44 Md. 268;
White v. Dresser, 135 Mass. 150; s.c. 46 Am. Rep. 454;
Gilmore v. Driscoll, 122 Mass. 199; s.c. 23 Am. Rep. 312;
Thurston v. Hancock, 12 Mass. 220; s.c. 7 Am. Dec. 57;
Buskirk v. Strickland, 47 Mich. 389; s.c. 11 N. W. Rep. 210;
Dyer v. City of St. Paul, 27 Minn. 457; s.c. 8 N. W. Rep. 272;
Charless v. Rankin, 23 Mo. 566; s.c. 66 Am. Dec. 612;
Executors of Lord v. Carbon Iron Mfg. Co., 38 N. J. Eq. (11 Stew.) 452;
Zinc Co. v. Franklinite Co., 13 N. J. Eq. (2 Beas.) 342;
McGuire v. Grant, 25 N. J. L. (1 Dutch.) 356; s.c. 67 Am. Dec. 49;
Marvin v. Brewster Iron Mining Co., 55 N. Y. 538; s.c. 14 Am. Rep. 322;
Hay v. Cohoes Co., 2 N. Y. 159; s.c. 51 Am. Dec. 279;
Lasala v. Holbrook, 4 Paige Ch. (N. Y.) 169; s.c. 25 Am. Dec. 224;
Carlin v. Chappell, 101 Pa. St. 348; s.c. 47 Am. Rep. 723;
Horner v. Watson, 79 Pa. St. 242; s.c. 21 Am. Rep. 55;
Horner v. Watson, 70 Pa. St. 251; s.c. 21 Am. Rep. 55;
Jones v. Wagner, 66 Pa. St. 429; s.c. 5 Am. Rep. 385;
Wheatley v. Baugh, 25 Pa. St. 528; s.c. 64 Am. Dec. 721;
Coleman v. Chadwick, 8 Pa. St. 81;
Hoy v. Sterrett, 2 Watts (Pa.) 327; s.c. 27 Am. Dec. 313;
Beard v. Murphy, 37 Vt. 99; s.c. 86 Am. Dec. 693;
Richardson v. Vermont Cent. R. Co., 25 Vt. 465; s.c. 60 Am. Dec. 283;
Tunstall v. Christian, 80 Va. 1; s.c. 56 Am. Rep. 581;
Northern Trans. Co. of Ohio v. Chicago, 99 U. S. 635; bk. 25 L. ed. 336;
Wyatt v. Harrison, 3 Barn. & Ad. 871; s.c. 23 Eng. C. L. 380;
Smart v. Morton, 5 El. & B. 30; s.c. 30 Eng. L. & Eq. 385;
Pennington v. Gellard, 9 Exch. 1;
Rowbotham v. Wilson, 8 H. L. Cas. 348;
Dalton v. Angus, L. R. 6 App. Cas. 740; s.c. 34 Moak Eng. Rep. 742;
Hext v. Gill, L. R. 7 Ch. App. 699;
Harris v. Ryding, 5 Mees. & W. 59, 60.

SEC. 2226. **Same—Same—How acquired.**—A right to lateral and subjacent support is one that exists *ex jure naturæ*, but is incident to the soil only and does not include any structure or extra burden placed thereon, unless such right of support has been acquired in the same manner as any other easement, by grant, either express or implied, or by prescription.¹

SEC. 2227. **Same—Same—Implied grant of lateral support.**—Where one person owns two adjoining lots and conveys one of them with a building thereon, there is an implied grant of an easement for lateral support which the grantor cannot, by excavation upon the other lot, deprive the grantee of. A court of equity will restrain a grantor from digging a pit or doing any other act on the lot retained which will detract from the full enjoyment of the lot conveyed.² In those cases where there is a separate ownership in the upper and lower portion of a house, the owner of the upper portion is entitled to subjacent support from the owner of the lower portion, and the owner of the lower has an easement in the upper portion, the roof and the like, for protection from rain and the elements. In such cases neither owner can do any affirmative act upon his own premises which will result in damages to the other. Yet neither is under obligation to repair his portion for the protection of the other.³

SEC. 2228. **Same—Party walls.**—By a party wall, in the ordinary meaning of the term, is understood a wall between adjoining owners, built at their common expense and for their common advantage;⁴ and each has title in

¹ See: *Ante*, p. 2233, footnote 1.

² *McGuire v. Grant*, 25 N. J. L. (1 Dutch.) 356; s.c. 67 Am. Dec. 49;

Eno v. Del Vecchio, 4 Duer (N. Y.) 53;

Lasala v. Holbrook, 4 Paige Ch. (N. Y.) 169; s.c. 25 Am. Dec. 524;

United States v. Appleton, 1 Sumn. C. C. 492; s.c. Fed. Cas. No. 14463;

Humphries v. Brogden, 12 Ad. & E. N. S. (12 Q. B.) 738, 743; s.c. 64 Eng. C. L. 738, 743;

Brown v. Windsor, 1 Crompt. & J. 20;

Richards v. Rose, 9 Ex. Ch. 218; s.c. 2 C. L. R. 311; 23 L. J. Ex. 3;

Palmer v. Fleshees, 1 Sid. 167.

³ *Cheesebrough v. Green*, 10 Conn. 318; s.c. 26 Am. Dec. 396;

Pierce v. Dyer, 109 Mass. 374; s.c. 12 Am. Rep. 716;

Calvert v. Aldrich, 99 Mass. 74; s.c. 96 Am. Dec. 693.

⁴ *Orman v. Day*, 5 Fla. 385, 392; *Koenig v. Haddix*, 21 Ill. App. 53;

severalty to the one-half, but may do nothing that will weaken the support of the other half. Thus, where one of the owners of a party wall tears down his half of such wall, he does so at the risk of rendering himself liable for any damages sustained by the owner of the remaining portion of the wall by reason thereof.¹ It is not every wall which is common between two houses that is entitled to be designated as a party wall. Thus a wall of which the two adjoining owners are tenants in common is not strictly a party wall;² neither is a wall divided longitudinally into two equal parts, one moiety belonging to each of the adjoining owners;³ even though each moiety is subject to a cross easement in favor of the owner of the other;⁴ or a wall belonging entirely to one

Traute v. White, 46 N. J. Eq. 437; s.c. 19 Atl. Rep. 196;

Hammann v. Jordan, 9 N. Y. Supp. 423;

Hieatt v. Morris, 10 Ohio St. 523; s.c. 78 Am. Dec. 280;

Western National Bank's Appeal, 102 Pa. St. 171;

Gordon v. Milne, 10 Phila. (Pa.) 15;

Beaver v. Nutter, 10 Phila. (Pa.) 345.

¹ *Orman v. Day*, 5 Fla. 385;

Brooks v. Curtis, 50 N. Y. 639; s.c. 10 Am. Rep. 545;

Dubois v. Beaver, 25 N. Y. 123; s.c. 82 Am. Dec. 326;

Eno v. Del Vecchio, 4 Duer (N. Y.) 53;

Sherred v. Cisco, 4 Sandf. (N. Y.) 480;

Matts v. Hawkins, 5 Taunt. 20; s.c. 14 Rev. Rep. 695.

² *Montgomery v. Masonic Hall*, 70 Ga. 38;

Brown v. Werner, 40 Md. 15;

Sherred v. Cisco, 4 Sandf. (N. Y.) 480;

Regina v. Copp, 17 Ont. Reps. (Can.) 738;

Wiltshire v. Sidford, 8 Barn. & C. 257, 259; s.c. 15 Eng. C. L. 134;

Cubitt v. Porter, 8 Barn. & C. 257; s.c. 15 Eng. C. L. 133;

Watson v. Gray, 14 Ch. Div. 192; s.c. 49 L. J. Ch. 243; 42 L. T. 294; 28 W. R. 438; 44 J. P. 537;

Standard Bank of B. S. A. v.

Stokes, 9 Ch. Div. 68; s.c. 47 L. J. Ch. 554; 38 L. T. 672; 26 W. R. 492;

Jones v. Read, 10 Ir. C. L. 315.

³ *Cubitt v. Porter*, 8 Barn. & C. 257; s.c. 15 Eng. C. L. 133;

Standard Bank v. Stokes, 9 Ch. Div. 68; s.c. 47 L. J. Ch. 554; 38 L. T. 672; 26 W. R. 492;

Matts v. Hawkins, 5 Taunt. 20; s.c. 14 Rev. Rep. 695.

⁴ *Graves v. Smith*, 87 Ala. 450; s.c. 6 So. Rep. 308;

Gibson v. Holden, 115 Ill. 199; s.c. 56 Am. Rep. 146; 3 N. E. Rep. 282;

Ingals v. Plamondon, 75 Ill. 118;

Wilcox v. Danforth, 5 Ill. App. 378;

Bloch v. Isham, 28 Ind. 37; s.c. 92 Am. Dec. 287;

Hoffman v. Kuhn, 56 Miss. 746; s.c. 34 Am. Rep. 491;

Brooks v. Curtis, 50 N. Y. 639; s.c. 10 Am. Rep. 545;

Hendricks v. Stark, 37 N. Y. 106; s.c. 93 Am. Dec. 549;

Partridge v. Gilbert, 15 N. Y. 601; s.c. 99 Am. Dec. 632;

Nash v. Kemp, 49 How. (N. Y.) Pr. 522;

Sherred v. Cisco, 4 Sandf. (N. Y.) 480;

Burton v. Moffitt, 3 Oreg. 29;

Sanders v. Martin, 2 Lea (Tenn.) 213; s.c. 31 Am. Rep. 598;

Andrae v. Haseltine, 58 Wis. 395; s.c. 46 Am. Rep. 635.

of the adjoining owners, although subject to an easement or right of the other adjoining owner to have it maintained as a dividing wall between the two tenements.¹ But each of these common walls may become a party wall by prescription, where used as such for twenty years or more.² Party walls are generally erected by express agreement between the parties, partly on the land of each for the common support of their buildings, and the owner of each house has an easement in such wall for its support.³ And where a person owning a tract of land, or two lots, erects thereon two buildings with one wall between them for common support, a conveyance by him of either, together with the land upon which it is erected, will carry with it an easement for its support in the common wall, which will thereby become a party wall.⁴ While as a general rule party walls are erected half on each of two contiguous estates, yet it is not indispensably necessary to the character of a party wall that they should be so erected.⁵ The separation wall between two buildings will be presumed to be a party wall until the contrary is shown,⁶ and the parties will be liable to con-

¹ *Rogers v. Sinsheimer*, 50 N. Y. 646.

See: *Kilgour v. Ashcom*, 5 Har. & J. (Md.) 82;

Lampinan v. Milks, 31 N. Y. 505, 509, 513;

Knight v. Pursell, 11 Ch. Div. 412; s.c. 48 L. J. Ch. 395; 40 L. T. 391; 27 W. R. 817;

Weston v. Arnold, L. R. 8 Ch. Div. 1084; s.c. 43 L. J. Ch. 123; 22 W. R. 284.

² *Dowling v. Hennings*, 20 Md. 179; s.c. 83 Am. Dec. 545;

Eno v. Del Vecchio, 4 Duer (N. Y.) 53.

See: *Mitchell v. Mayor*, 49 Ga. 19; s.c. 15 Am. Rep. 669;

Napier v. Bulwinkle, 5 Rich. (S. C.) L. 311.

³ *Webster v. Stevens*, 5 Duer (N. Y.) 553;

Eno v. Del Vecchio, 4 Duer (N. Y.) 53.

See: *Bloch v. Isham*, 28 Ind. 37; s.c. 92 Am. Dec. 287;

Hieatt v. Morris, 10 Ohio St. 523; s.c. 78 Am. Dec. 280.

⁴ *Webster v. Stevens*, 5 Duer (N. Y.) 553;

Giles v. Dugro, 1 Duer (N. Y.) 331;

Murly v. McDermott, 8 Ad. & E. 136, 138; s.c. 35 Eng. C. L. 519.

See: *Wheeler v. Clark*, 58 N. Y. 267.

⁵ See: *Dowling v. Hennings*, 20 Md. 179; s.c. 83 Am. Dec. 545;

Partridge v. Gilbert, 15 N. Y. 601; s.c. 69 Am. Dec. 632;

Brondage v. Warner, 2 Hill (N. Y.) 145;

Evan v. Jayne, 23 Pa. St. 34, 36;

Wiltshire v. Sidford, 8 Barn. & C. 258, 259; s.c. 15 Eng. C. L. 134;

Cubitt v. Porter, 8 Barn. & C. 257; s.c. 15 Eng. C. L. 133;

Bradlee v. Christ's Hospital, 4 Mann. & G. 712, 761; s.c. 43 Eng. C. L. 368, 393.

⁶ *Schile v. Brokhahus*, 80 N. Y. 614;

Campbell v. Mesier, 4 John. Ch. (N. Y.) 335; s.c. 8 Am. Dec. 570.

tribute to the expenses of the erection of such a wall under such circumstances.¹

SEC. 2229. *Same—Mines and mining rights.*—We have already seen that the owner of the surface of the soil has a right to all that lies beneath, but that he may sever the possession of the soil, and the right to the minerals that lie beneath, conveying the one and retaining the other.² Thus it is not uncommon in mining districts for the ownership of the surface to vest in one person, and the right to the minerals to be vested in another.³ In such cases the owner of the right to the minerals will be entitled to work and mine them upon certain conditions and restrictions, and the surface will be entitled to support.⁴ In the absence of anything regulating the rights and enjoyment of each, the owner of the minerals cannot remove them without leaving a sufficient support to maintain the surface in its natural state;⁵ consequently where the owner of an entire fee grants to another the right to the minerals, reserving the surface, such grantee will be entitled to take only so much as he can without injury to the surface reserved;⁶ and the

¹ *Brown v. Werner*, 40 Md. 13, 20;
Crashaw v. Sumner, 55 Mo. 517,
 531;
Partridge v. Gilbert, 15 N. Y.
 607; s.c. 59 Am. Dec. 632, 633;
Brown v. Pentz, 1 Abb. (N. Y.)
 App. Dec. 231;
Denman v. Prince, 40 Barb.
 N. Y. 217;
Ferris v. Van Buskirk, 18 Barb.
 (N. Y.) 397, 401;
Partridge v. Gilbert, 3 Duer (N.
 Y.) 184, 204;
Campbell v. Mesier, 4 John. Ch.
 (N. Y.) 334, 335; s.c. 8 Am.
 Dec. 570;
Brown v. Pentz, 11 Leg. Obs. (N.
 Y.) 28;
In re Rensselaer & S. R. Co., 4
 Paige Ch. (N. Y.) 556;
Clarke v. Southwick, 1 Curt. C. C.
 297, 301; s.c. 5 Fed. Cas. 981.
 See; *Antomarchi v. Russell*, 63
 Ala. 356, 360; s.c. 35 Am. Rep.
 40, 43;
Eno v. Del Vecchio, 4 Duer (N.
 Y.) 53, 60;
Sherred v. Cisco, 4 Sandf. (N.

Y.) 480, 485.

² See: *Ante*, § 97.

³ See: *Melton v. Lambard*, 51 Cal.
 258;

Adam v. Briggs Iron Co., 61
 Mass. (7 Cush.) 361;
Ryckman v. Gillis, 57 N. Y. 68;
 s.c. 15 Am. Rep. 464.

⁴ See: *Ante*, §§ 99–101.

⁵ *Wilms v. Jess*, 94 Ill. 464; s.c. 34
 Am. Rep. 242;

Yandes v. Wright, 66 Ind. 219;
 s.c. 32 Am. Rep. 109;
Horner v. Watson, 79 Pa. St.
 242; s.c. 21 Am. Rep. 55;
Jones v. Wagner, 66 Pa. St. 429;
 s.c. 5 Am. Rep. 385;
Smart v. Morton, 5 El. & B. 30;
 s.c. 30 Eng. L. & Eq. 335;
Harris v. Ryding, 5 Mees. & W.
 58, 60.

⁶ *Zinc Co. v. Franklinite Co.*, 13 N.
 J. Eq. (2 Beas.) 342;

*Marvin v. Brewster Iron Mining
 Co.*, 55 N. Y. 538; s.c. 14 Am.
 Rep. 322;
Coleman v. Chadwick, 80 Pa. St.
 81; s.c. 21 Am. Rep. 93;

grantee will be entitled to the same right where the owner reserves the minerals and conveys the surface, unless there is a clause in the contract of sale or deed of conveyance clearly showing that a power to destroy the surface, if it shall be necessary to do so in order to get the minerals, is reserved by the grantor.¹ Where there has been a severance of the surface and the minerals,² a right of way for mining purposes may be created by grant, either express or implied,³ or may be acquired by prescription.⁴ The owner of the minerals may also acquire an easement in water for use in his mining operations,⁵ and also a right to foul such water and discharge it after precipitation of the minerals.⁶ Statutes have been passed in many of the states of the Union in which mineral deposits are found granting the right to take water from natural streams by appropriation for mining purposes.⁷ Where water is appropriated, as provided by these statutes, the person first appropriating is prior in right to the use and enjoyment of the waters thus appropriated to the full extent of that appropriation.⁸ Such appropriation will carry with it the right to foul

Wakefield v. Buccleuch, L. R. 4 Eq. Cas. 613.

¹ Hext v. Gill, L. R. 7 Ch. 699; s.c. 41 L. J. Ch. 761; 27 L. T. 291; 20 W. R. 957.

See: Livingston v. Moingona Coal Co., 49 Iowa 369; s.c. 31 Am. Rep. 150; *Ante*, § 102.

² See: *Ante*, § 97.

³ Tracy v. Atherton, 35 Vt. 52; s.c. 82 Am. Dec. 621;

Ackroyd v. Smith, 10 C. B. (10 J. Scott) 164; s.c. 70 Eng. C. L. 164;

Midgley v. Richardson, 14 Mees. & W. 595; s.c. 15 L. J. Eq. 257;

Daud v. Kingscote, 6 Mees. & W. 196.

⁴ Ogden v. Grove, 38 Pa. St. 487; Gayford v. Moffatt, L. R. 4. Ch. 133.

⁵ Sampson v. Burnside, 3 N. II. 264;

McCallum v. Germantown Water Co., 54 Pa. St. 40;

Baxendale v. McMurray, L. R. 2 Ch. 790; s.c. 15 W. R. 32.

⁶ Wright v. Williams, 1 Mees. & W. 77; s.c. 1 Tyr. & G. 375; 1 Gale 410.

See: Earl v. De Hart, 12 N. J. Eq. (1 Beas.) 280; s.c. 72 Am. Dec. 395;

Carlyon v. Lovering, 1 Hurl. & N. 784, 798; s.c. 26 L. J. Ex. 251;

Ante, § 141.

⁷ Smith v. O'Hara, 43 Cal. 371; Union Water Co. v. Crary, 25 Cal. 504, 505; s.c. 85 Am. Dec. 145;

Butte Canal & D. Co. v. Vaughn, 11 Cal. 143; s.c. 70 Am. Dec. 769;

Atchison v. Peterson, 87 U. S. (20 Wall.) 507, 508; bk. 22 L. ed. 414.

⁸ Hill v. Smith, 27 Cal. 476;

Woolman v. Garringer, 1 Mon. Tr. 535;

Lobdell v. Simpson, 2 Nev. 274; s.c. 90 Am. Dec. 537;

Atchison v. Peterson, 87 U. S. (20 Wall.) 507, 508; bk. 22 L. ed. 414.

waters above referred to, and also carries with it the right to have the quality of the water appropriated preserved, so that it shall not be impaired for the use for which designed, and the purpose of the appropriation thereby defeated.¹

SEC. 2230. **Same—Legalized nuisance.**—The owner of land may acquire, either by grant or prescription, the right to do things on his land which, without such license, would be a nuisance, and for which he would be liable in damages. This right constitutes an easement in the land to create the nuisance free from such liabilities or consequential damages. Thus where a party exercises an offensive trade in the same place for more than twenty years, with no molestation or interruption, except a suspension thereof for two years before the twenty years elapse, he does not, by such suspension, lose his right, unless it appears that he intended to abandon and not resume the exercise of such trade.² But to render the nuisance a lawful easement upon neighboring land, the business or trade must be productive of benefit to the public. A nuisance thus legalized must be kept strictly within the conditions on which the right was acquired; it can neither be increased nor established in a new place, and in the exercise of the trade or calling, the parties will be required to do so with the least possible discomfort or annoyance to the public.³

¹ Butte Canal & D. Co. v. Vaughn, 11 Cal. 143; s.c. 70 Am. Dec. 769.

See: Union Water Co. v. Crary, 25 Cal. 504; s.c. 85 Am. Dec. 145; Wixon v. Bear River & Auburn Water & Mining Co., 24 Cal. 367; s.c. 85 Am. Dec. 69; Phoenix Co. v. Fletcher, 23 Cal. 481.

² Dana v. Valentine, 46 Mass. (5 Met.) 8.

Mere ceasing to enjoy an easement does not destroy a party's right, unless it appears from the facts and circumstances that he intended to abandon and not to resume it. So it was decided in Moore v. Rawson, 3 Barn. &

C. 332; s.c. 5 Doyl. & Ryd. 234; 10 Eng. C. L. 156. In that case, the party's right to the easement had become perfect before he ceased to enjoy it, and in that respect it differs from the present case; but the principle, we think, applies here. The material inquiry in all such cases is, whether there was an intention to abandon the easement or privilege before enjoyed, or whether the non-user is imputable to some other cause.

Dana v. Valentine, 46 Mass. (5 Met.) 8.

³ Dana v. Valentine, 46 Mass. (5 Met.) 8;

SEC. 2231. **How created.**—At common law easements are created by grant, either express or implied, or acquired by prescription, which is said to imply a grant.¹ They are incapable of being created by parol, unless such a part performance is shown as to take the transaction out of the statute of frauds.² In many of the states an easement may be created by an exception or reservation in a deed of conveyance;³ and an exception in a deed

Holsman v. Boiling Spring Co.,
14 N. J. Eq. (1 McC.) 335,
346;

Bower v. Hill, 2 Bing. N. C. 339;
s.c. 29 Eng. C. L. 563;

Elliotson v. Fleetham, 2 Bing. N.
C. 134; s.c. 29 Eng. C. L.
470;

*St. Helen's Smelting Co. v. Tip-
ping*, 11 H. L. Cas. 642; s.c. L.
J. Q. B. 66; 11 Jur. N. S. 785;
12 L. T. 776; 13 W. R. 1083;

Baxendale v. McMurray, L. R. 2
Ch. 790; s.c. 15 W. R. 32;

Aldred's Case, 9 Co. 559a.

¹ See: *Cook v. Pridden*, 45 Ga. 331;
Morse v. Copeland, 68 Mass. (2
Gray) 302;

Sargent v. Ballard, 26 Mass. (9
Pick.) 255;

Fuhr v. Dean, 26 Mo. 116;

Lobdell v. Hall, 3 Nev. 507;

Adams v. Andrews, 15 Ad. & E.
N. S. (15 Q. B.) 284; s.c. 69
Eng. C. L. 289.

Rowbotham v. Wilson, 8 H. L.
Cas. 362.

² *Robinson v. Thrailkill*, 110 Ind.
117; s.c. 10 N. E. Rep. 647;

Taylor v. Millard, 118 N. Y. 244;
s.c. 23 N. E. Rep. 376; 6 L. R.
A. 667.

See: *Declonet v. Borel*, 15 La.
An. 606;

Dyer v. Sanford, 50 Mass. (9 Met.)
395; s.c. 43 Am. Dec. 399;

Arnold v. Stearn, 41 Mass. (24
Pick.) 109; s.c. 35 Am. Dec.
305;

Fuhr v. Dean, 26 Mo. 116; s.c.
69 Am. Dec. 484;

Veghte v. The R. W. P. Co., 19
N. J. Eq. (4 C. E. Gr.) 142;

Cronkhite v. Cronkhite, 94 N. Y.
323;

Pierce v. Keator, 70 N. Y. 419,
422;

Child v. Chappell, 9 N. Y. 246;

Pitkin v. Long Island R. Co., 2

Barb. Ch. (N. Y.) 221; s.c. 47
Am. Dec. 320;

Shepherd v. McCalmont Oil Co.,
38 Hun (N. Y.) 37;

Thompson v. Gregory, 4 John.
(N. Y.) 81; s.c. 4 Am. Dec.
255;

Post v. Parshall, 22 Wend. (N. Y.)
425, 432;

Huff v. McCauley, 53 Pa. St. 206;
s.c. 91 Am. Dec. 203;

Collam v. Hocker, 1 Rawle (Pa.)
108;

Harris v. Miller, 1 Meigs (Tenn.)
158; s.c. 33 Am. Dec. 138;

Large v. Dennis, 5 Sneed (Tenn.)
597;

Stevenson v. Wallace, 27 Gratt.
(Va.) 77.

A right in the nature of an easement cannot be created by a parol agreement for the partition of lands, because that involves something besides a severance of the unity of possession.

Taylor v. Millard, 118 N. Y. 244;
s.c. 23 N. E. Rep. 376; 6 L. R.
A. 667.

³ *Chappell v. New York, N. H. & H.
R. Co.*, 62 Conn. 195; s.c. 24

Atl. Rep. 997; 17 L. R. A. 420;

Brossart v. Corlett, 27 Iowa 288;

Claffin v. Boston & A. R. Co.,
157 Mass. 489; s.c. 32 N. E.
Rep. 659; 20 L. R. A. 638;

Ashcroft v. Eastern R. Co., 126
Mass. 196; s.c. 30 Am. Rep.
672;

Corbin v. Dale, 57 Mo. 297;

Cocheco Mfg. Co. v. Whittier, 10
N. H. 310;

Hagerty v. Lee, 54 N. J. L. (25
Vr.) 580; s.c. 25 Atl. Rep. 319;
20 L. R. A. 631;

Rose v. Bun, 21 N. Y. 275;

Burr v. Mills, 21 Wend. (N. Y.)
290;

Richardson v. Clements, 89 Pa.
St. 503; s.c. 33 Am. Rep. 784;

may preserve a permanent easement to the grantor

Whitaker v. Brown, 46 Pa. St. 197;

Crouch v. Shepard, 4 Coldw. (Tenn.) 389.

The technical distinction between reservation and exception will be disregarded, and the language used so construed as to effectuate the intention of the parties.

Hagerty v. Lee, 54 N. J. L. (25 Vr.) 530; s.c. 25 Atl. Rep. 319; 20 L. R. A. 631.

A reservation in a deed granting a right of way for railroad tracks, of the privilege of crossing and recrossing and maintaining water-pipes over it, will preserve a permanent easement to the grantor, where the strip granted is so situated as to shut off all access to the grantor's valuable wharves, in such a manner that without the reservation a way of necessity would exist, and the reservation is in effect an exception of an already existing right.

Chappell v. New York, N. H. & H. R. Co., 62 Conn. 195; s.c. 24 Atl. Rep. 997; 17 L. R. A. 420.

Implied reservation.—Where land is sold and a burden is imposed upon the portion sold where marks of the burden are open and visible, the purchaser takes the property with the servitude upon it, because the parties are presumed to have contracted with reference to this condition of the property.

Lampman v. Milks, 21 N. Y. 505. See: *Huttemeier v. Albro*, 18 N. Y. 48;

Lansing v. Wiswall, 5 Den. (N. Y.) 213.

Many of the cases hold that this construction can be placed upon the transaction in favor of the grantee only, and that easements of absolute necessity alone are implied to be reserved to the grantor.

See: *Turner v. Thompson*, 58 Ga. 268; s.c. 24 Am. Rep. 497;

Cihak v. Klekr, 117 Ill. 643; s.c. 7 N. E. Rep. 111;

Robinson v. Thraillkill, 110 Ind. 117; s.c. 10 N. E. Rep. 647;

John Hancock Mut. Life Ins.

Co. v. Patterson, 103 Ind. 582; s.c. 43 Am. Rep. 550; 2 N. E. Rep. 229;

Adams v. Marshall, 138 Mass. 228; s.c. 52 Am. Rep. 271;

Griffiths v. Morrison, 106 N. Y. 165;

Butterworth v. Crawford, 46 N. Y. 349; s.c. 7 Am. Rep. 352;

Smyles v. Hastings, 22 N. Y. 217; *Lapman v. Milks*, 21 N. Y. 505;

Outerbridge v. Phelps, 13 Abb. (N. Y.) N. C. 117;

Pennsylvania R. Co. v. Jones, 50 Pa. St. 417;

Phillips v. Phillips, 48 Pa. St. 178; *McCarty v. Kitchenman*, 47 Pa. St. 239;

Sanderlin v. Baxter, 76 Va. 299; s.c. 44 Am. Rep. 165;

Hardy v. McCullough, 23 Gratt. (Va.) 251;

Scott v. Beutel, 23 Gratt. (Va.) 1;

Burwell v. Hobson, 12 Gratt. (Va.) 322; s.c. 65 Am. Dec. 247;

Powell v. Sims, 5 W. Va. 1; s.c. 13 Am. Rep. 629;

Galloway v. Bonesteel, 65 Wis. 79; s.c. 56 Am. Rep. 616; 26 N. W. Rep. 262;

Jarstadt v. Smith, 51 Wis. 96; s.c. 8 N. W. Rep. 29;

Petland v. Keep, 41 Wis. 490;

Dillman v. Hoffman, 38 Wis. 559;

Hazard v. Robinson, 3 Mas. C. C. 272; s.c. Fed. Cas. No. 6281;

United States v. Appleton, 1 Sumn. C. C. 492; s.c. Fed. Cas. No. 14463.

The foundation of this rule is the fact that it is not reasonable to suppose an implied reservation was intended except in cases of strict necessity.

See: *Lide v. Hadley*, 36 Ala. 627; *Yunker v. Nichols*, 1 Colo. Tr. 551;

Pierce v. Sellich, 18 Conn. 321;

Collins v. Prentice, 15 Conn. 39;

Thompson v. Miner, 30 Iowa 386;

Dickey v. Lyon, 19 Iowa 544;

Warren v. Blake, 54 Me. 276; s.c. 89 Am. Dec. 748;

Burns v. Gallagher, 62 Md. 462;

Mitchell v. Seipel, 53 Md. 251; s.c. 36 Am. Dec. 404;

Hathorn v. Stimson, 10 Me. 224; s.c. 24 Am. Dec. 228;

Oliver v. Hook, 47 Md. 301;

without the word "limitations."¹ Easements by prescription in land are acquired only by adverse user thereof for the term required by the statute of limitations;² and in the absence of any express statute, for the term of twenty years.³ But in order to create an easement this possession must be adverse, continuous, uninterrupted, and by the acquiescence of the owner of the land over which the easement is claimed; if permissive, or under a license from the owner, it cannot ripen

Buss v. Dyer, 135 Mass. 287;
Hollenbeck v. McDonald, 112 Mass. 247;

Barnes v. Lloyd, 112 Mass. 224;
Carbrey v. Willis, 89 Mass. (7 Allen) 364; s.c. 83 Am. Dec. 688;

Nichols v. Luce, 41 Mass. (24 Pick.) 102; s.c. 35 Am. Dec. 302;

Grant v. Chase, 17 Mass. 443; s.c. 9 Am. Dec. 161;

Gayetty v. Bethune, 14 Mass. 55; s.c. 7 Am. Dec. 182;

Lanier v. Booth, 50 Miss. 410;

Wentworth v. Philpot, 60 N. H. 193;

New Ipswich Factory v. Batchelder, 3 N. H. 190; s.c. 14 Am. Dec. 346;

Dunklee v. Wilton R. Co., 24 N. H. (4 Fost.) 489;

Denton v. Leddell, 23 N. J. Eq. (8 C. E. Gr.) 64;

Stuyvesant v. Woodruff, 21 N. J. L. (1 Zab.) 133; s.c. 47 Am. Dec. 156;

N. Y. Life Ins. Co. v. Milnor, 1 Barb. Ch. (N. Y.) 362;

Francis's Appeal, 96 Pa. St. 200;

Strickler v. Todd, 10 Serg. & R. (Pa.) 63; s.c. 13 Am. Dec. 649;

Phillips v. Phillips, 48 Pa. St. 178; s.c. 86 Am. Dec. 577;

Providence Tool Co. v. Corliss Steam Engine Co., 9 R. I. 564;

Valley Falls Co. v. Dolan, 9 R. I. 489;

Holmes v. Goring, 2 Bing. 76; s.c. 9 Eng. C. L. 488;

Proctor v. Hodgson, 10 Exch. 924;

Kenyon v. Nichols, 1 R. I. 412;

Ferguson v. Witsell, 5 Rich. (S. C.) L. 280; s.c. 57 Am. Dec. 744;

McPherson v. Acker, 4 McA. (D. C.) 150; s.c. 43 Am. Rep. 749.

¹ *Chappell v. New York, N. H. & H. R. Co.*, 62 Conn. 195; s.c. 24 Atl. Rep. 977; 17 L. R. A. 420.

² See: *Ante*, § 2216.

The general rule is that an easement is required by prescription within the time prescribed by the statute of limitations for the recovery of lands.

Stearns v. Janes, 94 Mass. (12 Allen) 582;

Watkins v. Peck, 13 N. H. 360; s.c. 40 Am. Dec. 156;

Carlisle v. Cooper, 19 N. J. Eq. (4 C. E. Gr.) 256;

Hammond v. Zehner, 21 N. Y. 118;

Jones v. Crow, 32 Pa. St. 398;

Ricard v. Williams, 20 U. S. (7 Wheat.) 59; bk. 5 L. ed. 398;

Campbell v. Wilson, 3 East 294; s.c. 7 Rev. Rep. 462.

³ *Parish v. Kaspere*, 109 Ind. 586; s.c. 10 N. E. Rep. 109; 7 West. Rep. 369;

Hill v. Hagaman, 84 Ind. 287;

McCardle v. Barricklow, 68 Ind. 356;

Claffin v. Boston & A. R. Co., 157 Mass. 489; s.c. 32 N. E. Rep. 659; 20 L. R. A. 638.

An easement by prescription is not shown by the use for less than twenty years of a right of way across a railroad after the termination of the right which had previously existed under a reservation in a deed for the lives of the grantors, although the right to cross was referred to in certain deeds, between the parties, but not in a way sufficient to give the right.

Claffin v. Boston & A. R. Co., 157 Mass. 489; s.c. 32 N. E. Rep. 659; 20 L. R. A. 638.

into a right or work an ouster.¹ Thus it has been said that a prescriptive right to use a driveway is not established by continuing its use for more than thirty years, under an agreement for perpetual easement, made before the previous use had continued long enough to ripen into a right by prescription.²

SEC. 2232. **How lost or extinguished—Introduction.**—An easement is a right which may be extinguished or taken away by act of God, or the operation of law, and which may be surrendered by the acts of the owner of the dominant estate, or lost by the acts of the owner of the servient estate.³ Thus the right of the party to an easement may be suspended by the act of God, as by the drying up of streams, wells, or springs, but will be revived again by the return of the water. Where the easement is suspended by the act of the party the right will be extinguished.⁴ The reasons for this distinction are : first, the well-established principle that no man shall be injured by the act of God or the law ;⁵ and secondly, because the act of the party is to be construed most strongly against

¹ *Curtis v. La Grande Hydraulic Water Co.*, 20 Oreg. 34 ; s.c. 23 Pac. Rep. 808 ; 25 Pac. Rep. 378 ; 10 L. R. A. 484.

² *Nowlin v. Whipple*, 120 Ind. 596 ; s.c. 22 N. W. Rep. 669 ; 6 L. R. A. 159 ;

Parish v. Kaspere, 109 Ind. 586 ; s.c. 10 N. W. Rep. 109 ; 7 West. Rep. 369 ;

Talbott v. Grace, 30 Ind. 389 ; s.c. 95 Am. Dec. 704 ;

State v. Green, 41 Iowa 693, 698 ;

Green v. Bethea, 30 Ga. 896 ;

State v. Horn, 35 Kans. 717 ; s.c. 12 Pac. Rep. 148 ;

Cyr v. Madore, 73 Me. 53 ;

Claffin v. Boston & A. R. Co., 157 Mass. 489 ; s.c. 32 N. E. Rep. 659 ; 20 L. R. A. 638 ;

McCreary v. Boston & M. R. Co., 153 Mass. 300 ; s.c. 26 N. E. Rep. 864 ; 11 L. R. A. 359 ;

Chestnut Hill Turnpipe Co. v. Piper, 77 Pa. St. 432 ;

Petland v. Keep, 41 Wis. 490 ;

Jones v. Davis, 35 Wis. 376.

³ *Hancock v. Wentworth*, 46 Mass. (5 Met.) 446, 451 ;

Corning v. Gould, 16 Wend. (N. Y.) 531, 541 ;

Taylor v. Hampton, 4 McC. (S. C.) L. 96 ; s.c. 17 Am. Dec. 710.

⁴ *Tyler v. Hammond*, 28 Mass. (11 Pick.) 192, 220 ;

Partridge v. Gilbert, 15 N. Y. 601 ; s.c. 69 Am. Dec. 632 ;

Corning v. Gould, 16 Wend. (N. Y.) 531, 538 ;

Taylor v. Hampton, 4 McC. (S. C.) L. 96 ; s.c. 17 Am. Dec. 710 ;

Pearce v. McClenaghan, 5 Rich. (S. C.) L. 178 ; s.c. 55 Am. Dec. 710 ;

Queen v. Chorley, 12 Ad. & E. N. S. (12 Q. B.) 515 ; s.c. 64 Eng. C. L. 515 ;

Liggins v. Inge, 7 Bing. 682 ; s.c. 20 Eng. C. L. 304 ;

Thomas v. Thomas, 2 Crompt. M. & R. 34, 41 ; s.c. 1 Gale 61 ;

5 Tyr. 804.

Taylor v. Hampton, 4 McC. (S. C.) L. 96 ; s.c. 17 Am. Dec. 710.

himself.¹ An easement is extinguished by operation of law in those cases where the particular purpose for which the easement was granted no longer exists,² as where the right of way to certain buildings is lost by the laying out and constructing of a highway over the site of such buildings.³ The easement is also extinguished where the servient and dominant estates are united in the same person.⁴

SEC. 2233. **Same—By merger.**—An easement will be extinguished by merger in those cases where the dominant and servient estates become united in the same owner, and cannot afterwards be revived except by a new grant.⁵ The reason for this rule is the fact that a man cannot have an easement in his own land.⁶ But in order to extinguish an easement by merger the estates united must be co-equal and co-extensive, and not liable to be again disjoined by act of the law;⁷ consequently where the dominant estate is transferred to the owner of the servient estate, and the former is less than the latter, the easement will simply be suspended during the unity

¹ Taylor v. Hampton, 4 McC. (S. C.) L. 96; s.c. 17 Am. Dec. 710.

² Chase v. Sutton Manuf. Co., 58 Mass. (4 Cush.) 152;

National, etc., Co. v. Donald, 4 Hurl. & N. 8.

³ Hancock v. Wentworth, 46 Mass. (5 Met.) 446.

⁴ See: Post, § 2233.

⁵ Warren v. Blake, 54 Me. 276; s.c. 89 Am. Dec. 748;

Atwater v. Bodfish, 77 Mass. (11 Gray) 150;

Ritger v. Parker, 62 Mass. (8 Cush.) 145, 147; s.c. 54 Am. Dec. 744;

Coleman's Appeal, 62 Pa. St. 252, 274;

Plimpton v. Converse, 42 Vt. 712.

⁶ White v. Chapin, 94 Mass. (12 Allen) 516, 518;

Atwater v. Bodfish, 77 Mass. (11 Gray) 150;

Ritger v. Parker, 62 Mass. (8 Cush.) 145; s.c. 54 Am. Dec. 744;

Seymour v. Lewis, 13 N. J. (2 Beas.) 439, 450; s.c. 78 Am. Dec. 108;

Stuyvesant v. Woodruff, 21 N.

J. L. (1 Zab.) 133; 47 Am. Dec. 156;

Wolfe v. Frost, 4 Sandf. Ch. (N. Y.) 72.

⁷ Bradley Fish Co. v. Dudley, 37 Conn. 136;

White v. Chapin, 94 Mass. (12 Allen) 518;

Reed v. West, 82 Mass. (16 Gray) 283, 284;

Hancock v. Carlton, 72 Mass. (6 Gray) 39, 51;

Curtis v. Francis, 63 Mass. (9 Cush.) 427;

Ritger v. Parker, 62 Mass. (8 Cush.) 147; s.c. 54 Am. Dec. 744;

Ivimey v. Stocker, L. R. 1 Ch. 396; s.c. 35 L. J. Ch. 467; 12

Jur. N. S. 419; 14 L. T. 427; 14 W. R. 743.

“Unity of possession or right that extinguishes a prescriptive right,” it is said in Reed v. West, *supra*, “must be such that the party should have an estate in the land *a qua*, and in the land *in qua*, equal in duration, quality, and all other circumstances of right.”

of the two estates, and will revive on their separation.¹

SEC. 2234. **Same—By act of the parties.**—An easement may be lost or destroyed by an act of the parties which is either incompatible in its nature² or because actually destructive to it.³ Thus an easement may be lost by an abandonment of the right ;⁴ by non-user for a long time, where the easement is claimed by prescription ;⁵ but where the right is claimed by deed, mere non-user will not impair or defeat the right, no matter how long such non-user may continue, where there is no possession adverse to his or conflicting to the claimant's right ;⁶ but in order that non-user may work the extinguishment of an easement, it must be accompanied by an express or implied intention of abandonment on the part of the owner of the servient estate, and must be continued for the period of prescription.⁷ An easement may also be

- ¹ *McTavish v. Carroll*, 7 Md. 352 ; s.c. 61 Am. Dec. 353 ;
Carbrey v. Willis, 89 Mass. (7 Allen) 364, 374 ; s.c. 83 Am. Dec. 688 ;
Grant v. Chase, 17 Mass. 443 ; s.c. 9 Am. Dec. 161 ;
Brakely v. Sharp, 10 N. J. Eq. (2 Stock.) 206 ;
Pearce v. McClenaghan, 5 Rich. (S. C.) L. 178 ; s.c. 55 Am. Dec. 710.
- ² *Dyer v. Sanford*, 50 Mass. (9 Met.) 395 ; s.c. 43 Am. Dec. 399 ;
Gawtry v. Leland, 31 N. J. Eq. (4 Stew.) 385 ;
Arnold v. Cornman, 50 Pa. St. 361 ;
Hazard v. Robinson, 3 Mas. C. C. 272 ; s.c. Fed. Cas. No. 6281 ;
Cooper v. Barber, 3 Taunt. 99 ; s.c. 12 Rev. Rep. 604.
- ³ *Vogler v. Geiss*, 51 Md. 407 ;
Crain v. Fox, 16 Barb. (N. Y.) 184 ;
Moore v. Rawson, 3 Barn. & C. 333 ; s.c. 10 Eng. C. L. 156 ;
Nicholas v. Chamberlain, Cro. Jac. 121 ;
Lawrence v. Obee, 3 Camp. 514 ; s.c. 14 Rev. Rep. 830.
- ⁴ *Louisville R. R. v. Covington*, 2 Bush (Ky.) 526, 532 ;
Dana v. Valentine, 46 Mass. (5 Met.) 8, 14 ;
Stokoe v. Singers, 8 El. & Bl. 31 ; s.c. 92 Eng. C. L. 31 ;
Crossley v. Lightowler, L. R. 2 Ch. 478 ; s.c. 36 L. J. Ch. 584 ;
Parkins v. Dunham, 3 Strob. (S. C.) L. 224.
 See : *Jamaica Pond Aqueduct v. Chandler*, 121 Mass. 3 ;
Hayford v. Spokesfield, 100 Mass. 491.
- ⁵ *Pillsbury v. Moore*, 44 Me. 154 ; s.c. 69 Am. Dec. 91 ;
Farrar v. Cooper, 34 Me. 394, 400 ;
Jennison v. Walker, 77 Mass. (11 Gray) 423, 425 ;
Arnold v. Stevens, 41 Mass. (24 Pick.) 106 ; s.c. 35 A. D. 305 ;
White v. Crawford, 10 Mass. 183 ;
Wilder v. St. Paul, 12 Minn. 192, 208 ;
Queen v. Chorley, 12 Ad. & E. N. S. (12 Q. B.) 515 ; s.c. 64 Eng. C. L. 515.
- ⁶ *Arnold v. Stevens*, 41 Mass. (24 Pick.) 106 ; s.c. 35 Am. Dec. 305 ;
Londendyck v. Anderson, 59 How. (N. Y.) Pr. 1.
- ⁷ *Farrar v. Cooper*, 34 Me. 394, 400 ;
Chandler v. Jamaica Pond Aqueduct, 125 Mass. 544 ;

destroyed by the owner of the dominant estate giving the owner of the servient estate a license to do certain acts and things which will prevent a future use and enjoyment of the easement. But such license will not have the effect to destroy the easement until after execution of the license, and, being without consideration, may at any time be revoked before execution.¹ An easement may also be destroyed by the owner of the dominant estate making such changes in the use and conditions of the estate, as, in fact, to renounce the easement itself, and the owner of the servient estate may rely on such changes as evidence of abandonment;² as where he grants an express license to do acts on his own land, the necessary effect of which is to take away or to impair the easement permanently, and the acts are done accordingly.³ A simple abuse of an easement, however, will not amount to such a change as will work a forfeiture of the easement; such as using the way for purposes not included in the grant, because such abuse is merely a trespass.⁴ An easement must be accepted and enjoyed as granted. Any change in the dominant estate which will increase the burden of the servient estate to such an extent that it cannot be restored to its original condition,

Bannon v. Angier, 84 Mass. (2 Allen) 128;

Pope v. O'Hara, 48 N. Y. 446, 466;

Jewett v. Jewett, 16 Barb. (N. Y.) 150;

Hall v. McCaughey, 51 Pa. St. 43;

Nitzell v. Paschall, 3 Rawle (Pa.) 76.

¹ *Addison v. Hack*, 2 Gill (Md.) 221; s.c. 41 Am. Dec. 421;

Dyer v. Sanford, 50 Mass. (9 Met.) 395; s.c. 43 Am. Dec. 399;

Elliott v. Rhett, 5 Rich. (S. C.) L. 405; s.c. 57 Am. Dec. 750;

Liggins v. Inge, 7 Bing. 682; s.c. 20 Eng. C. L. 304;

Winter v. Brockwell, 8 East 378; s.c. 9 Rev. Rep. 473.

² *Dyer v. Sanford*, 50 Mass. (9 Met.) 395; s.c. 43 Am. Dec. 399;

Moore v. Rawson, 3 Barn. & C. 332; s.c. 5 Dow. & Ry. 234; 10 Eng. C. L. 156;

Liggins v. Inge, 7 Bing. 682; s.c. 5 Moo. & P. 712; 20 Eng. C. L. 304.

See: *Leathers v. Furr*, 62 Ga. 421;

Garritt v. Sharp, 3 Ad. & E. 325; s.c. 30 Eng. C. L. 163;

Jones v. Tapling, 11 C. B. N. S. 283; s.c. 103 Eng. C. L. 283;

Hutchinson v. Copestake, 9 C. B. N. S. 863; s.c. 99 Eng. C. L. 863.

Compare: *Stackpole v. Curtis*, 32 Me. 383, 385;

Casler v. Shipman, 35 N. Y. 533;

Aynsley v. Glover, L. R. 18 Eq. 544; s.c. 10 Ch. App. 283; 13 Moak Eng. Rep. 726.

³ *Dyer v. Sanford*, 50 Mass. (9 Met.) 395; s.c. 43 Am. Dec. 399.

⁴ *Mendell v. Delano*, 48 Mass. (7 Met.) 176.

See: *Jones v. Tapling*, 11 C. B. N. S. 283; s.c. 103 Eng. C. L. 283.

will extinguish the right itself; but if the increase on the burden can be separated from the easement, the latter will remain.¹

SEC. 2235. **Same—By release.**—An easement may of course be extinguished by the owner of the dominant estate giving a release to the owner of the servient estate;² but such release must be in writing, an easement being an interest in land which cannot be extinguished or renounced by a mere parol agreement between the owner of the dominant and servient tenements,³ unless the agreement is carried into execution by some affirmative act sufficient to take the agreement out of the statute of frauds.⁴

SEC. 2236. **Rights and liabilities of parties.**—The rights

- ¹ *Whittier v. Cochecho Mfg. Co.*, 9 N. H. 454; s.c. 32 Am. Dec. 382;
Bullen v. Runnells, 2 N. H. 255; s.c. 9 Am. Dec. 55;
Taylor v. Hampton, 4 McC. (S. C.) L. 96; s.c. 17 Am. Dec. 710;
Blanchard v. Bridges, 4 Ad. & E. 176; s.c. 31 Eng. C. L. 94;
Garritt v. Sharp, 3 Ad. & E. 325; s.c. 30 Eng. C. L. 163;
Saunders v. Newman, 1 Barn. & Ald. 258;
Luttrell's Case, 4 Co. 87;
Hall v. Swift, 6 J. Scott 167; s.c. 4 Bing N. C. 381; 33 Eng. C. L. 763; 1 Arn. 157;
Cherrington v. Abney Mill, 2 Vern. 646.
- ² *Pope v. Devereux*, 71 Mass. (5 Gray) 409;
Coleman's Appeal, 62 Pa. St. 252, 274;
Queen v. Chorley, 12 Ad. & E. N. S. (12 Q. B.) 515; s.c. 64 Eng. C. L. 515.
- ³ *Dyer v. Sanford*, 50 Mass. (9 Met.) 395; s.c. 43 Am. Dec. 399.
- License to obstruct easement** given to the owner of the servient estate will not be revocable if it is executed, and may operate as an abandonment to the extent of the license given.
- Manning v. Smith*, 6 Conn. 289;
Pue v. Pue, 4 Md. Ch. 386;
Hayford v. Spokesfield, 100 Mass. 491;
- Jennison v. Walker*, 77 Mass. (11 Gray) 423;
Pope v. Devereux, 71 Mass. (5 Gray) 409;
Arnold v. Stevens, 41 Mass. (24 Pick.) 106; s.c. 35 Am. Dec. 305;
French v. Braintree Manf. Co., 40 Mass. (23 Pick.) 216;
Williams v. Nelson, 40 Mass. (23 Pick.) 141; s.c. 34 Am. Dec. 45;
Smyles v. Hastings, 22 N. Y. 217;
Jewett v. Jewett, 16 Barb. (N. Y.) 150;
Jackson v. Dysling, 2 Cai. (N. Y.) 198;
Corning v. Gould, 16 Wend. (N. Y.) 531;
Hall v. McCaughey, 51 Pa. St. 43;
Pearce v. McClenaghan, 5 Rich. (S. C.) L. 178; s.c. 55 Am. Dec. 710;
Parkins v. Dunham, 3 Strobl. (S. C.) L. 224;
Dyer v. Depui, 5 Whart. (Pa.) 584;
Mowry v. Sheldon, 2 R. I. 369;
Queen v. Chorley, 12 Ad. & E. N. S. (12 Q. B.) 515; s.c. 64 Eng. C. L. 515;
Moore v. Rawson, 3 Barn. & C. 332; s.c. 10 Eng. C. L. 156;
Liggins v. Inge, 7 Bing. 682; s.c. 20 Eng. C. L. 304;
Stokes v. Hewsinger, 7 El. & Bl. 811;
Ward v. Ward, 7 Exch. 838; s.c. 21 L. J. Ex. 324.

and liabilities of parties under any particular easement are governed by the terms of the grant. It is the right of each party to insist that the easement shall remain substantially as it was at the time of its creation. If the rights of the owner of the dominant estate are in any way obstructed or threatened, he may, by injunction, restrain a threatened injury or impairment of the easement, or he may enforce the performance of the condition of such easement by mandamus, according to the circumstances of the case;¹ and where the acts have been performed he may maintain an action for damages for obstructions to or interferences with the easement which have already happened.² Such action may be maintained by any person in possession of the premises to which the easement belongs.³

¹ See : *Parker v. Griswold*, 17 Conn.

288; s.c. 42 Am. Dec. 739;

Bliss v. Kennedy, 43 Ill. 67,

74;

Munroe v. Stickney, 48 Me.

462;

Burnham v. Kempton, 44 N. H.

79;

Jackson v. Newcastle, 33 L. J. N. S. 698;

Clifford v. Hare, L. R. 9 C. P. 362;

372; s.c. 9 Moak Eng. Rep.

449;

Aynsley v. Grover, L. R. 18 Eq.

Cas. 544; s.c. 11 Moak Eng.

Rep. 521.

Injunction to prevent injury to easement.—There being many cases of injury to an easement not susceptible of being compensated in damages, courts of equity will interfere by injunction to prevent threatened injury (*Ingraham v. Dunnell*, 46 Mass. (5 Met.) 118; *Mott v. Schoolbred*, L. R. 20 Eq. 22; s.c. 13 Moak Eng. Rep. 582), and restrain the continuance of an existing wrong.

Merrifield v. Lombard, 95 Mass. (13 Allen) 16; s.c. 90 Am. Dec. 172;

Corning v. Troy Nail Co., 40 N. Y. 191, 192;

Burwell v. Hobson, 12 Gratt. (Va.) 322; s.c. 65 Am. Dec. 247;

Ackerman v. Horicon Co., 16 Wis. 150, 154;

Wood v. Saunders, L. R. 10 Ch. App. 582; s.c. 14 Moak Eng. Rep. 805.

² *Gilmore v. Driscoll*, 122 Mass. 199;

s.c. 23 Am. Rep. 312;

Chatfield v. Wilson, 27 Vt. 670;

Sampson v. Hoddinott, 1 C. B. N. S. 590; s.c. 87 Eng. C. L.

590.

³ *Sould v. Thompson*, 45 Mass. (4 Met.) 224;

Brown v. Brown, 30 N. Y. 519;

s.c. 86 Am. Dec. 406;

Miller v. Long Island R. Co., 9 Hun (N. Y.) 195;

Ferguson v. Wetsell, 5 Rich. (S. C.) L. 280; s.c. 57 Am. Dec.

744;

Pearce v. McClenaghan, 5 Rich. (L. C.) 178; s.c. 55 Am. Dec.

710;

Foley v. Wyeth, 84 Mass. (2 Allen) 135;

Hastings v. Livermore, 73 Mass. (7 Gray) 194;

Noyes v. Hemphill, 59 N. H. 536;

Carleton v. Cate, 56 N. H. 130;

Tinsman v. Belvidere Del. R. Co. 25 N. J. L. (1 Dutch.) 255; s.c.

64 Am. Dec. 415;

Stiles v. Hooker, 7 Cow. (N. Y.) 286;

Hall v. McCaughey, 51 Pa. St. 43;

Bedingfield v. Onslow, 3 Lev. 209.

CHAPTER V.

RENTS.

- SEC. 2237. Definition.
- SEC. 2238. Nature of estate.
- SEC. 2239. Kinds of rents.
- SEC. 2240. How payable.
- SEC. 2241. When payable.
- SEC. 2242. Where payable.
- SEC. 2243. To whom payable.
- SEC. 2244. Who liable for—The tenant.
- SEC. 2245. Same—Parties continuing to occupy.
- SEC. 2246. Same—Assignee of tenant.
- SEC. 2247. Same—Assignee for benefit of creditors.
- SEC. 2248. Same—Surety.
- SEC. 2249. Apportionment.
- SEC. 2250. Remedies of landlord.
- SEC. 2251. Same—Suit for use and occupation.
- SEC. 2252. Same—Suit for rent.
- SEC. 2253. Same—Distress for rent.

SECTION 2237. **Definition.**—Rent may be defined to be a compensation or return in the nature of acknowledgment given for the occupation and possession of some corporeal hereditament; in other words, is a certain profit issuing out of lands and tenements,¹ though chattels are demised therewith.² It has been said that rent is in

¹ *Merritt v. Fisher*, 19 Iowa 354; *Kites v. Church*, 142 Mass. 586; s.c. 8 N. E. Rep. 743; *Bates v. Phinney*, 45 Mich. 388; s.c. 8 N. W. Rep. 88; *Spraker v. Cook*, 16 N. Y. 567; *Manice v. Brady*, 15 Abb. Pr. (N. Y.) 173; *New York Central R. Co. v. Saratoga & S. R. Co.*, 39 Barb. (N. Y.) 289; *Gibbs v. Ross*, 2 Head (Tenn.) 437, 439; *Shultz v. Sprain*, 1 Tex. App. Civ. Cas., § 916; *United States v. Gratiot*, 39 U. S. (14 Pet.) 526; bk. 10 L. ed. 573, aff'g s.c. 1 McL. C. C. 454; Fed. Cas. No. 15249; *Anderson's L. Dict.* 878. ² *Baldwin v. Walker*, 21 Conn. 168; *Lathrop v. Clewis*, 63 Ga. 287; s.c. 56 Ga. 188; *Toler v. Seabrook*, 39 Ga. 14; *Fay v. Holloran*, 35 Barb. (N. Y.) 295; *Sutliff v. Atwood*, 15 Ohio St. 186;

effect the price or purchase paid for the ownership of the premises during the term.¹ At common law the rent must issue out of the thing granted,² and not be a part of the land or thing itself; and to be valid must be certain, or capable of being reduced to a certainty by either party.³

SEC. 2238. Nature of estate.—Unaccrued rent is in the nature of a chattel real,⁴ and is an interest in the land which passes by conveyance with the reversion,⁵ unless

- Vetter's Appeal, 99 Pa. St. 52 ;
 Micles v. Miles, 31 Pa. St. 20 ; s.c.
 1 Grant Cas. 320 ;
 Bird v. Higginson, 2 Ad. & E.
 696 ; s.c. 29 Eng. C. L. 321 ;
 Farewell v. Dickenson, 6 Barn. &
 C. 251 ; s.c. 13 Eng. C. L. 251 ;
 Newman v. Anderton, 2 Bos. &
 P. 224 ;
 Spencer's Case, 5 Co. 16a ;
 Selby v. Greaves, L. R. 3 C. P.
 594 ;
 Croom v. Talbot, Comb. 238 ;
 Collins v. Harding, Cro. Eliz.
 607 ;
 Emmott v. Cole, Cro. Eliz. 255 ;
 Read v. Lawnse, Dyer 212b ;
 Sury v. Brown, Latch 99 ;
 Walsh v. Pemberton, Selw. N.
 P. 603.
¹ Fowler v. Bott, 6 Mass. 63, 67.
 See : Stone v. Patterson, 36 Mass.
 (19 Pick.) 476 ; s.c. 31 Am.
 Dec. 156 ;
 Farley v. Thompson, 15 Mass. 18.
² 1 Co. Litt. (19th ed.) 147.
³ Bowser v. Scott, 8 Blackf. (Ind.)
 86 ;
 Cross v. Tome, 14 Md. 247 ;
 Dutcher v. Culver, 24 Minn. 543 ;
 Smith v. Fyler, 2 Hill (N. Y.)
 648 ;
 Smith v. Colson, 10 John. (N. Y.)
 91.
⁴ Dixon v. Nicolls, 39 Ill. 373 ; s.c.
 89 Am. Dec. 312 ;
 Foltz v. Prouce, 17 Ill. 487 ;
 Watson v. Penn, 108 Ind. 21 ; s.c.
 8 N. E. Rep. 636.
⁵ Alabama G. L. I. Co. v. Oliver,
 78 Ala. 158 ;
 Steed v. Hinson, 76 Ala. 298 ;
 Westmoreland v. Foster, 60 Ala.
 448 ;
 Tubb v. Fort, 58 Ala. 277 ;
 English v. Key, 39 Ala. 113 ;
 Pope v. Harkins, 16 Ala. 321 ;
 Randolph v. Carlton, 8 Ala. 606 ;
 Gibbons v. Dillingham, 10 Ark.
 9 ; s.c. 50 Am. Dec. 233 ;
 Reynolds v. Lathrop, 7 Cal. 43 ;
 Peck v. Northrop, 17 Conn. 220 ;
 Stayton v. Morris, 4 Harr. (Del.)
 224 ;
 Wilson v. Delaplaine, 3 Harr.
 (Del.) 499 ;
 Stout v. Kean, 3 Harr. (Del.) 82 ;
 Dixon v. Nicolls, 39 Ill. 372 ; s.c.
 89 Am. Dec. 312 ;
 Crosby v. Loop, 13 Ill. 625 ;
 Green v. Massie, 13 Ill. 263 ;
 Carson v. Crigler, 9 Ill. App. 83 ;
 Raymond v. Kerker, 2 Ill. App.
 496 ;
 Bryson v. McCreary, 102 Ind. 1 ;
 s.c. 1 N. E. Rep. 55 ;
 Page v. Lashley, 15 Ind. 152 ;
 Sampson v. Grimes, 7 Blackf.
 (Ind.) 176 ;
 Lufkin v. Preston, 52 Iowa 235 ;
 s.c. 3 N. W. Rep. 58 ;
 Townsend v. Isenberger, 45 Iowa
 670 ;
 Combs v. Branch, 4 Dana (Ky.)
 547 ;
 Childers v. Smith, 10 B. Mon.
 (Ky.) 235, 237 ;
 Williamson v. Richardson, 6 B.
 Mon. (Ky.) 596, 603 ;
 Miller v. Stagner, 3 B. Mon. (Ky.)
 58 ; s.c. 38 Am. Dec. 178 ;
 Martin v. Dickson, 35 La. An.
 1036 ;
 Gale v. Edwards, 52 Me. 362 ;
 Winslow v. Rand, 29 Me. 362 ;
 Johnson v. Hines, 61 Md. 122 ;
 Martin v. Martin, 7 Md. 268 ; s.c.
 61 Am. Dec. 364 ;
 Bloodworth v. Stevens, 51 Miss.
 475, 476 ;
 Vaughn v. Locke, 27 Mo. 290 ;
 Biddle v. Hussman, 23 Mo. 597 ;

severed from such reversion by contract or operation of law,¹ and in absence of such severance descends to the heirs;² where severed, it descends to the representatives.

- Buffum v. Deane*, 70 Mass. (4 Gray) 385;
Patten v. Deshon, 67 Mass. (1 Gray) 325;
Burden v. Thayer, 44 Mass. (3 Met.) 76; s.c. 37 Am. Dec. 117;
Perrin v. Lepper, 34 Mich. 292;
Bowman v. Keleman, 65 N. H. 593;
Kimball v. Pike, 18 N. H. 419;
Alton v. Pickering, 9 N. H. 494, 500;
Willard v. Harvey, 5 N. H. 252;
Ryerson v. Quackenbush, 26 N. J. L. (2 Dutch.) 236, 250;
Condit v. Neighbor, 13 N. J. L. (1 C. E. Gr.) 83;
Farley v. Craig, 11 N. J. L. (6 Halst.) 263, 279;
New York Cent. R. Co. v. Saratoga & S. R. Co., 39 Barb. (N. Y.) 289;
Van Wicklen v. Paulson, 14 Barb. (N. Y.) 654;
Demarest v. Willard, 8 Cow. (N. Y.) 206;
Pollock v. Cronise, 12 How. Pr. (N. Y.) 363;
Beebe v. Coleman, 8 Paige Ch. (N. Y.) 392;
Holly v. Holly, 94 N. C. 96;
Wilcoxon v. Donelly, 90 N. C. 245;
Lancashire v. Mason, 75 N. C. 455;
Bullard v. Johnson, 65 N. C. 436;
Kornegay v. Collier, 65 N. C. 69;
Markland v. Crump, 1 Dev. & B. (N. C.) L. 94; s.c. 27 Am. Dec. 230;
Mixon v. Coffield, 2 Ired. (N. C.) L. 301;
Lewis v. Wilkins, 1 Phill. (N. C.) Eq. 303;
Shollenberger v. Filbert, 44 Pa. St. 404;
Burns v. Cooper, 31 Pa. St. 426;
Gibbs v. Ross, 2 Head (Tenn.) 437, 439;
Ellis v. Foster, 7 Heisk. (Tenn.) 131, 135;
Shultz v. Sprain, 1 Tex. App. Civ. Cas., § 917;
Faulkner v. Warren, 1 Tex. App. Civ. Cas., § 658;
Leonard v. Burgess, 16 Wis. 41.
¹ *Alabama G. L. I. Co. v. Oliver*, 78 Ala. 158;
Beill v. Chessen, 15 Ill. App. 266,
Childers v. Smith, 10 B. Mon. (Ky.) 235, 237;
Ryerson v. Quackenbush, 26 N. J. L. (2 Dutch.) 236, 250;
Condit v. Neighbor, 13 N. J. L. (1 C. E. Gr.) 83;
Farley v. Craig, 11 N. J. L. (6 Halst.) 263, 279;
Demarest v. Willard, 8 Cow. (N. Y.) 206;
Willard v. Tillman, 2 Hill (N. Y.) 274;
Huerstel v. Lorillard, 6 Rob. (N. Y.) 260;
Faulkner v. Warren, 1 Tex. App. Civ. Cas., § 658;
Leonard v. Burgess, 16 Wis. 41.
² *Leitch v. Boyington*, 84 Ill. 179;
Dixon v. Nicolls, 39 Ill. 372; s.c. 89 Am. Dec. 312;
Foltz v. Prouse, 17 Ill. 487;
Sherman v. Dutch, 16 Ill. 283;
Crosby v. Loop, 13 Ill. 625;
Green v. Massie, 13 Ill. 363;
Dorsett v. Gray, 98 Ind. 273;
Kidwell v. Kidwell, 84 Ind. 224;
Evans v. Hardy, 76 Ind. 527;
King v. Anderson, 20 Ind. 383;
Doe v. Lanius, 3 Ind. 441;
Shawhan v. Long, 26 Iowa 488;
Lavery v. Woodward, 16 Iowa 1;
Beezeley v. Burgett, 15 Iowa 192;
Foteaux v. Lepage, 6 Iowa 123;
Head v. Sutton, 31 Kans. 616; s.c. 3 Pac. Rep. 280;
Ball v. Covington Bank, 80 Ky. 501;
Wilson v. Unselt, 12 Bush (Ky.) 215;
O'Bannon v. Roberts, 2 Dana (Ky.) 54;
Kimball v. Sumner, 62 Me. 305;
Mills v. Merryman, 49 Me. 65;
Fuller v. Young, 10 Me. 365;
Getzandaffer v. Caylor, 38 Md. 280;
Jaques v. Gould, 58 Mass. (4 Cush.) 384;
Shouse v. Krusor, 24 Mo. App. 279;
Bloodworth v. Stevens, 51 Miss. 476;

Being an interest in the land, unaccrued rent cannot be transferred by parol.¹ Where the rent is past due it ceases to be a chattel real and becomes a chose in action,² and on the death of the lessor without collection becomes assets in the hands of the personal representatives.³ Rent being, as above described, a compensation for the use of lands and tenements, any moneys paid for a mere license,⁴ or a mere agreement for a lease,⁵ or upon the assignment of a lease,⁶ or any addition to the rent which is reserved in the lease,⁷ will not be rent.

- Allen *v.* Van Houten, 19 N. J. L. (4 Harr.) 47;
 Ware *v.* Hall, 16 N. J. L. (1 Harr.) 333;
 Fay *v.* Holloran, 35 Barb. (N. Y.) 295;
 Kohler *v.* Knapp, 1 Bradf. (N. Y.) 241;
 Wright *v.* Williams, 5 Cow. (N. Y.) 501;
 King *v.* Little, 77 N. C. 138;
 Fleming *v.* Chunn, 4 Jones (N. C.) Eq. 422;
 McDowell *v.* Adams, 45 Pa. St. 430;
 Haslage *v.* Krugh, 25 Pa. St. 97;
 Cobel *v.* Cobel, 8 Pa. St. 342;
 McCoy *v.* Scott, 2 Rawle (Pa.) 222; s.c. 19 Am. Dec. 640;
 Adams *v.* Adams, 4 Watts (Pa.) 160;
 Rowan *v.* Riley, 6 Baxt. (Tenn.) 67;
 Smith *v.* Thomas, 14 Lea (Tenn.) 324;
 Porter *v.* Sweeney, 61 Tex. 213;
 Jones *v.* Lackland, 2 Gratt. (Va.) 81;
 Hobson *v.* Yancy, 2 Gratt. (Va.) 73.
¹ Brown *v.* Brown, 23 N. J. L. (3 Zab.) 650;
Ex parte Hall, L. R. 10 Ch. Div. 615; s.c. 27 Moak Eng. Rep. 140.
² Van Wicklen *v.* Paulson, 14 Barb. (N. Y.) 654;
 Demarest *v.* Willard, 8 Cow. (N. Y.) 206;
 Willard *v.* Tillman, 2 Hill (N. Y.) 274;
 Watson *v.* Pennsylvania, 108 Ill. 21; s.c. 58 Am. Rep. 26.
 Notes given for rent are personal property.
 Succession of Gamble, 23 La. An. 9, 11.
³ Palmer *v.* Steiner, 68 Ala. 400;
 Henry *v.* Stevens, 108 Ind. 201; s.c. 9 N. E. Rep. 356;
 Dorsett *v.* Gray, 98 Ind. 273;
 King *v.* Anderson, 20 Ind. 385;
 Combs *v.* Branch, 4 Dana (Ky.) 547;
 Mills *v.* Merryman, 49 Me. 65;
 Bloodworth *v.* Stevens, 51 Miss. 476;
 Van Rensselaer *v.* Jones, 5 Den. (N. Y.) 449;
 Fleming *v.* Chunn, 4 Jones (N. C.) Eq. 422;
 Rowan *v.* Riley, 6 Baxt. (Tenn.) 67.
⁴ Hancock *v.* Austin, 14 C. B. N. S. (14 J. Scott N. S.) 634; s.c. 108 Eng. C. L. 634.
⁵ Alford *v.* Vickery, 1 Car. & M. 280; s.c. 41 Eng. C. L. 156;
 Sullivan *v.* Bishop, 2 Car. & P. 359; s.c. 12 Eng. C. L. 616;
 Jenner *v.* Clegg, 1 Moody & R. 213.
⁶ Preece *v.* Corrie, 5 Bing. 24; s.c. 15 Eng. C. L. 453;
 Poultney *v.* Holmes, 1 Str. 405;
 Parmenter *v.* Weber, 8 Taunt. 593; s.c. 4 Eng. C. L. 293.
⁷ Ardesco Oil Co. *v.* North Am. Oil Co., 66 Pa. St. 375;
 Miners' Bank *v.* Heilner, 47 Pa. St. 452;
 Donellan *v.* Read, 3 Barn. & Ad. 899; s.c. 23 Eng. C. L. 391;
 Morrice *v.* Antrolus, Hardr. 325;
 Lambert *v.* Norris, 2 Mees. & W. 333;
 Hoby *v.* Roebuck, 7 Taunt. 157; s.c. 2 Eng. C. L. 305;
 Smith *v.* Mapleback, 1 Durnf. & E. (1 T. R.) 441; s.c. 1 Rev. Rep. 247.

SEC. 2239. **Kinds of rents.**—At common law rent was of three kinds, to wit: rent-service, rent-charge, and rent-seck. Rent-service was where a tenant held land by fealty, homage, or other service, and a certain material return, the delivery of which was enforceable by distress.¹ This was the only kind of rent originally known to the common law, and is the one most prevalent in the United States to-day. It was called rent-service, because given as a compensation for services rendered, to which the land was originally liable.² A right of distress was an inseparable incident to a rent-service as long as it was payable to the lord who was entitled to the fealty of the tenant.³ A rent-charge is a rent reserved where the landlord has no reversionary interest. He would have for such rent no right to distrain unless the power be contained in the lease;⁴ there being no fealty annexed to such a grant of the holder of an estate, this kind of rent was not favored at common law.⁵ A rent-seck was the same as a rent-charge, except that there was no right to distress reserved.⁶ Although this is a species of realty, it cannot be sold under *fieri facias*.⁷

SEC. 2240. **How payable.**—Rent may be payable either in money or in kind,⁸ but is usually payable in money,⁹

- ¹ *Laughter v. Humphrey*, Cro. Eliz. 524;
Anderson's L. Dict. 879.
See: *Connell v. Lamb*, 2 Cow. (N. Y.) 652, 656;
Wallace v. Harmstad, 44 Pa. St. 492, 497;
Kenege v. Elliott, 9 Watts (Pa.) 258;
1 Co. Litt. (19th ed.) 96a.
² *Cornell v. Lamb*, 2 Cow. (N. Y.) 652;
Kenege v. Elliott, 9 Watts (Pa.) 258;
1 Co. Litt. (19th ed.) 141b.
³ *Cornell v. Lamb*, 2 Cow. (N. Y.) 652, 659;
Ingersoll v. Sergeant, 1 Whart. (Pa.) 337;
3 Cruise Dig. (4th ed.) 272, § 4.
⁴ *Cornell v. Lamb*, 2 Cow. (N. Y.) 652, 659.
See: *People v. Haskins*, 7 Wend. (N. Y.) 463;
Cuthbert v. Kuhn, 3 Whart. (Pa.) 357; s.c. 31 Am. Dec. 513;
In re Locke, 2 Dowl. & R. 603, 605; s.c. 16 Eng. C. L. 111.
⁵ See: *Ingersoll v. Sergeant*, 1 Whart. (Pa.) 337;
1 Co. Litt. (19th ed.) 143d.
⁶ *Fawley v. Craig*, 15 N. J. L. (3 J. S. Gr.) 191, 194;
Cornell v. Lamb, 2 Cow. (N. Y.) 652, 659;
People v. Haskins, 7 Wend. (N. Y.) 463;
Cuthbert v. Kuhn, 3 Whart. (Pa.) 357; s.c. 31 Am. Dec. 513.
⁷ *Coombs v. Jordan*, 3 Bland (Md.) 284, 316; s.c. 22 Am. Dec. 276.
⁸ *Walter v. Dewey*, 16 John. (N. Y.) 222.
⁹ *Merritt v. Fisher*, 19 Iowa 354;
Cross v. Tome, 14 Md. 247;
Melick v. Benedict, 43 N. J. L. (14 Vr.) 424;
Shollenberger v. Brinton, 52 Pa. St. 9.

and where payable in money may be made payable either in gold,¹ or silver,² coin, or in paper currency. Rent may also be made payable in a share of the crops;³ board furnished;⁴ home furnished;⁵ iron produced;⁶ other lands;⁷ payment of interest,⁸ so long as it does not violate the usury laws;⁹ repairs or improvements of the premises;¹⁰ royalty of what is taken from mines;¹¹ serv-

- ¹ *Kaufman v. Myers*, 33 Ga. 133 ;
Myers v. Kauffman, 37 Ga. 600 ;
 s.c. 95 Am. Dec. 367 ;
Sears v. Dewing, 96 Mass. (14 Allen) 413.
- ² *Rankin v. Demott*, 61 Pa. St. 263 ;
Christ Church Hospital v. Fuechsel, 54 Pa. St. 71 ;
Mather v. Kinike, 51 Pa. St. 425 ;
 s.c. 6 Phila. (Pa.) 107 ;
Hill v. Trustees, 7 Phila. (Pa.) 28 ;
Jefferson Med. Col. Case, 6 Phila. (Pa.) 313 ;
Patterson v. Blight, 5 Phila. (Pa.) 460 ;
Maule v. Stokes (Pa.), 3 W. N. C. 373 ;
Reinhart v. Collins (Pa.), 2 W. N. C. 305 ;
Bronson v. Rodes, 74 U. S. (7 Wall.) 229 ; bk. 19 L. ed. 141.
- ³ See : *Swanner v. Swanner*, 50 Ala. 66 ;
Smyth v. Tankersley, 20 Ala. 212 ;
 s.c. 56 Am. Dec. 193 ;
Thompson v. Mawhinney, 17 Ala. 362 ; s.c. 52 Am. Dec. 176 ;
Ewing v. Coddling, 5 Blackf. (Ind.) 433 ;
Wilcoxon v. Bowles, 1 La. An. 230 ;
Hoskins v. Rhodes, 1 Gill & J. (Md.) 266 ;
Lewis v. Wilkins, 1 Phila. (N. C.) Eq. 303 ;
Miller v. Fulton, 4 Ohio 433 ;
United States v. Gratiot, 39 U. S. (14 Pet.) 526 ; bk. 10 L. ed. 573 ;
Pollitt v. Forrest, 11 Ad. & E. N. S. (11 Q. B.) 949 ; s.c. 63 Eng. C. L. 947.
- ⁴ See : *Chamberlain v. Neale*, 91 Mass. (9 Allen) 410 ;
Evans v. Norris, 6 Mich. 369 ;
Shouse v. Krusor, 24 Mo. App. 279.
- See : *Chamberlain v. Neale*, 91 Mass. (9 Allen) 410 ;
- Evans v. Norris*, 6 Mich. 369 ;
Shouse v. Krusor, 24 Mo. App. 279.
- ⁵ *Lilley v. Fifty Associates*, 101 Mass. 432 ;
Jones v. Gurdin, 3 Watts & S. (Pa.) 531.
- ⁶ *Osborn v. Farewell*, 87 Ill. 80 ;
 s.c. 29 Am. Rep. 47.
- ⁷ *Sainet v. Duchamp*, 14 La. An. 539 ;
Pierce v. Pierce, 25 Barb. (N. Y.) 243.
- ⁸ *Tribble v. Anderson*, 63 Ga. 31 ;
Spence v. Steadman, 49 Ga. 133, 140 ;
Montague v. Sewell, 57 Md. 407 ;
People v. Howlett, 76 N. Y. 574 ;
King v. Murray, 6 Ired. (N. C.) L. 62.
- ⁹ *Gunn v. Pollock*, 6 Cal. 240 ;
Raybourn v. Ramsdell, 78 Ill. 622 ;
Sherwin v. Lasher, 9 Ill. App. 227 ;
Manice v. Brady, 15 Abb. (N. Y.) Pr. 173 ;
Madox v. Humphries, 24 Tex. 195 ;
Rich v. Bolton, 46 Vt. 84 ; s.c. 14 Am. Rep. 615.
- ¹⁰ *Steele v. Mills*, 68 Iowa 406 ; s.c. 27 N. W. Rep. 294 ;
Waters v. Stevenson, 13 Nev. 157 ; s.c. 29 Am. Rep. 293 ;
Fitch v. Archibald, 29 N. J. L. (5 Dutch.) 160 ;
Andendroid v. Woodward, 28 N. J. L. (4 Dutch.) 265 ;
Preston v. McCall, 7 Gratt. (Va.) 121 ;
Edmonds v. Eastwood, 2 Hurl. & N. 826 ;
Reg. v. Westbrook, 10 Ad. & E. (10 Q. B.) 178 ; s.c. 59 Eng. C. L. 178 ;
Daniel v. Grace, 6 Ad. & E. (6 Q. B.) 145 ; s.c. 51 Eng. C. L. 144.

ices;¹ specific articles;² tolls,³ or in any other manner agreed between the parties.⁴

SEC. 2241. **When payable.**—The time of the payment of rent is generally provided by an express stipulation in the lease; and in the absence of express stipulation in the lease, by custom. By express stipulation the rent may be made payable in advance, but the custom to pay in advance cannot be imported into a lease providing for a quarterly payment;⁵ but the time of paying rent may be changed from the beginning to the end of the month by the lessor's verbal agreement, where founded upon a new and sufficient consideration.⁶ In the absence of an express stipulation in the lease, and of no custom controlling, where the rent is payable in money, it is not due until the end of the term;⁷ where the rent is payable in a share of the crop, payment should be made within a reasonable time after the crop is gathered;⁸ where there is a lease for years from a specified day, with the rent payable quarterly, the rent will not become due until the

¹ *Merritt v. Fisher*, 19 Iowa 354;
Duncan v. Blake, 9 Lea (Tenn.)
534.

² *Tucker v. Cox*, 65 Ga. 700;
Wilkins v. Taliaferro, 52 Ga. 208;
Toler v. Seabrook, 39 Ga. 14;
Craig v. Merime, 16 Ill. App.
214;
Safely v. Gilmore, 21 Iowa 588;
s.c. 89 Am. Dec. 592;
Heywood v. Heywood, 42 Me.
229; s.c. 66 Am. Dec. 277;
Brooks v. Cunningham, 49 Miss.
108;
Livingston v. Miller, 11 N. Y.
80;
Fraser v. Davie, 5 Rich. (S. C.)
59, 60;
Brooks v. Wilcox, 11 Gratt. (Va.)
411.

³ *Fry v. Jones*, 2 Rawle (Pa.) 11.

⁴ *Swanner v. Swanner*, 50 Ala.
66;

Farley v. Thompson, 15 Mass. 18.

⁵ *Mitchell v. Weller*, 1 Jur. 622.

⁶ *Wilgus v. Whiteheart*, 89 Pa. St.
131.

⁷ *Dixson v. Niccolls*, 39 Ill. 372; s.c.
89 Am. Dec. 312;
Raymond v. Thomas, 24 Ind.

476, 478;

Calhoun v. Atchison, 4 Bash
(Ky.) 261; s.c. 96 Am. Dec.
299;

Weed v. Crocker, 79 Mass. (13
Gray) 219;

Gibbens v. Thompson, 21 Minn.
398;

Ridgley v. Stillwell, 27 Mo. 128;
Garvey v. Dodyns, 8 Mo. 213;

Duryee v. Turner, 20 Mo. App.
34;

Perry v. Aldrich, 13 N. H. 343;
s.c. 13 Am. Dec. 493;

Boyd v. McCombs, 4 Pa. St.
146;

Menough's Appeal, 5 Watts & S.
(Pa.) 432;

Hopkins v. Helmore, 8 Ad. & E.
463; s.c. 35 Eng. C. L. 682.

⁸ *Toler v. Seabrook*, 39 Ga. 14;

Roush v. Emerick, 80 Ind. 551;

Lamberton v. Stouffer, 55 Pa. St.
276;

Brown v. Adams, 35 Tex. 447.

See: *Patton v. Garrett*, 37 Ark.
605;

Dockham v. Parker, 9 Me. (9
Greenl.) 137; s.c. 23 Am. Dec.
547.

end of the quarter ;¹ and where rent is payable quarterly on certain days, it will not be due until midnight of the day specified.² Where the rent is payable by the way of repairs, improvements, and the like, no other claim of rent can be maintained.³

SEC. 2242. **Where payable.**—In those cases where the lease is silent as to the place where rent is to be paid, a tender on the premises is good, whether the rent is payable in money or in kind.⁴ In such cases a landlord seeking to enforce forfeiture should demand payment of the rent by the tenant on the premises just before sunset on the specified day.⁵

SEC. 2243. **To whom payable.**—Where the rent is not severed from the reversion in a lease,⁶ it will be payable to the lessor,⁷ notwithstanding the fact that notice may

¹ Garvey v. Dodyns, 8 Mo. 213.

² Sherlock v. Thayer, 4 Mich. 355 ; s.c. 66 Am. Dec. 539 ;

Ordway v. Remington, 12 R. I. 319 ; s.c. 34 Am. Rep. 646.

In Ordway v. Remington, *supra*, the court say : " Whether the quarter expired December 1st or November 30th depends on the construction of the lease. The lease, as we have seen, ran ' from the first day of September.' If the first day of September is included, the quarter expired November 30 ; if it is excluded, the quarter expired December 1. The day is to be included or excluded according to the apparent intention of the parties to the lease ; but if the demise is from a given day and there is nothing else to indicate the intention, then, unless there is some particular reason for holding otherwise, according to the weight of authority, we think the given day must be excluded."

Citing : Weeks v. Hull, 19 Conn. 376 ; s.c. 50 Am. Dec. 249 ;

Handley v. Cunningham's Trustee, 12 Bush (Ky.) 401 ;

Bemis v. Leonard, 118 Mass. 502 ; s.c. 19 Am. Rep. 470 ;

Atkins v. Sleeper, 89 Mass. (7

Allen) 487 ;

Farwell v. Rogers, 58 Mass. (4 Cush.) 460 ;

Bigelow v. Willson, 18 Mass. (1 Pick.) 485 ;

Blake v. Crowninshield, 9 N. H. 304 ;

Millard v. Willard, 3 R. I. 42 ;

Sheets v. Selden's Lessee, 69 U. S. (2 Wall.) 177, 190 ; bk. 17 L. ed. 822 ;

Clayton's Case, 5 Co. 1 ;

Styles v. Wardle, 4 Barn. & C. 908 ; s.c. 10 Eng. C. L. 854 ;

Webb v. Fairmanner, 3 Mees. & W. 473.

³ Sherwin v. Lasher, 9 Ill. App. 227 ;

Ardesco Oil Co. v. North American Oil Co., 66 Pa. St. 375.

⁴ Fisher v. Smith, 48 Ill. 184 ;

Walter v. Dewey, 16 John. (N. Y.) 222, 226.

⁵ Jenkins v. Jenkins, 63 Ind. 415 ; s.c. 30 Am. Rep. 229 ;

Hartwell v. Kelly, 117 Mass. 235 ;

Chapman v. Harney, 100 Mass. 353.

See : *Ante*, § 1207.

⁶ Crosby v. Loop, 13 Ill. 625 ;

Winn v. Murehead, 52 Iowa 64 ; s.c. 2 N. W. Rep. 949 ;

Perrin v. Lepper, 34 Mich. 292.

⁷ Crawford v. Jones, 54 Ala. 459 ;

Davenport v. Haynie, 30 Ill. 59 ;

be given him to pay to a third party, or the assignee of the lessor ;¹ to owner of the reversion at the time when the rent falls due,² and in case of his death, to his administrators or executors ;³ to the assignee or purchaser of the reversion,⁴ who may sue upon the lease for the rent after

Kieth v. Paulk, 55 Iowa 260 ; s.c. 7 N. W. Rep. 588 ;

McCoy v. Bateman, 8 Nev. 126.

¹ *Fox v. Corey*, 41 Me. 81.

Subtenants are to pay to their original lessor.

Robinson v. Lehman, 72 Ala. 401 ;

Camp v. Scott, 47 Conn. 366 ;

Dunlap v. Bullard, 131 Mass. 161 ;

Dartmouth College v. Clough, 8 N. H. 22 ;

Gibson v. Mullican, 58 Tex. 430 ;

Way v. Holton, 46 Vt. 184.

Subtenant may pay rent to the paramount owner in those cases where it is necessary to protect his interest.

Peck v. Ingersoll, 7 N. Y. 528 ;

Raubitscheck v. Semken, 4 Abb. (N. Y.) N. C. 205n.

² *Jaffe v. Skae*, 48 Cal. 540 ;

Lathrop v. Clewis, 63 Ga. 282, 287 ;

Toler v. Seabrook, 39 Ga. 14 ;

Leitch v. Boyington, 84 Ill. 179 ;

Dixon v. Niccolls, 39 Ill. 372 ; s.c. 89 Am. Dec. 312 ;

Dorsett v. Gray, 98 Ind. 273 ;

Kidwell v. Kidwell, 84 Ind. 224 ;

Evans v. Hardy, 76 Ind. 527 ;

Shawhan v. Long, 26 Iowa 488 ; s.c. 96 Am. Dec. 164 ;

Head v. Sutton, 31 Kan. 616 ; s.c. 3 Pac. Rep. 280 ;

Ball v. First National Bank of Covington, 80 Ky. 501 ;

Wilson v. Unselt, 12 Bush (Ky.) 215 ;

Kimball v. Sumner, 62 Me. 305 ;

Hunt v. Thompson, 84 Mass. (2 Allen) 341 ;

Bloodworth v. Stevens, 51 Miss. 470 ;

Shouse v. Kruser, 24 Mo. App. 279 ;

King v. Little, 77 N. C. 138 ;

Sutliff v. Atwood, 15 Ohio St. 186 ;

Vetter's Appeal, 99 Pa. St. 52 ;

McDowell v. Addams, 45 Pa. St. 430 ;

Porter v. Sweeney, 61 Tex. 213.

³ **Administrators or executors are entitled to collect rent to the day**

of his death only.

Stewart v. Smiley, 46 Ark. 373 ;

Sherman v. Dutch, 16 Ill. 283 ;

Kidwell v. Kidwell, 84 Ind. 224 ;

King v. Anderson, 20 Ind. 385 ;

Doe v. Lanins, 3 Ind. 441 ;

O'Bannon v. Roberts, 2 Dana (Ky.) 54 ;

Getzandaffer v. Caylor, 38 Md. 280 ;

Tucker v. Whitehead, 58 Miss. 762 ;

Allen v. Van Houton, 19 N. J. L. (4 Harr.) 47 ;

Condit v. Neighbor, 13 N. J. L. (1 J. S. Gr.) 83 ;

Wright v. Trustees of M. E. Church, 1 Hoffm. Ch. (N. Y.) 202 ;

King v. Little, 77 N. C. 138 ;

Haslage v. Krugh, 25 Pa. St. 97 ;

McCoy v. Scott, 2 Rawle (Pa.) 222 ; s.c. 19 Am. Dec. 640 ;

Adams v. Adams, 4 Watts (Pa.) 160.

⁴ *Tubbs v. Fort*, 58 Ala. 277 ;

Wise v. Faulkner, 51 Ala. 359 ;

English v. Key, 39 Ala. 113 ;

Pope v. Harkins, 16 Ala. 321 ;

Randolph v. Carlton, 8 Ala. 606 ;

Reynolds v. Lathrop, 7 Cal. 43 ;

Wilson v. Delaplaine, 3 Harr. (Del.) 499 ;

Ferguson v. Hardy, 59 Ga. 758 ;

Bowen v. Roach, 78 Ind. 361 ;

Townsend v. Isenberger, 45 Iowa 670 ;

Dailey v. Grimes, 27 Md. 440 ;

Martin v. Martin, 7 Md. 368 ; s.c. 61 Am. Dec. 364 ;

McNeil v. Kendall, 128 Mass. 245 ; 35 Am. Rep. 373 ;

Buffum v. Deane, 70 Mass. (4 Gray) 385 ;

Field v. Swan, 51 Mass. (10 Met.) 112 ;

Fish v. Potts, 8 N. J. Eq. (4 Halst.) 277, 909 ;

Corrigan v. Trenton Del. Falls Co., 7 N. J. Eq. (3 Halst.) 489 ;

Lancashire v. Mason, 75 N. C. 455 ;

Kornegay v. Collier, 65 N. C. 69.

attornment to him,¹ although the tenant may pay rent to his lessor until notified of the assignment;² but payment to the lessor after notice will not protect him against the claim of the purchaser or assignee;³ to the owner of the paramount title, to prevent eviction;⁴ to the mortgagee in possession;⁵ to a joint tenant of premises descending to him or his heirs;⁶ or to representatives of a deceased landlord of rent falling due before his death, and the heirs of a deceased landlord of rent falling due after his death;⁷ to a purchaser at a foreclosure sale, of the

¹ *Lyon v. Washburn*, 3 Colo. 201;
Fisher v. Deering, 60 Ill. 114;
Dunshie v. Grundy, 81 Mass. (15 Gray) 814.

² *Comer v. Sheehan*, 74 Ala. 452;
Otis v. McMillan, 70 Ala. 46;
Sampson v. Grimes, 7 Blackf. (Ind.) 176;
Stone v. Patterson, 36 Mass. (19 Pick.) 476, 477; s.c. 31 Am. Dec. 156;
Farley v. Thompson, 15 Mass. 18;
Johnson v. Futch, 57 Miss. 73;
Gray v. Rogers, 30 Mo. 258;
Green v. Sternberg, 15 Mo. App. 32.

³ *Ala. G. L. I. Co. v. Oliver*, 78 Ala. 158;
McDevitt v. Sullivan, 8 Cal. 592, 593;
Van Wagner v. Van Nostrand, 19 Iowa 422;
Willard v. Tillman, 19 Wend. (N. Y.) 358;
Snyder v. Riley, 1 Spear (N. C.) L. 272, 273; s.c. 40 Am. Dec. 602;
Whiting v. Street, Anth. 276.

⁴ *Farris v. Houston*, 74 Ala. 162;
Montanye v. Wallahan, 84 Ill. 355;
Anderson v. Smith, 63 Ill. 126;
Mills v. Peed, 14 B. Mon. (Ky.) 146;
George v. Putney, 58 Mass. (4 Cush.) 351, 354; s.c. 50 Am. Dec. 788;
Foss v. Van Driele, 47 Mich. 201; s.c. 10 N. E. Rep. 201;
Mattis v. Robinson, 1 Neb. 3;
Russell v. Fabyan, 28 N. H. 543; s.c. 61 Am. Dec. 629;
Home Life Ins. Co. v. Sherman, 46 N. Y. 370;
Ross v. Dysart, 33 Pa. St. 452.

⁵ *King v. Husatonic R. Co.*, 45

Conn. 234;

Reed v. Bartlett, 9 Ill. App. 267;
Scheidt v. Belz, 4 Ill. App. 431;
Lucier v. Marsales, 133 Mass. 454;
Cook v. Johnson, 121 Mass. 326;
Mirick v. Hoppin, 118 Mass. 582;
Stone v. Patterson, 36 Mass. (19 Pick.) 476; s.c. 31 Am. Dec. 156;

Jones v. Hill, 64 N. C. 198.
⁶ *Cruger v. McLaury*, 41 N. Y. 219, aff'g 51 Barb. (N. Y.) 642.

⁷ *Leitch v. Boyington*, 84 Ill. 179;
Dixon v. Niccolls, 39 Ill. 372; s.c. 89 Am. Dec. 312;

Foltz v. Prouse, 17 Ill. 487;
Sherman v. Dutch, 16 Ill. 283;
Crosby v. Loop, 13 Ill. 625;
Green v. Massie, 13 Ill. 363;
Henry v. Stevens, 108 Ind. 281; s.c. 9 N. E. Rep. 356;
Dorsett v. Gray, 98 Ind. 273;
Kidwell v. Kidwell, 84 Ind. 224;
Evans v. Hardy, 76 Ind. 527;
King v. Anderson, 20 Ind. 385;
Doe v. Lanins, 3 Ind. 441;
Shawhan v. Lang, 26 Iowa 488; s.c. 96 Am. Dec. 164;

Laverty v. Woodward, 16 Iowa 1;

Beezley v. Burgett, 15 Iowa 192;
Foteaux v. Lepage, 6 Iowa 123;
Head v. Sutton, 31 Kan. 616; s.c. 3 Pac. Rep. 280;

Ball v. First Nat. Bank of Covington, 80 Ky. 501;
Wilson v. Unsell, 12 Bush (Ky.) 215;

Combs v. Branch, 4 Dana (Ky.) 547;
O'Bannon v. Roberts, 2 Dana (Ky.) 54;

Kimball v. Sumner, 62 Me. 305;
Mills v. Merryman, 49 Me. 65;
Fuller v. Young, 10 Me. 365;
Getzandaffer v. Caylor, 38 Md. 280;

rent accruing after the completion of sale.¹ Purchasers at a partition sale,² but not at an execution sale,³ are entitled to the unpaid rents accruing from the day of sale.

SEC. 2244. **Who liable for—The tenant.**—The terms of the lease usually fix the liability of the tenant for rent, where the lease is in writing.⁴ Any reservation must be to the grantor of the lessor and not to a stranger.⁵ Where the lease is by parol the liability of the tenant may be fixed by a parol promise.⁶ In the absence of an express agree-

- Jaques v. Gould, 58 Mass. (4 Cush.) 384 ;
 Tucker v. Whitehead, 58 Miss. 762 ;
 Bloodworth v. Stevens, 51 Miss. 476 ;
 Shouse v. Krusor, 24 Mo. App. 279 ;
 Allen v. Van Houten, 19 N. J. L. (4 Harr.) 47 ;
 Ware v. Hall, 16 N. J. L. (1 Harr.) 333 ;
 Fay v. Holloran, 35 Barb. (N. Y.) 295 ;
 Kohler v. Knapp, 1 Bradf. (N. Y.) 241 ;
 Wright v. Williams, 5 Cow. (N. Y.) 501 ;
 Van Rensselaer v. Jones, 5 Den. (N. Y.) 449 ;
 Wright v. Trustees of M. E. Church, 1 Hoffm. Ch. (N. Y.) 202 ;
 Holly v. Holly, 94 N. C. 639, 670 ;
 King v. Little, 77 N. C. 138 ;
 Fleming v. Chunn, 4 Jones (N. C.) Eq. 422 ;
 Shillingford v. Good, 95 Pa. St. 25 ;
 McDowell v. Addams, 45 Pa. St. 430 ;
 Haslage v. Krugh, 25 Pa. St. 97 ;
 Cobel v. Cobel, 8 Pa. St. 342 ;
 McCoy v. Scott, 2 Rawle (Pa.) 222 ; s.c. 19 Am. Dec. 640 ;
 Adams v. Adams, 4 Watts (Pa.) 160 ;
 Rowan v. Riley, 6 Baxt. (Tenn.) 67 ;
 Robinson v. Robinson, 4 Humph. (Tenn.) 392 ;
 Smith v. Thomas, 14 Lea (Tenn.) 324 ;
 Porter v. Sweeney, 61 Tex. 213 ;
- Jones v. Lackland, 2 Gratt. (Va.) 81 ;
 Hobson v. Yancy, 2 Gratt. (Va.) 73.
¹ Hatch v. Sykes, 64 Miss. 307 ; s.c. 1 So. Rep. 248 ;
 Peck v. Knickerbocker Ice Co., 18 Hun (N. Y.) 183.
² Stephenson v. Hancock, 72 Mo. 612.
 See : Goodwin v. Hudson, 60 Ind. 117 ;
 Worthington v. Cook, 56 Md. 51.
³ Anderson v. Comeau, 33 La. An. 1119 ;
 Sheerer v. Stanley, 2 Rawle (Pa.) 276 ;
 Braddee v. Wiley, 10 Watts (Pa.) 362 ;
 Bank of Pennsylvania v. Wise, 3 Watts (Pa.) 394 ;
 Snyder v. Riley, 1 Spears (S. C.) L. 272 ; s.c. 40 Am. Dec. 602 ;
 Moore v. Turnpin, 1 Spears (S. C.) L. 32 ; s.c. 40 Am. Dec. 589.
⁴ 2 Bl Com. 299.
⁵ 2 Bl Com. 299 ;
 1 Co. Litt. (19th ed.) 47a ;
 Gilbertson v. Richard, 4 Hurl. & N. 276 ;
 Sacheverell v. Trogate, 2 Saund. 370.
⁶ Himesworth v. Edwards, 5 Harr. (Del.) 376 ;
 Bull v. Griswold, 19 Ill. 631 ;
 Swan v. Clark, 80 Ind. 57 ;
 Hufman v. Starks, 31 Ind. 474 ;
 Yates v. Mallen, 23 Ind. 562 ;
 Weatherby v. Baker, 25 La. An. 229 ;
 McDonald v. Stewart, 18 La. An. 90 ;
 Rachel v. Pearsall, 8 Mart. (La.) 702 ;

ment or understanding to the contrary, the tenant must pay as rent so much as the premises are reasonably worth,¹ as ascertained by witness acquainted with the land, and having knowledge of rents;² the obligation to pay rent is raised by implication from the lease.³ Thus it has been held that an obligation to pay rent is implied by occupancy,⁴ but not from occupancy without consent.⁵ Where lands are held by the tenant rent-free, as they may be,⁶ possession after notice or knowledge

- Union Banking Co. v. Gittings, 45 Md. 181;
 Merrill v. Mackman, 24 Mich. 279; s.c. 9 Am. Rep. 124;
 Gilson v. Boston, 11 Nev. 413;
 Becar v. Flues, 64 N. Y. 518;
 Bowler v. Erhard, Ohio, 1 Cleveland L. Rep. 173;
 Williams v. Ackerman, 8 Oreg. 405;
 Bank of America v. Banks, 101 U. S. 240; bk. 25 L. ed. 850.
¹ Wells v. Deming, 2 Root (Conn.) 150;
 Stose v. Heissler, 120 Ill. 433; s.c. 60 Am. Rep. 563; 11 N. E. Rep. 161;
 Murdock v. Ford, 17 Ind. 52;
 Harlan v. Emery, 46 Iowa 538;
 Newell v. Sandford, 13 Iowa 192;
 Abercrombie v. Redpath, 1 Iowa 111;
 Dougherty v. Lewellen, 3 Bibb (Ky.) 364;
 Silverstein v. Stern, 21 La. An. 743;
 Forbes v. Smiley, 56 Me. 174;
 Sarzent v. Ashe, 28 Me. 201;
 Jordan v. Jordan, 4 Me. (4 Greenl.) 175; s.c. 16 Am. Dec. 249;
 Emmes v. Feeley, 132 Mass. 346;
 Theological Inst. v. Barbour, 70 Mass. (4 Gray) 329;
 Dwight v. Cutler, 3 Mich. 566; s.c. 64 Am. Dec. 105;
 Alton v. Pickering, 9 N. H. 494;
 Conover v. Conover, 1 N. J. Eq. (1 Saxt.) 403;
 Perrine v. Hankinson, 11 N. J. L. (6 Halst.) 183;
 Van Brunt v. Pope, 6 Abb. (N. Y.) Pr. N. S. 217;
 Scrantom v. Booth, 29 Barb. N. Y. 171;
 Grove v. Barclay, 106 Pa. St. 155;
 Sterrett v. Wright, 27 Pa. St. 259;
 Henwood v. Cheeseman, 3 Serg. & R. (Pa.) 500;
 Blumberg v. McNear, 1 Wash. 141;
 In re Fowler, 8 Ben. D. C. 421; s.c. 9 Fed. Cas. 613;
 Matter of McGrath, 5 Ben. D. C. 183; s.c. 5 Nat. Bankr. Reg. 254; Fed. Cas. No. 8808;
 Cobb v. Kidd, 19 Blatchf. C. C. 560; s.c. 8 Fed. Rep. 695; 8 Bost. Rep. 769;
 Scott v. Hawsman, 2 McL. C. C. 180; s.c. Fed. Cas. No. 12532;
 Re Hamburger, 12 Nat. Bankr. Reg. 277;
 Re Breck, 8 Ben. D. C. 93; s.c. 12 Nat. Bankr. Reg. 215; 4 Fed. Cas. 43.
² Lyles v. Lyles, 1 Hill (S. C.) Eq. 76, 79.
³ Voight v. Resor, 80 Ill. 331.
⁴ Hoagland v. Crum, 113 Ill. 365; s.c. 55 Am. Rep. 424.
⁵ Jackson v. Mowry, 30 Ga. 143;
 Stoddert v. Newman, 7 Har. & J. (Md.) 251;
 Spring v. Hyde Park, 137 Mass. 554; s.c. 50 Am. Rep. 334.
⁶ Board of Commrs. v. Harman, 101 Ind. 551;
 Dillon v. Wilson, 24 Mo. 278;
 Middleton v. Middleton, 35 N. J. Eq. (8 Stew.) 141;
 Robinson v. Robinson, 4 Humph. (Tenn.) 392-394;
 Ridley v. McNairy, 2 Humph. (Tenn.) 174-177;
 Lougue v. Memphis, 7 Lea (Tenn.) 67;
 Clark v. Clark's Estate, 58 Vt. 327;
 Bouldin v. Alexander, 153 U. S. 330; bk. 25 L. ed. 203.

that rent is demanded will create a liability to pay rent,¹ even though the rent is protested against, or the premises are merely used for the possession of storage.² Where the relation of landlord and tenant does not exist, there will be no implied promise to pay rent,³ as where the lands are held under the relation of vendor and vendee.⁴

SEC. 2245. Same—Parties continuing to occupy.—A party who continues to occupy the premises of another after being notified by the owner that if he does so he will be expected to pay rent, is bound to pay a reasonable rent thereafter,⁵ even though he has heretofore held rent-free.⁶

SEC. 2246. Same—Assignee of tenant.—The assignee of a tenant is liable for rent, because the express covenant in a lease to pay rent runs with the land,⁷ and for that rea-

¹ *Dudley v. Kelly*, 74 Me. 556 ;
Thompson v. Sanborn, 52 Mich.
 141 ; s.c. 17 N. W. Rep. 730.

² *Horton v. Cooley*, 135 Mass. 589 ;
Ducey Lumber Co. v. Lane, 58
 Mich. 520 ; s.c. 25 N. W. Rep.
 568 ;

Grove v. Barclay, 106 Pa. St.
 155.

See: *Lore v. Pierson*, 10 Daly
 (N. Y.) 272.

³ *Davis v. Watts*, 90 Ind. 372 ;
Nance v. Alexander, 49 Ind. 516 ;
Jones v. Tipton, 2 Dana (Ky.)
 295 ;

Dennett v. Penobscot F. G. Co., 57
 Me. 425 ; s.c. 2 Am. Rep. 58 ;
Mayo v. Shattuck, 31 Mass. (14
 Pick.) 525 ;

Hedgepath v. Rose, 95 N. C. 41 ;
Carpenter v. United States, 6 Ct.
 of Cl. 156.

⁴ *Barnes v. Shinholster*, 14 Ga.
 131 ;

Miles v. Elkin, 10 Ind. 329 ;
Newby v. Vestal, 6 Ind. 412 ;

Garvin v. Jennerson, 20 Kan.
 371.

Where the contract has been aban-
 doned or rescinded the parties are
 held liable for rent.

Patterson v. Stoddard, 47 Me.
 355 ; s.c. 74 Am. Dec. 490 ;

Jones v. Hutchinson, 21 Tex.
 370.

See: *McNair v. Swartz*, 16 Ill.
 24 ;

Coffman v. Huck, 19 Mo. 435.

Where the contract of purchase is
 void one taking possession there-
 under will be liable for rent.

Mattock v. Hightshue, 39 Ind.
 95.

⁵ *Illinois Cent. R. Co. v. Thompson*,
 116 Ill. 159 ; s.c. 5 N. E. Rep.
 117 ;

Griffin v. Kinsey, 75 Ill. 411 ;
Higgins v. Halligan, 46 Ill. 173 ;
Duley v. Kelly, 74 Me. 556.

⁶ *Board of Commrs. v. Harman*,
 101 Ind. 551 ;

Dillon v. Wilson, 24 Mo. 278 ;
Middleton v. Middleton, 35 N. J.
 Eq. (8 Stew.) 141 ;

Robinson v. Robinson, 4 Humph.
 (Tenn.) 392-394 ;

Ridley v. McNairy, 2 Humph.
 (Tenn.) 174-177 ;

Loague v. Memphis, 7 Lea (Tenn.)
 67 ;

Clark v. Clark's Estate, 58 Vt.
 527 ;

Bouldin v. Alexander, 103 U. S.
 330 ; bk. 26 L. ed. 308.

⁷ *Salisbury v. Shirley*, 66 Cal. 224 ;
Webster v. Nichols, 104 Ill. 160 ;

Carley v. Lewis, 24 Ind. 23 ;
McCormick v. Young, 2 Dana
 (Ky.) 294 ;

Worthington v. Cooke, 52 Md. 297 ;

son is binding upon the assignee of the original tenant by privity to the estate, during the continuance of such privity;¹ but should the assignee fail to pay the rent

- Lester v. Hardesty*, 29 Md. 50;
Hosford v. Ballard, 39 N. Y. 147;
Van Rensselaer v. Barringer, 39 N. Y. 9;
Van Rensselaer v. Read, 26 N. Y. 558;
Van Rensselaer v. Hays, 19 N. Y. 68; s.c. 75 Am. Dec. 278;
Lyons v. Adde, 63 Barb. (N. Y.) 9;
Tyler v. Heidorn, 46 Barb. (N. Y.) 439;
Main v. Feathers, 21 Barb. (N. Y.) 646;
Van Rensselaer v. Bradley, 3 Den. (N. Y.) 135; s.c. 45 Am. Dec. 451;
Constantine v. Wake, 1 Sweeny (N. Y.) 239;
Smith v. Harrison, 42 Ohio St. 180;
Sutliff v. Atwood, 15 Ohio St. 186;
Springer v. Phillips, 71 Pa. St. 60;
Cowton v. Wickersham, 54 Pa. St. 302;
Hiester v. Shaeffer, 45 Pa. St. 537;
Hannen v. Ewalt, 18 Pa. St. 9;
Sandwith v. De Silver, 1 Browne (Pa.) 221;
Royer v. Ake, 3 Pen. & W. (Pa.) 461;
Conrad v. Smith, 12 Phila. (Pa.) 306;
Herbaugh v. Zentmyer, 2 Rawle (Pa.) 159;
Dunbar v. Jumper, 2 Yeates (Pa.) 74;
Ingersoll v. Sargent, 1 Whart. (Pa.) 348;
State v. Martin, 14 Lea (Tenn.) 92; s.c. 52 Am. Rep. 167;
Hurst v. Rodney, 1 Wash. C. C. 375; s.c. 1 Fed. Cas. No. 6937;
Williams v. Bosanquet, 1 Brod. & B. 238;
Stevenson v. Lambard, 2 East 575; s.c. 6 Rev. Rep. 511;
Parker v. Webb, 3 Salk. 5.
¹ *Bailey v. Richardson*, 66 Cal. 416;
Salisbury v. Shirley, 66 Cal. 224;
Webster v. Nichols, 104 Ill. 160;
Farnam v. Holman, 90 Ill. 312;
McDowell v. Hendrix, 67 Ind. 513;
Carley v. Lewis, 24 Ind. 23;
Trabue v. McAdams, 8 Bush (Ky.) 78;
McCormick v. Young, 2 Dana (Ky.) 294;
Muldoon v. Hite, 6 Ky. L. Rep. 663;
Brinton v. Datas, 17 La. An. 174;
D'Aquin v. Armant, 14 La. An. 217;
Myers v. Silljacks, 58 Md. 319;
Hintze v. Thomas, 7 Md. 346;
Sanders v. Partridge, 108 Mass. 556;
Patten v. Deshon, 55 Mass. (1 Gray) 325;
Blake v. Sanderson, 55 Mass. (1 Gray) 332;
Croade v. Ingraham, 30 Mass. (13 Pick.) 33;
Waldo v. Hall, 14 Mass. 486;
Willi v. Dryden, 52 Mo. 319;
Smith v. Brinker, 17 Mo. 148;
Gray v. Clement, 12 Mo. App. 579;
St. Louis Public Schools v. Boatman's Ins. & T. Co., 5 Mo. App. 91;
Stewart v. Long Island R. Co., 102 N. Y. 601; s.c. 55 Am. Rep. 844; 8 N. E. Rep. 200;
Durand v. Curtis, 57 N. Y. 7;
Van Rensselaer v. Dennison, 35 N. Y. 393;
Holsman v. De Gray, 6 Abb. (N. Y.) Pr. 79;
Burchfield v. Northern Cent. R. Co., 57 Barb. (N. Y.) 589;
Tyler v. Heidorn, 46 Barb. (N. Y.) 439;
Van Rensselaer v. Hays, 24 Barb. (N. Y.) 365;
House v. Burr, 24 Barb. (N. Y.) 525;
Main v. Feathers, 21 Barb. (N. Y.) 546;
Jacques v. Short, 20 Barb. (N. Y.) 269;
Carter v. Hammett, 18 Barb. (N. Y.) 608;
Childs v. Clark, 3 Barb. Ch. (N. Y.) 52; s.c. 49 Am. Dec. 164;
Church v. Seeley, 39 Hun (N. Y.) 269;
Tate v. McCormick, 23 Hun (N. Y.) 218;
Marshall v. Lippman, 16 Hun (N. Y.) 110;

stipulated, the original tenant will be liable thereafter, notwithstanding the agreement,¹ except in those cases where the assignment is made with the consent of the lessor,² or by operation of law.³ The original tenant's

- Port v. Jackson, 17 John. (N. Y.) 239, 479 ;
 Johnston v. Bates, 48 N. Y. Super. Ct. 180 ;
 Damb v. Hoffman, 3 E. D. Smith, 361 ;
 Furman v. Johnson, 12 N. Y. Week. Dig. 423 ;
 Provost v. Calder, 2 Wend. (N. Y.) 517 ;
 Sutliff v. Atwood, 15 Ohio St. 186 ;
 Rothschild v. Hudson (Ohio), 6 Cin. L. Bull. 752 ;
 Royer v. Ake, 3 Pen. & W. (Pa.) 461 ;
 Brolasky v. Furey, 12 Phila. (Pa.) 428 ;
 Conrad v. Smith, 12 Phila. (Pa.) 306 ;
 Wistar v. Mercer, 6 Phila. (Pa.) 44 ;
 State v. Martin, 14 Lea (Tenn.) 92 ; s.c. 52 Am. Rep. 167 ;
 Le Gierse v. Green, 61 Tex. 128 ;
 Overman v. Sanborn, 27 Vt. 54 ;
 Martineau v. Steele, 14 Wis. 272 ;
 Hurst v. Rodney, 1 Wash. C. C. 375 ; s.c. Fed. Cas. No. 6937 ;
Ex parte Doble, 38 L. T. N. S. 183.
- ¹ State v. McCauley, 15 Cal. 431 ;
 Garner v. Byard, 23 Ga. 280 ; s.c. 63 Am. Dec. 527 ;
 Stein v. Jones, 18 Ill. App. 543 ;
 Carley v. Lewis, 24 Ind. 23 ;
 Barhydt v. Burgess, 46 Iowa 476 ;
 Bartels v. Creditors, 11 La. An. 433 ;
 Fox v. Corey, 41 Me. 81 ;
 Worthington v. Cook, 56 Md. 51, 53 ;
 Wall v. Hinds, 70 Mass. (4 Gray) 256 ; s.c. 64 Am. Dec. 64 ;
 Fletcher v. McFarlane, 12 Mass. 43 ;
 Richards v. Whittle, 16 N. H. 259 ;
 Phelps v. Van Duzen, 3 Abb. (N. Y.) App. 604 ;
 House v. Burr, 24 Barb. (N. Y.) 525 ;
 Port v. Jackson, 17 John. (N. Y.) 239, 479 ;
 Johnston v. Bates, 48 N. Y. Super. Ct. 180 ;
- Damb v. Hoffman, 3 E. D. Smith (N. Y.) 361 ;
 Smith v. Harrison, 42 Ohio St. 180 ;
 McHenry v. Carson, 41 Ohio St. 221 ;
 Taylor v. De Bus, 31 Ohio St. 468 ;
 Harmony Lodge v. White, 30 Ohio St. 569 ; s.c. 27 Am. Rep. 492 ;
 Sutliff v. Atwood, 15 Ohio St. 186 ;
 Great Western Dispatch Co. v. Nova Casarea Harmony Lodge (Ohio), 3 Cin. Law Bull. 345 ; s.c. 7 Am. Law Rec. 12 ;
 Frank v. McGuire, 42 Pa. St. 77 ;
 Ghegan v. Young, 23 Pa. St. 18 ;
 Estate of Wiley, 12 Phila. (Pa.) 152 ;
 Bailey v. Wells, 8 Wis. 141 ; s.c. 76 Am. Dec. 233 ;
 Hornby v. Houlditch, Andrew 40 ;
 Broom v. Hore, Cro. Eliz. 633 ;
 Brett v. Cumberland, Cro. Jac. 521 ;
 Auriol v. Mills, 4 Durnf. & E. (4 T. R.) 99 ; s.c. 2 Rev. Rep. 341 ;
 Wadham v. Marlowe, 8 East 314n ; s.c. 9 Rev. Rep. 456 ;
 Coghill v. Freelove, 3 Mod. 326 ;
 Thursby v. Plant, 1 Saund. 240 ;
 Orgill v. Kemshead, 4 Taunt. 642 ; s.c. 13 Rev. Rep. 712 ;
 Buckland v. Hall, 8 Ves. 92 ; s.c. 7 Rev. Rep. 1 ;
 Staines v. Morris, 1 Ves. & B. 9.
- ² Garner v. Byard, 23 Ga. 289 ; s.c. 68 Am. Dec. 527 ;
 Colton v. Gorham, 72 Iowa 324 ; s.c. 33 N. W. Rep. 76 ;
 Stimmel v. Waters, 2 Bush (Ky.) 283 ;
 Knickerbocker Life Ins. Co. v. Patterson, 75 N. Y. 589 ;
 Harrower v. Heath, 19 Barb. (N. Y.) 331 ;
 Vandekar v. Reeves, 40 Hun (N. Y.) 430.
- ³ *Ex parte* Allen, L. R. 20 Ch. D. 341 ;
Ex parte Morrish, 47 L. T. N. S. 26 ;
In re Commercial Bulletin Co., 2

express covenant to pay rent will not be discharged by the lessor's concurrence in the assignment of the lease,¹ nor by the acceptance of rent by the lessor from the assignee, in the absence of an express agreement or operation of law.² And the lessor may hold the original tenant or his assignee,³ but not both.⁴ The assignee of the original tenant is liable on the covenant to pay rent in a lease only during his privity of estate, and will be discharged from further liability by assigning over,⁵

Woods C. C. 220; s.c. 14 Nat. Bankr. Reg. 286; 8 Chicago L. News 330; 3 New York Week. Dig. 12; 1 La. Law J. 176; 7 Fed. Cas. No. 3060.

¹ Stein v. Jones, 18 Ill. App. 543; Oswald v. Fratenburgh, 36 Minn. 270; s.c. 31 N. W. Rep. 173; House v. Burr, 24 Barb. (N. Y.) 525;

Harmony Lodge v. White, 30 Ohio St. 569; s.c. 27 Am. Rep. 492;

Sutliff v. Atwood, 15 Ohio St. 194;

Great Northern Dispatch Co. v. Nova Cæsarea Harmony Lodge (Ohio), 3 Cin. L. Bull. 345; s.c. 7 Am. L. Rec. 12;

Estate of Wiley, 12 Phila. (Pa.) 152,

² Harris v. Hackman, 62 Iowa 411; s.c. 17 N. W. Rep. 592;

Barhydt v. Burgess, 46 Iowa 476; Worthington v. Cook, 56 Md. 51, 53;

Wall v. Hinds, 70 Mass. (4 Gray) 256; s.c. 64 Am. Dec. 64;

Fletcher v. McFarlane, 12 Mass. 43;

Phelps v. Van Dusen, 2 Abb. (N. Y.) App. Dec. 604;

Port v. Jackson, 17 John. (N. Y.) 239;

Damb v. Hoffman, 3 E. D. Smith (N. Y.) 361;

Smith v. Harrison, 42 Ohio St. 180;

Taylor v. De Bus, 31 Ohio St. 468;

Harmony Lodge v. White, 30 Ohio St. 569; s.c. 27 Am. Rep. 492;

Sutliff v. Atwood, 125 Ohio St. 186, 194;

Frank v. McGuire, 42 Pa. St. 77;

Chegan v. Young, 23 Pa. St. 18;

Dewey v. Dupuy, 2 Watts & S.

(Pa.) 553;

Shaw v. Partridge, 17 Vt. 626;

Bailey v. Wells, 8 Wis. 141; s.c. 76 Am. Dec. 233;

Smith v. Clark, 1 W. N. C. 445;

Barnard v. Godscall, Cro. Jac. 309.

³ Carley v. Lewis, 24 Ind. 23;

Barhydt v. Burgess, 46 Iowa 470;

Sutliff v. Atwood, 15 Ohio St. 186.

⁴ Sutliff v. Atwood, 15 Ohio St. 194.

⁵ Johnson v. Sherman, 15 Cal. 287; s.c. 76 Am. Dec. 481;

Pierce v. Minturn, 1 Cal. 475;

Trabue v. McAdams, 8 Bush (Ky.) 78;

Muldoon v. Hite, 6 Ky. L. Rep. 663;

Hintze v. Thomas, 7 Md. 346;

Carter v. Hammett, 18 Barb. (N. Y.) 608;

Childs v. Clark, 3 Barb. Ch. (N. Y.) 52;

Armstrong v. Wheeler, 9 Cow. (N. Y.) 88;

Day v. Swackhamer, 2 Hilt. (N. Y.) 4;

Stoppanios v. Richards, 1 Hilt. (N. Y.) 509;

Stern v. Florence Sewing Machine Co., 53 How. (N. Y.) Pr. 478;

Siefke v. Koch, 31 How. (N. Y.) Pr. 383;

Johnson v. Bates, 48 N. Y. Super. Ct. 180;

Astor v. L'Amoureux, 4 Sandf. (N. Y.) 524;

Sutliff v. Atwood, 15 Ohio St. 186;

Borland's Appeal, 66 Pa. St. 470;

Estate of Wiley, 12 Phila. (Pa.) 152;

State v. Martin, 14 Lea (Tenn.) 92; s.c. 52 Am. Rep. 167;

Hurst v. Rodney, 1 Wash. C. C. 375;

Williams v. Earle, 9 Best & Smith 740; s.c. Fed. Cas. No. 6938;

even though the assignment be made to an infant, a married woman, or an irresponsible person.¹ The motive with which such assignment is made will not affect its validity or operation,² and the effect of the original assignee still remaining in possession will not render him liable to the lessor for the rent; the reason for this is the fact that privity of estate is the sole foundation of the liability of an assignee of a lease for the rent, mere possession not being sufficient, because possession without title does not create privity.³ But it has been said that should an assignee of a lease under seal assign the same in writing, not under seal, and not recorded, he still remains liable to the landlord for the rent where his assignee does not enter, and he continues to collect the rent from the subtenants.⁴ The reason for this exception is the well-known rule, that the lease being under seal could be assigned only by an instrument of like dignity, that is, by a writing under seal.⁵

SEC. 2247. Same—Assignee for benefit of creditors.—An assignee in bankruptcy, or for the benefit of creditors, will have a reasonable time in which to accept or disclaim the lease held by his assignor.⁶ If the assignee does not regard the acceptance of the lease as for the benefit of

- Taylor v. Shum*, 1 Bos. & P. 23 ;
Chancellor v. Poole, 1 Doug. 764 ;
Barnfather v. Jordan, 1 Doug. 452 ;
Auriol v. Mills, 4 Durnf. & E. (4 T. R.) 94 ; s.c. 2 Rev. Rep. 341 ;
Harley v. King, 1 Gale 100 ;
Crouch v. Tregonning, L. R. 7 Ex. 88 ;
Onslow v. Corrie, 2 Madd. 330 ;
Keeling v. Morrice, 12 Mod. 371 ;
Pitcher v. Tovey, 4 Mod. 71 ; s.c. 3 Lev. 295 ;
London v. Richmond, 2 Vern. 421 ;
Treackle v. Coke, 1 Vern. 165 ;
Staines v. Morris, 1 Ves. & B. 11.
¹ *Johnson v. Sherman*, 15 Cal. 287 ; s.c. 76 Am. Dec. 481 ;
Valliant v. Dodemede, 2 Atk. 546 ;
Taylor v. Shum, 1 Bos. & P. 23 ;
Barnfather v. Jordan, 1 Doug. 452 ;
Onslow v. Corrie, 2 Madd. 330 ;
Lekeux v. Nash, 2 Str. 1221.
- ² *Durand v. Curtis*, 57 N. Y. 7 ;
Tate v. McCormick, 23 Hun (N. Y.) 218 ;
Johnston v. Bates, 48 N. Y. Super. Ct. 180.
³ *Tate v. McCormick*, 23 Hun (N. Y.) 218.
 See : *Negley v. Morgan*, 46 Pa. St. 281.
⁴ *Sanders v. Partridge*, 108 Mass. 556.
⁵ *Sanders v. Partridge*, 108 Mass. 556 ;
Bridgham v. Tileston, 87 Mass. (5 Allen) 371 ;
Blake v. Saunderson, 67 Mass. (1 Gray) 332 ;
Patten v. Deshon, 67 Mass. (1 Gray) 325 ;
Brewer v. Dyer, 61 Mass. (7 Cush.) 337 ;
Wood v. Partridge, 11 Mass. 488.
⁶ *Whiting v. Griffing*, 34 Conn. 437 ;
Boyce v. Blakewell, 37 Mo. 492.

the creditors, he may disclaim it.¹ Not being chargeable for rent by virtue of the assignment,² the assignee will not be liable for rent unless he enters; but if the assignee enters, or fails to disclaim within a reasonable time, he will be liable upon the covenants of the lease.³ Where the assignee accepts the lease he must pay arrears of rent in preference to other claims,⁴ as well as taxes and ground-rent, out of the proceeds of the sale of the mortgaged leasehold, even though the sum received be insufficient to satisfy the mortgage debt.⁵

SEC. 2248. **Same—Surety.**—Where the person by his written undertaking becomes responsible for the payment of rent reserved in a lease, he becomes responsible

¹ *Whiting v. Griffing*, 44 Conn. 437.

² *Gould v. Kerr*, 52 Ga. 610;

Horwitz v. Davis, 16 Md. 313;

Abbott v. Stearns, 139 Mass. 168;

Snyder's Estate, 8 Phila. (Pa.) 302;

Naish v. Tatlock, 2 H. Bl. 319;

s.c. 3 Rev. Rep. 384;

Welch v. Meyers, 4 Camp. 368;

Bourdillon v. Dalton, 1 Esp.* 233;

Briggs v. Lowery, 8 Mees. & W. 729;

Clarke v. Hume, 1 Ryan & M. 207.

See: *Bokee v. Hammersley*, 16 How. (N. Y.) Pr. 461.

³ *Dorrance v. Jones*, 27 Ala. 630;

White v. Griffing, 44 Conn. 437;

Horwitz v. Davis, 16 Md. 313;

Ex parte Faxon, 1 Low. C. C. 404; s.c. 4 Nat. Bankr. Reg. 32;

8 Fed. Cas. 1109;

Longstreth v. Pennock, 9 Phila. (Pa.) 394;

Re Secor, 18 Fed. Rep. 319;

Re Wheeler, 18 Nat. Bankr. Reg. 385; s.c. 26 Pittsb. L. J. 84;

Fed. Cas. No. 17490;

Re Ives, 18 Nat. Bankr. Reg. 28;

s.c. Fed. Cas. No. 7116;

Re Lucius Hart Manuf. Co., 17 Nat. Bankr. Reg. 459; s.c. Fed. Cas. No. 8592;

Buckner v. Jewell, 14 Nat. Bankr. Reg. 286;

Re Washburn, 11 Nat. Bankr. Reg. 66; s.c. Fed. Cas. No. 17211;

Re Ten Eyck, 7 Nat. Bankr. Reg. 26; s.c. Fed. Cas. No. 13829;

Re Webb, 6 Nat. Bankr. Reg. 302; s.c. Fed. Cas. No. 17315;

Re Laurie, 4 Nat. Bankr. Reg. 7; s.c. 1 Low. C. C. 404; 4 Fed. Cas. No. 1109.

Re Rose, 3 Nat. Bankr. Reg. 265 (Quarto 63); s.c. 1 Balt. L. Trans. 625; Fed. Cas. No. 12043;

Re Merrifield, 3 Nat. Bankr. Reg. 98 (Quarto 25);

Re Walton, 1 Nat. Bankr. Reg. 557 (Quarto 154); s.c. Fed. Cas. No. 17131;

Re Commercial Bulletin Co., 2 Woods C. C. 220; s.c. 14 Nat. Bankr. Reg. 286; 8 Chicago L. News 330; 3 N. Y. Week. Dig. 12; 1 La. Law J. 176; 6 Fed. Cas. 220;

Wilson v. Wallani, L. R. 5 Ex. D. 155;

Titterton v. Cooper, L. R. 9 Q. B. D. 473;

Thomas v. Pemberton, 7 Taunt. 206.

⁴ *Longstreth v. Pennock*, 7 Nat. Bankr. Reg. 449; s.c. 20 Pittsb. Leg. J. 107; 30 Leg. Int. 29; 9 Phila. (Pa.) 394; Fed. Cas. No. 8488.

⁵ *Stewart v. Clark*, 60 Md. 310;

Stephenson v. Haines, 16 Ohio St. 478;

Hoagland's Case, 18 Nat. Bankr. Reg. 530; s.c. 12 Fed. Cas. No. 6545.

* See: *Ante*, (*) footnote, p. 257.

thereafter in the event of a delivery by the tenant, because such contract runs with the land,¹ whether such guarantee is upon the lease at the time of the execution or contained in a separate agreement. Where the contract of suretyship is upon the original lease, it need not express the stipulation,² because the lease and guaranty are considered one instrument ;³ but where the guaranty is a stipulated agreement, then the consideration must be expressed.⁴ Where one has become surety for the payment of rent and stipulated for in a lease, he is liable thereafter in the first instance, and the lessor is not required to demand the rent of the lessee or to institute proceedings for the recovery thereof, or even to notify such surety of non-payment.⁵ The reason for this is because the relation of the grantor to the lessor is independent to that of the tenant to the lessor.⁶

SEC. 2249. Apportionment.—By apportionment of rent is understood as the division of the rent corresponding with a division of the statute from which it arises either by acts of the parties or by operation of law.⁷ Rent being an incident of the reversion and passing with it, it follows that whenever the reversion is severed, either by the act of the party or by the act of the law, the rent received therefrom will be apportioned between or among the parties according to their respective interest, that is, according to the value of the part received by each, and according to the quantity or number of acres.⁸ In case of apportionment the rent becomes payable to the several

¹ *Allen v. Culver*, 3 Den. (N. Y.) 184.

² *Evoy v. Tewksbury*, 5 Cal. 285 ;
Adams v. Bean, 12 Mass. 137.

³ *Otto v. Jackson*, 35 Ill. 349 ;
Adams v. Bean, 12 Mass. 137.

⁴ *Westmoreland v. Porter*, 75 Ala. 452 ;

Newcomb v. Clark, 1 Den. (N. Y.) 226 ;

Wain v. Warlters, 5 East 10 ; s.c. 1 Smith 299 ; 7 Rev. Rep. 645.

⁵ *Ducker v. Rapp*, 41 N. Y. Super. Ct. 235.

See : *Evoy v. Tewksbury*, 5 Cal. 285 ;

Ward v. Wilson, 100 Ind. 52 ;

Taylor v. Taylor, 64 Ind. 356 ;

Voltz v. Harris, 40 Ill. 155 ;

Elmore v. Robinson, 18 La. An. 651 ;

Turnure v. Hohenthal, 36 N. Y. Super. Ct. 79.

⁶ *Mendelson v. Stout*, 37 N. Y. Super. Ct. 408.

⁷ *Ryerson v. Quackenbush*, 26 N. J. L. (2 Dutch.) 236, 250 ;

Farley v. Craig, 11 N. J. L. (6 Halst.) 263, 279.

⁸ *Van Rensselaer v. Galop*, 5 Den. (N. Y.) 454.

grantees or assignees *pro rata* according to relative value of the respective shares,¹ and they may severally bring action for their proportion.² Thus the rent will be apportioned, by operation of law, among the several heirs or devisees to whom the reversion or right to receive rent descends, on the death of the lessor;³ upon a partition of the leased premises among the heirs during the term;⁴ upon the taking of the premises for a public use;⁵ upon eviction from a portion of the premises by the person holding a paramount title;⁶ upon surrender,⁷ or forfeiture of a portion of the leased premises;⁸ upon the judicial sale, either of the leasehold premises

¹ *Cole v. Patterson*, 25 Wend. (N. Y.) 456.

See: *Martin v. Martin*, 7 Md. 368;

Russell v. Allen, 84 Mass. (2 Allen) 42;

Reed v. Ward, 22 Pa. St. 144.

² *Cole v. Patterson*, 25 Wend. (N. Y.) 456.

³ *Crosby v. Loop*, 13 Ill. 625;

Cruger v. McLawry, 41 N. Y. 219;

Cole v. Patterson, 25 Wend. (N. Y.) 456;

Ewer v. Moyle, Cro. Eliz. 771;

Wotton v. Shirt, Cro. Eliz. 742;

1 Co. Litt. (19th ed.) 148a.

⁴ *Murray v. Mount*, 19 Ind. 364.

⁵ *Chicago v. Garrity*, 7 Ill. App. 474;

David v. Beelman, 5 La. An. 545;

Parks v. Boston, 32 Mass. (15 Pick.) 198;

Kingsland v. Clark, 24 Mo. 24;

Biddle v. Hussman, 23 Mo. 597;

Wiggin v. New York, 9 Paige Ch. (N. Y.) 16;

Post v. Logan, 1 N. Y. Leg. Obs. 59;

Gillespie v. Mayor, 23 Wend. (N. Y.) 643;

Gillespie v. Thomas, 15 Wend. (N. Y.) 464;

Turner v. Williams, 10 Wend. (N. Y.) 139;

Getz v. Philadelphia & R. Ry. Co., 105 Pa. St. 547;

Sch. & Dan. Co. v. Schmoele, 57 Pa. St. 271;

Cuthbert v. Kuhn, 3 Whart (Pa.) 357; s.c. 31 Am. Dec. 513.

See: *Patterson v. Boston*, 37 Mass. (20 Pick.) 159;

Foot v. Cin., 11 Ohio 408; s.c. 38 Am. Dec. 737;

Steifel v. Metz (Ohio), 2 Cin. L. Bull. 95;

Eldred v. Leahy, 31 Wis. 546.

Halligan v. Wade, 21 Ill. 470; s.c. 74 Am. Dec. 108;

Fillebrown v. Hoar, 124 Mass. 580;

McFaddin v. Rippey, 8 Mo. 738;

Russell v. Fabyan, 28 N. H. 545; s.c. 61 Am. Dec. 629;

Perry v. Aldrich, 13 N. H. 349;

Carter v. Burr, 39 Barb. (N. Y.) 59;

Moffat v. Strong, 9 Bosw. (N. Y.) 57;

Lansing v. Van Alstyne, 2 Wend. (N. Y.) 561, 563n;

McAlpin v. Woodruff, 1 Disn. (Ohio) 339;

Seabrook v. Moyer, 88 Pa. St. 417;

Peters v. Grubb, 21 Pa. St. 455;

Smart v. Allegaert, 14 Phila. (Pa.) 179;

Hulseman v. Griffiths, 10 Phila. (Pa.) 350;

Hayes v. Ferguson, 15 Lea (Tenn.) 1; s.c. 54 Am. Rep. 398;

University of Vt. v. Josiyn, 21 Vt. 52;

Tunis v. Grandy, 22 Gratt. (Va.) 109;

Eldred v. Leahy, 31 Wis. 546;

Walker's Case, 3 Co. 22;

Smith v. Malings, Cro. Jac. 160; 1 Co. Litt. (19th ed.) 1480.

⁷ *Myers v. Silljacks*, 58 Md. 319;

Ehrman v. Mayer, 57 Md. 612;

Smith v. Malings, Cro. Jac. 160.

⁸ *Chure v. Seely*, 49 Hun (N. Y.) 269.

or of the reversion ;¹ and also by act of God, interfering with the use of the premises.² There may be an apportionment of rent by the act of the parties, by their agreement or settlement of the apportionment, or by the intervention of a jury.³ Hence there cannot be an apportionment of the rent by the landlord to different persons without the tenant's assent.⁴ Apportionment will be made to the tenant where he is placed in the possession of a portion only of the demised premises,⁵ and a part of the premises are taken for a public use,⁶ and the like. Where the leased property, or the right to the reversion, has been divided among several persons, on their omission to claim same, an apportion of rent is not a matter of which the tenant can complain,⁷ so long as he is not in any way inconvenienced thereby.

Where the property leased is destroyed either by act of God or the public enemy, the tenant may elect to rescind the contract, and by surrendering will be discharged from the liability to pay rent.⁸ But where the premises are destroyed by fire, resulting from accident or negligence, the tenant either pays the whole or his proportion of the rent.⁹

¹ *Buffum v. Deane*, 70 Mass. (4 Gray) 385 ;

Montague v. Gay, 17 Mass. 440 ;
Nellis v. Lathrop, 22 Wend. (N. Y.) 121 ;

4 Bac. Abr. 370 ;
1 Rol. Abr. 237.

² *Ripley v. Wightman*, 4 McC. (N. C.) L. 447 ;

Richard Le Taverner's Case, Dyer 56a ;

1 Rol. Abr. 236, pl. 46.

See : *Coogan v. Parker*, 2 S. C. 255 ; s.c. 16 Am. Rep. 659.

³ *Hatfield v. Fullerton*, 24 Ill. 278 ;
McElderry v. Flannagan, 1 Har. & G. (Md.) 308 ;

Ryerson v. Quackenbush, 26 N. J. L. (2 Dutch.) 236, 250 ;

Farley v. Craig, 11 N. J. L. (6 Halst.) 263, 279 ;

Cuthbert v. Kuhn, 3 Whart. (Pa.) 357.

⁴ *Bliss v. Collins*, 5 Barn. & Ald. 876 ; s.c. 1 Dowl. & R. 291 ; 7 Eng. C. L. 476.

See : *Matter of Eddy*, 10 Abb.

(N. Y.) N. C. 376.

⁵ *Damainabillie v. Mann*, 32 N. Y. 197 ;

Knox v. Hexter, 42 N. Y. Super. Ct. 8.

⁶ *Cuthbert v. Kuhn*, 3 Whart. (Pa.) 357 ; s.c. 31 Am. Dec. 513.

See : *Dyer v. Wrightman*, 66 Pa. St. 429 ;

O'Connor v. O'Connor, 2 Grant Cas. (Pa.) 245.

Compare : *Workman v. Mifflin*, 30 Pa. St. 371 ; s.c. 31 Am. Dec. 517n.

⁷ *People v. Dudley*, 58 N. Y. 323.

⁸ *Coogan v. Parker*, 2 S. C. 255 ; s.c. 16 Am. Rep. 659.

See : *Cowie v. Goodwin*, 9 Car. & P. 378 ; s.c. 38 Eng. C. L. 162 ;

Edwards v. Hetherington, 7 Moo. & Ry. 117 ; s.c. 16 Eng. C. L. 271.

⁹ See : *Cowley v. Lumley*, 39 Cal. 151 ; s.c. 12 Am. Rep. 430 ;

Smith v. Ankrum, 21 Miss. (13 Smed. & M.) 39 ;

SEC. 2250. **Remedies of the landlord.**—The statutes of the several states provide for the recovery of rent, and the method by which it may be obtained. Among these are an action for use and occupation,¹ enforcement of lien for rent,² and distress for rent. Under the common-law practice in most cases an action for rent will lie, or for debt;³ and in many states an action of assumpsit for the use and occupation of land by permission of the plaintiff lies on an implied,⁴ as well as an expressed,⁵ agreement.

SEC. 2251. **Same—Suit for use and occupation.**—An action for use and occupation lies only where the conventional relation of landlord and tenant, created by agreement, exists between the parties; for title on the part of the plaintiff, and use and occupation on the part of the defendant, is not sufficient.⁶ This action will not lie against a person in possession under a contract of sale;⁷

Graves v. Berdan, 29 Barb. (N. Y.) 100; s.c. 26 N. Y. 498;
Izon v. Gorton, 5 Bing. N. C. 501; s.c. 35 Eng. C. L. 198;
Lofft v. Dennis, 1 El. & E. 481;
s.c. 102 Eng. C. L. 472.

¹ See: *Post*, § 2250.

² See: *Post*, § 2251.

³ *Duppa v. Mayo*, 1 Saund. 281.

See: *Trabue v. McAdams*, 8 Bush (Ky.) 74;

Guild v. Rogers, 8 Barb. (N. Y.) 504;

Allen v. Bryan, 5 Barn. & C. 512;
s.c. 11 Eng. C. C. 563.

⁴ *Guns v. Scovil*, 4 Day (Conn.) 228;
s.c. 4 Am. Dec. 208;

Crouch v. Briles, 7 J. J. Marsh. (Ky.) 255; s.c. 23 Am. Dec. 404;

Howard v. Runsen, 2 Aik. (Vt.) 252.

⁵ *Warner v. Hale*, 65 Ill. 395;

Eppes v. Cole, 4 Har. & McH. (Md.) 161;

Swasey v. Little, 24 Mass. (7 Pick.) 296;

Sutton v. Mandeville, 1 Munf. (Va.) 407.

⁶ *Lankford v. Green*, 52 Ala. 103;

Dell v. Gardner, 25 Ark. 134;

Clark v. Clark, 58 Ill. 527;

Nance v. Alexander, 49 Ind. 516;

Richmond R. Co. v. Rogers, 7

Bush (Ky.) 532;

Central Mills Co. v. Hart, 124 Mass. 123;

Marquette R. Co. v. Harlow, 37 Mich. 554;

Dalton v. Landahn, 30 Mich. 349;

Edmunson v. Kite, 43 Mo. 176;

Stewart v. Fitch, 31 N. J. L. (2 Vr.) 17;

Wiggin v. Wiggin, 6 N. H. 298;

Preston v. Hawley, 101 N. Y. 506; s.c. 5 N. E. Rep. 770;

Pierce v. Pierce, 25 Barb. (N. Y.) 243;

Hall v. Southmayd, 15 Barb. (N. Y.) 32, 36;

Richie v. Hinde, 6 Ohio 371;

Espy v. Fenton, 5 Oreg. 523;

Brolasky v. Ferguson, 48 Pa. St. 434;

Henwood v. Chessman, 3 Serg. & R. (Pa.) 500;

Moore v. Harvey, 50 Vt. 297;

De Pere Co. v. Reynen, 65 Wis. 271; s.c. 22 N. E. Rep. 761; 27 Id. 155.

⁷ *Vanderhuel v. Storrs*, 3 Conn. 203;

Dixon v. Haley, 16 Ill. 145;

McNair v. Schwartz, 16 Ill. 24;

Jones v. Lipton, 2 Dana (Ky.) 295;

Little v. Pearson, 24 Mass. (7 Pick.) 301;

against a trespasser ;¹ nor against a tortuous possessor.² An action for use and occupation may be brought by a trustee under the devise ;³ by a judgment plaintiff, where the tenant has agreed to surrender possession and does not do so.⁴ An action for use and occupation may be brought against the tenant or his sub-tenant ;⁵ against a tenant under a parol lease, who has occupied for a portion of the time and then abandoned the premises ;⁶ but it will not lie where the enjoyment of the premises has ceased,⁷ or where the defendant was merely a member of the occupying family by contract ;⁸ or where there was a lease under seal between the parties ;⁹ debt or covenant is the only remedy in such a case.¹⁰

SEC. 2252. *Same*—*Lien for rent*.—A lien for the rent agreed to be paid is frequently secured by contract on the personal property of the tenant,¹¹ and may cover the crops raised on the premises in case of farm letting,¹² or any

Bancroft v. Wardell, 13 John. (N. Y.) 489 ;

Smith v. Stewart, 6 John. (N. Y.) 46.

¹ *Patterson v. Stoddard*, 47 Me. 355 ;
Little v. Pearson, 24 Mass. (7 Pick.) 301 ;
Dwight v. Cutler, 3 Mich. 566.

Possession under a lease to commence in futuro, which is void under the statute of frauds, renders the tenant liable in an action for use and occupation.

Smith v. Kinkaid, 1 Ill. App. 620.

In such case, however, there must be an agreement for the use of the premises, express or implied.

Bates v. Phinney, 45 Mich. 388 ;
Lockwood v. Thunder Bay Co., 42 Mich. 536 ;

Stewart v. Fitch, 31 N. J. L. (2 Vr.) 17 ;

Rowland v. Pendleton, 21 Ohio St. 664.

See : *Bacon v. Parker*, 137 Mass. 309 ;

Porter v. Hubbard, 134 Mass. 233 ;
Weaver v. Jones, 24 Ala. 420 ;

Goddard v. Hall, 55 Me. 279 ;
Hurd v. Miller, 2 Hilt. (N. Y.)

540 ;

Featherstonhaugh v. Bradshaw, 1 Wend. (N. Y.) 135 ;

National Co. v. Bush, 88 Pa. St. 335.

² *Smith v. Houston*, 16 Ala. 111 ;
Nance v. Alexander, 49 Ind. 516 ;
Wiggin v. Wiggin, 6 N. H. 298 ;
McClosky v. Miller, 72 Pa. St. 151 ;

Henwood v. Chessman, 3 Serg. & R. (Pa.) 500 ;

Ackerman v. Lyman, 20 Wis. 455.

³ *Chapin v. Foss*, 75 Ill. 280.

⁴ *Hindan v. Jordan*, 57 Cal. 184.

⁵ *Moffatt v. Smith*, 4 N. Y. 126.

⁶ *Prial v. Entwistle*, 10 Daly (N. Y.) 398.

⁷ *Bates v. Phinney*, 45 Mich. 388 ;
s.c. 8 N. W. Rep. 88.

⁸ *Tinder v. Davis*, 88 Ind. 99.

⁹ *Codman v. Jenkins*, 14 Mass. 93 ;
Kiersted v. Orange R. Co., 69 N. Y. 343.

¹⁰ *Codman v. Jenkins*, 14 Mass. 93.

¹¹ *Wilkinson v. Ketler*, 69 Ala. 435 ;
Roth v. Williams, 45 Ark. 447.

¹² *Fejavyary v. Broesch*, 52 Iowa 88 ;
s.c. 2 N. W. R. 963.

See : *Jones v. Webster*, 48 Ala. 109 ;

Roberts v. Jacks, 31 Ark. 597 ;
Weed v. Standley, 12 Fla. 166 ;

personal property brought on the premises by the tenant,¹ as well as any improvements made on the leased premises;² but in some of the states a landlord cannot secure a lien upon the crops in advance of their being planted.³ A lien of the landlord for rent is created by statute in most of the states, and the extent of the lien, as well as the method of its enforcement, are regulated to such statutes.⁴

- Davis *v.* Collier, 13 Ga. 485 ;
 Webster *v.* Nichols, 104 Ill. 160 ;
 Fowler *v.* Hawkins, 17 Ind. 211 ;
 Chissom *v.* Hawkins, 11 Ind. 316 ;
 Gibson *v.* Mullican, 58 Tex. 430 ;
 Willmarth *v.* Pratt, 56 Vt. 474 ;
 Buswell *v.* Marshall, 51 Vt. 87 ;
 Tinker *v.* Cobb, 39 Vt. 483 ;
 Loomis *v.* Lincoln, 24 Vt. 153.
¹ Wisner *v.* Ocumpaugh, 71 N. Y. 113 ;
 McCaffey *v.* Wooden, 65 N. Y. 459 ;
 Hale *v.* Omaha Nat. Bank, 49 N. Y. 626.
² Levy *v.* Twiname, 42 Ga. 249 ;
 Webster *v.* Nichols, 104 Ill. 160 ;
 Hartwell *v.* Kelly, 117 Mass. 235 ;
 McCaffey *v.* Wooden, 62 Barb. (N. Y.) 316.
³ See : Vincent *v.* Hallowell, 10 Bush (Ky.) 538 ;
 McCombs *v.* Becker, 5 Thomp. & C. (N. Y.) 550.
⁴ Lake *v.* Gaines, 75 Ala. 143 ;
 Jackson *v.* Bain, 74 Ala. 328 ;
 Robinson *v.* Lehman, 72 Ala. 401 ;
 Kennon *v.* Wright, 70 Ala. 434 ;
 Scaife *v.* Stovall, 67 Ala. 237 ;
 Foster *v.* Westmoreland, 52 Ala. 223 ;
 Varner *v.* Rice, 39 Ark. 344 ;
 Hammond *v.* Harper, 39 Ark. 248 ;
 Bloom *v.* McGehee, 38 Ark. 329 ;
 Mitchell *v.* Badgett, 33 Ark. 387 ;
 Wallach *v.* Chesley, 2 Mackey (D. C.) 209 ;
 Blanchard *v.* Raines, 20 Fla. 467 ;
 Cathcart *v.* Turner, 18 Fla. 837 ;
 McCray *v.* Samuel, 65 Ga. 739 ;
 Lathrop *v.* Clewis, 63 Ga. 282 ;
 Worrill *v.* Barnes, 57 Ga. 504 ;
 Herron *v.* Gill, 112 Ill. 247 ;
 Webster *v.* Nichols, 104 Ill. 160 ;
 Wetzel *v.* Mayers, 91 Ill. 497 ;
 Hunter *v.* Whitfield, 89 Ill. 229 ;
 Mead *v.* Thompson, 78 Ill. 62 ;
 Prettyman *v.* Unland, 77 Ill. 206 ;
 Thompson *v.* Mead, 67 Ill. 395 ;
 Kennard *v.* Harvey, 80 Ind. 37 ;
 Holden *v.* Cox, 60 Iowa 449 ; s.c. 15 N. W. Rep. 269 ;
 Richardson *v.* Peterson, 58 Iowa 724 ; s.c. 13 N. W. Rep. 63 ;
 Thorpe *v.* Fowler, 57 Iowa 541 ; s.c. 11 N. W. Rep. 3 ;
 Conwell *v.* Kuykendall, 29 Kan. 707 ;
 Tarpy *v.* Persing, 27 Kan. 745 ;
 Neifert *v.* Ames, 26 Kan. 516 ;
 Stone *v.* Bohm, 79 Ky. 141 ;
 English *v.* Duncan, 14 Bush (Ky.) 377 ;
 Paine *v.* Aberdeen Hotel Co., 60 Miss. 360 ;
 Fitzgerald *v.* Fowikes, 60 Miss. 270 ;
 Dunn *v.* Kelly, 57 Miss. 825 ;
 Love *v.* Law, 57 Miss. 596 ;
 Arbuckle *v.* Nehms, 50 Miss. 556 ;
 Van Horn *v.* Goken, 41 N. J. L. (12 Vr.) 499 ;
 State *v.* Rose, 90 N. C. 712 ;
 Ledbetter *v.* Quick, 90 N. C. 276 ;
 Montague *v.* Mail, 89 N. C. 137 ;
 Durham *v.* Speeke, 82 N. C. 87 ;
 Edward's Appeal, 105 Pa. St. 103 ;
 Kennedy *v.* Reames, 15 S. C. 548 ;
 Phillips *v.* Maxwell, 57 Tenn. 25 ;
 Lewis *v.* Mahone, 9 Baxt. (Tenn.) 374 ;
 Richardson *v.* Blakemore, 11 Lea (Tenn.) 290 ;
 Templeman *v.* Gresham, 61 Tex. 50 ;
 Hempstead Assoc. *v.* Cochran, 60 Tex. 620 ;
 Bourcier *v.* Edmondson, 58 Tex. 675.

SEC. 2253. **Same—Distress for rent.**—A distress for rent, at common law, was where a person entitled to receive the reserve of land leases entered on the lands and seized the personal property and chattels found there and sold them for the payment of the rent due.¹ In England, distress has been extended to all kinds of rent;² but in this country it has been modified by statutes in several of the states,³ and has been discarded in many others,⁴ while in others still it has been expressly abolished by statute,⁵ though still retained by special enactment in others.⁶ To entitle a landlord to distrain for rent, it must be fixed and certain, or at least capable of being made certain by either of the parties.⁷ Where the right of the landlord to distrain for rent has arisen, it will not be defeated by his taking a note and chattel mortgage as security for the rent;⁸ but where a right of entry for breach exists, the demand for payment of the rent is a waiver for the right of entry, where the default

¹ *Clark v. Fraley*, 3 Blackf. (Ind.) 264;

Van Rensselaer v. Hays, 19 N. Y. 76;

Fraser v. Davis, 5 Rich. (S. C.) L. 59;

Woglam v. Cowperthwaite, 2 U. S. (2 Dall.) 68; bk. 1 L. ed. 292;

2 *Dane Abr.* 451;

3 *Bl. Com.* 6;

3 *Cruise Dig.* (4th ed.) 285.

² *Stat.* 4 Geo. II., c. 28.

³ See: *Bean v. Edge*, 84 N. Y. 510; *Cornell v. Lamb*, 2 Cow. (N. Y.) 656, 659;

Stat. 4 Geo. II., c. 28;

3 *Kent Com.* (13th ed.) 473.

⁴ See: *Givens v. Easley*, 17 Ala. 385;

Howard v. Dill, 7 Ga. 52;

Owen v. Boyle, 23 Me. 47;

Knox v. Hunt, 18 Mo. 243;

Wait, Appellant, 24 Mass. (7 Pick.) 105;

Mayor v. Pearl, 11 Humph. (Tenn.) 249;

2 *Dane Abr.* 126;

3 *Kent Com.* (13th ed.) 472, 473, 373n.

⁵ *Dickerson v. Cook*, 16 Barb. (N. Y.) 510;

Guild v. Rogers, 8 Barb. (N. Y.)

502.

⁶ As in Maryland, *Waring v. Slinguff*, 63 Md. 53.

See: 21 Cent. L. J. 101.

⁷ *Smoot v. Straus*, 21 Fla. 611; *Steininger v. Williams*, 63 Ga. 475;

Poer v. Peebles, 1 B. Mon. (Ky.) 3;

Myers v. Mayfield, 7 Bush (Ky.) 212;

Dailey v. Grimes, 27 Md. 440;

Briscoe v. McElween, 43 Miss. 556;

Smith v. Fyler, 2 Hill (N. Y.) 648;

Farrington v. Baley, 21 Wend. (N. Y.) 65;

Valentine v. Jackson, 9 Wend. (N. Y.) 302.

See: *Brooks v. Cunningham*, 49 Miss. 105.

⁸ *Bolton v. Duncan*, 61 Ga. 103;

Atkins v. Byrnes, 71 Ill. 326;

Cunnea v. Williams, 11 Ill. App. 72;

Giles v. Ebsworth, 10 Md. 323;

Cambria Iron Co.'s Appeal, 114 Pa. St. 58;

Snyder v. Kunkleman, 3 Pen. & W. (Pa.) 487;

Warren v. Torney, 13 Serg. & R. (Pa.) 52;

Hornbrooks v. Lucas, 24 W. Va. 493.

is known to the landlord ;¹ but the taking of a personal judgment against a tenant will not be.² A distraint for rent may be made by the lessor or his heir-at-law for his part in the demised premises ;³ by an executor of the landlord ;⁴ by a tenant in common for his share of the rent,⁵ or by the assignees of the landlord ;⁶ and may be maintained against the tenant,⁷ his executor or administrator, where the tenant dies before suit, or *pendente lite* ;⁸ but will not lie against a sub-tenant of the lessee, in the absence of statutory provisions to that effect, for want of privity of the estate.⁹

¹ *Camp v. Scott*, 47 Conn. 369.

² *Bates v. Nellis*, 5 Hill (N. Y.) 651 ;

Bantleon v. Smith, 2 Binn. (Pa.) 146 ;

Wise v. Old, 57 Tex. 514.

See : *Chapman v. Marlin*, 13

John, (N. Y.) 340.

³ *McGulich v. McAllister*, 10 Ill. App. 40.

⁴ *Carter v. Walter*, 63 Ga. 164.

⁵ *De Coursey v. Guarantee Co.*, 81 Pa. St. 217.

⁶ *Lothrop v. Clewis*, 63 Ga. 282.

⁷ *Oxford v. Ford*, 67 Ga. 362 ;

McCulloch v. Good, 63 Ga. 519 ;

Cohen v. Broughton, 54 Ga. 296 ;

Patty v. Bogle, 59 Miss. 491 ;

Scuyler v. Leggett, 2 Cow. (N. Y.) 660 ;

Hill v. Stocking, 6 Hill (N. Y.) 277 ;

Walbridge v. Pruden, 103 Pa. St. 1.

⁸ *Raugh v. Ritchie*, 11 Ill. App. 188.

⁹ *Gibson v. Mullican*, 68 Tex. 490.

BOOK V.

TITLE.

CHAPTER I.

FOUNDATION OF TITLE.

- SEC. 2254. Introductory.
SEC. 2255. Government grants.
SEC. 2256. Other sources of title.

SECTION 2254. **Introduction.**—We have already discussed the question of the origin of private property in land,¹ and also of the nature of tenure in the United States.² It remains for us only to say, by way of introduction, that by title, as it is generally regarded, is understood simply the means whereby the owner of land has the just possession of his property,³ possession being a necessary ingredient in a complete title to land; and such title has several stages or degrees, as follows: (1) Mere possession or occupation without pretense of right; (2) the right of possession, which one may have while another has the possession in fact; and (3) the mere right of property, which may exist without possession, or the right of possession.⁴ All these being united we have what is known as a complete legal title.⁵ In ordi-

¹ See : *Ante*, §§ 11-19.

² See : *Ante*, §§ 219-231.

³ 2 Bl. Com. 195;

1 Co. Inst. 345b.

See : Merrill v. Agricultural Ins. Co., 73 N. Y. 456;

Ehle v. Quackenboss, 6 Hill (N. Y.) 537.

⁴ Ehle v. Quackenboss, 6 Hill (N. Y.) 537;

2 Bl. Com. 195, 199.

⁵ 2 Bl. Com. 199.

See : Ehle v. Quackenboss, 6 Hill (N. Y.) 537, 538.

But the term "title," as used in the statutes of the various states, does not embrace these different degrees or stages of right. As used in these statutes the word "title" is limited to

nary acceptation, title is the right of ownership. Thus, having title to a farm is owning it. He who has the possession, the right of possession, and the right of property has a perfect title.¹

SEC. 2255. **Government grants.**—It is a fundamental principle of English law, from which our idea of tenures is derived,² that the king was the lord paramount, or original proprietor of all the kingdom, and consequently the source of all titles to land.³ When our forefathers came to this country they brought with them the doctrine of the common law, and adopted its precepts relating to the title to real property, and held the title to all lands by royal charter or grants from the crown. Hence it has become a fundamental doctrine in this country that all valid individual title to land is derived from the grant of the local state government, or from the federal government, or from royal chartered governments which were established and in operation prior to the declaration of independence.⁴ This doctrine was engrafted on our system of jurisprudence from the colonial jurisprudence, and seems to be in harmony with the principle in the jurisprudence of other nations. In the ancient states of Greece and Italy all title to land was derived from the government by allotment.⁵

the right of possession, and is synonymous therewith. They do not embrace the idea of possession in fact, nor that of the mere right of property.

See: *Ehle v. Quackenboss*, 6 Hill (N. Y.) 537, 539, 540.

¹ *Shelton v. Alcox*, 11 Conn. 249;

2 Bl. Com. 195;

4 Kent Com. (13th ed.) 373, 374;

1 Id. 177, 178.

² See: *Ante*, § 218, *et seq.*

³ 2 Bl. Com. 51, 53, 59, 86, 105;

3 Kent Com. (13th ed.) 377.

⁴ In the case of *Jackson ex d. Winthrop v. Ingraham*, 4 John. (N. Y.) 163, 182, the Supreme Court of New York say: "This court cannot take notice of any title to land not derived from our own government, and verified by a patent under the great seal of the state or the province of

New York. Whether claimants to lands within this state, founded on French grants, might not have an equitable claim on the government, under the capitulation of Montreal, in 1760, or the Treaty of 1763, is a question with which this court has no concern. Such a claim might have been presented and urged to the government, but it does not afford that evidence of legal title which can be recognized by this court. We can look no farther than to the titles derived under our grants. This has been the uniform sense of our courts, from the first establishment of the English government in the colony of New York."

⁵ 1 Arnold's Hist. of Rome, 267-270.

Under this doctrine all title to the land passes to the individuals from the government, federal, state, or colonial.¹

SEC. 2256. **Other sources of title.**— There are other mooted sources of title, such as Indian title by right of original occupancy, title by discovery, and the right of title acquired by colonization. These sources of title have already been sufficiently discussed for the purposes of this treatise.²

¹ 3 Kent Com. (13th ed.) 378.

² See : *Ante*, §§ 12-20.

CHAPTER II.

HOW ACQUIRED.

- SECTION I. By descent.
SECTION II. By original acquisition.
SECTION III. By public grant.
SECTION IV. By private grant.
SECTION V. By involuntary alienation.

SECTION I.—BY DESCENT.

- SEC. 2257. Introductory.
SEC. 2258. Rules of descent.
SEC. 2259. Same—To lineal descendants.
SEC. 2260. Same—Same—Posthumous children.
SEC. 2261. Same—Same—Illegitimate children.
SEC. 2262. Same—Same—Adopted children.
SEC. 2263. Same—To lineal ancestors.
SEC. 2264. Same—Same—To father.
SEC. 2265. Same—Same—To mother.
SEC. 2266. Same—Same—To brothers and sisters.
SEC. 2267. Same—Same—Same—Of whole and half blood.
SEC. 2268. Law governing descent of real property.
SEC. 2269. Alienage as a bar.

SECTION 2257. **Introductory.**—All title to land is acquired either by descent or by purchase.¹ Title by descent is where one acquires title by operation of law from a deceased owner, without his act or consent,² and of which he cannot dissolve himself by disclaimer.³ Title acquired in any other way is called title by purchase, and requires the assent, either express or implied, of the

¹ 2 Bl. Com. 201 ;
1 Co. Litt. (19th ed.) 18a ;
4 Kent Com. (13th ed.) 373.
See : *Pemberton v. Hicks*, 1 Binn.
(Pa.) 1.

² 1 Co. Litt. (19th ed.) 18a.
See : *Donahue's Estate*, 36 Cal.
329.

³ 2 Bl. Com. 201 ;
Bac. L. Tr. 128 ;
2 Co. Litt. (19th ed.) 191a.
In Louisiana such title may be formally rescinded.
Reed v. Crocker, 2 La. An. 436 ;
Womack v. Womack, 2 La. An.
339.

parties upon whom the title devolves.¹ All titles by purchase are either original, as where acquired solely by the parties claiming the same, or derivative, as where derived from or through another in whom the title formerly vested.²

SEC. 2258. **Rules of descent.**—We have heretofore discussed the general rules of descent in relation to real property, giving the common-law rules,³ as well as a synopsis of the rules prevailing in the United States,⁴ and it is unnecessary to here further discuss the subject.

SEC. 2259. **Same—To lineal descendants.**—The general rule is that property descends to the next of kin of a deceased owner.⁵ In the direct line of lineal descent the descendants take equally *per capita*, where they stand in equal degree to the common ancestor,⁶ and *per stirpes*, where they stand in different degrees of relationship to the deceased owner.⁷ Should there be no lineal descendants the property will go to lineal ancestors,⁸ in preference to the collateral branches;⁹ and should there be no parents, to the collateral line of brothers and sisters.¹⁰

SEC. 2260. **Same—Same—Posthumous children.**—In the distribution of real property, children born within the period of gestation after the death of the intestate will be entitled to a share of his property, in the same manner as those born during his lifetime, and who were alive at

¹ 2 Bl. Com. 201 ;
1 Co. Litt. (19th ed.) 18b;
4 Kent Com. (13th ed.) 373.
See : Nicolason v. Wadsworth, 2
Swanst. 365, 372.

² See : *Post*, § 2286.

³ See : *Ante*, §§ 406-417.

⁴ See : *Ante*, § 418.

⁵ See : Kean v. Hoffecker, 2 Harr.
(Del.) 103 ; s.c. 29 Am. Dec.
336 ;

Greenlee v. Davis, 19 Ind. 60 ;

Betts v. Wirt, 3 Md. Ch. 113 ;

Curtis v. Hewins, 52 Mass. (11
Met.) 294 ;

Peacock v. Smart, 17 Mo. 402 ;

Beebee v. Griffing, 14 N. Y. 235

Brown v. Burlingham, 5 Sandf.
(N. Y.) 418 ;

Cozzens v. Jaslin, 1 R. I. 122.

⁶ 4 Kent Com. (13th ed.) 390, 391.

See : Hyatt v. Pugsley, 33 Barb.
(N. Y.) 373 ;

Dutoit v. Doyle, 16 Ohio St. 409 ;

McCracken v. Rogers, 6 Wis. 278.

⁷ 4 Kent Com. (13th ed.) 391.

See : Beenman Appeal, 40 Pa. St.
115.

⁸ See : *Ante*, § 2262, *et seq.*

⁹ See : Kelsey v. Hardy, 20 N. H.
479.

¹⁰ 4 Kent Com. (13th ed.) 407.

See : Quinby v. Higgins, 14 Me.
309.

the time of his death.¹ This rule is said to be based upon the principle that a child *in ventre sa mere* is *in rerum natura*, the same as though born in the lifetime of the father,² and is so considered for all purposes which are for its benefit.³ The general rule is that such children are considered alive at the death of their parents,⁴ taking by descent or devise,⁵ and under the statute of distribution.⁶

SEC. 2261. **Same—Same—Illegitimate children.**—According to the principles of the common law, an illegitimate

¹ 4 Kent Com. (13th ed.) 412.

² *Morrow v. Scott*, 7 Ga. 535, 537;

Hill v. Moore, 1 Murp. (N. C.) L. 233, 251;

Wallis v. Hodson, 2 Atk. 116.

³ *Hall v. Hancock*, 32 Mass. (15 Pick.) 255, 258;

Doe d. Clarke v. Clarke, 2 H. Bl. 399, 401; s.c. 3 Rev. Rep. 430, 431.

See: *In re Corlass*, L. R. 1 Ch. Div. 460, 463; s.c. 45 L. J. Ch. 118;

Doe d. Lancashire v. Lancashire, 5 Durnf. & E. (5 T. R.) 49; s.c. 2 Rev. Rep. 535;

Millar v. Turney, 1 Ves. 85.

A child *en ventre sa mere* is taken to be a person in being, for many purposes. He may take by descent; by devise, *Long v. Blackall*, 7 Durnf. & E. (7 T. R.) 100; or under the statute of distributions, *Wallis v. Hodson*, 2 Atk. 117; *Doe d. Lancashire v. Lancashire*, 5 Durnf. & E. (5 T. R.) 49; s.c. 2 Rev. Rep. 535; *Thellusson v. Woodford*, 4 Ves. 322; and generally for all purposes where it is for his benefit.

LORD HARDWICKE says, in *Wallis v. Hodson*, *supra*: "The principal reason I go upon is, that a child *en ventre sa mere* is a person *in rerum natura*, so that, both by the rules of the civil and common law, he is to all intents and purposes a child, as much as if born in the father's lifetime. And BULLER, J., in delivering his opinion in *Thellusson v. Woodford*, 4 Ves. 227,

324; s.c. 4 Rev. Rep. 205, after citing various cases, says, the effect is, that there is no difference between a child actually born and a child *ventre sa mere*.

"The case of *Doe d. Clarke v. Clarke*, 2 H. Bl. 399; s.c. 3 Rev. Rep. 430, is directly in point. The devise was by the testator to his brother for life, and from his decease, to all and every such child or children as should be living at the time of his decease. The brother died in October, 1782, and the plaintiff was born in May, 1783, and it was held that she was entitled to a share as a child living. And it was stated as a fixed principle, that wherever such consideration would be for his benefit, a child *en ventre sa mere* shall be considered as absolutely born."

Distinction between a woman pregnant and quick with child is applicable mainly, if not exclusively, to criminal cases of descent, devise, and of gifts.

Hall v. Hancock, 32 Mass. (15 Pick.) 255.

⁴ *Catholic Mutual Benevolent Assn. v. Finnane*, 50 Mich. 82, 85; s.c. 14 N. W. Rep. 117.

⁵ *Long v. Blackall*, 7 Durnf. & E. (7 T. R.) 100.

⁶ *Wallis v. Hodson*, 2 Ark. 117; *Doe d. Lancashire v. Lancashire*, 5 Durnf. & E. (5 T. R.) 49; s.c. 2 Rev. Rep. 535;

Thellusson v. Woodford, 4 Ves. 227, 322; s.c. 4 Rev. Rep. 205,

child is *filius nullius*, and can have no father known to the law ;¹ consequently he cannot take by descent, for the reason that he has not, in contemplation of the law, inheritable blood.² The rigors of the common-law rule have been ameliorated by statute in this country, so that such children may inherit from the mother in many of the states ; but the general rule is that where there are legitimate children to answer to the description of “children,” those which are legitimate will take in preference to such as are illegitimate ;³ yet natural children may take under the simple description of “children,” if the will itself manifests an intent to include them in that term, either by express designation or by necessary implication.⁴ Such intention must be ascertained from the instrument only. Parol evidence of such intention is inadmissible ; so also is extrinsic evidence inadmissible to raise a construction by circumstances, except for the purpose of showing that illegitimate children have, at the date of the instrument, acquired the reputation of being the children of the testator, or the person named in the instrument.⁵ But the doctrine that the intention to give to illegitimate, as distinguished from the legitimate, children must appear on the face of the will, is not to be understood as precluding all inquiry into the state of the testator’s family. Thus in the case of a devise to “my children now living,” or “to the children of A,” a deceased person, it is not known, by a mere perusal of the will, whether legitimate or illegitimate children were intended ; and yet, when it is ascertained that no other

¹ *Lessee Brewer v. Blougher*, 30 U. S. (14 Pet.) 178, 198 ; bk. 10 L. ed. 408, 418 ;

4 Kent Com. (13th ed.) 413.

² 4 Kent Com. (13th ed.) 413.

³ *Gardner v. Heyer*, 2 Paige Ch. (N. Y.) 11 ;

Wilkinson v. Adam, 12 Price 470 ;

Bayley v. Mollard, 1 Russ. & M. 581 ;

Frazer v. Pigott, 1 Young 354 ;

Meredith v. Farr, 2 Younge & C. (N. S.) 525.

⁴ *Earle v. Wilson*, 17 Ves. 531 ; s.c. 11 Rev. Rep. 130 ;

Williamson v. Adams, 1 Ves. &

B. 462 ; s.c. 12 Price 470.

⁵ *Heath v. White*, 5 Conn. 228 ;

Cooley v. Dewey, 21 Mass. (4 Pick.) 93.

Collins v. Hoxie, 9 Paige Ch. (N. Y.) 88 ;

Gardner v. Heyer, 2 Paige Ch. (N. Y.) 11 ;

Mortimer v. West, 4 Russ. 370 ;

Harris v. Lloyd, 1 Turn. & Russ. 310 ;

Swaine v. Kennerlay, 1 Ves. & B. 469 ; s.c. 12 Rev. Rep. 269 ;

Wilkinson v. Adam, 1 Ves. & B. 422, 462 ; s.c. 12 Rev. Rep. 255 ;

4 Kent Com. (13th ed.) 413, 414.

than the latter objects are in existence, the conclusion that he meant illegitimate children is irresistible.¹

SEC. 2262. **Same—Same—Adopted children.**—In various states provisions are made by statute for the legal adoption of children by other than their parents, whereby they become members of the family of such persons, and by force of the statutes are entitled to all the rights accorded by law to natural children, including the right of inheritance;² and in this are on precisely the same footing as though lawful blood.² In those cases where a child is adopted by the husband or wife merely, it does not by reason thereof become heir of the other.⁴ The converse of the rule is not true, and the right of inheritance from an adopted child does not always accrue to the persons adopting. Thus it is held in Missouri that the relations by blood of an adopted child, and not those by adoption, are the heirs of the adopted child to his estate,⁵ even though the estate descending has been derived from the adopting parents.⁶ It is said, in the case of *Power v. Hafley*,⁷ that where the adopted child dies before the adopting parent, leaving issue, such issue will take to the exclusion of the adopting parents, as if they were grandchildren.⁸ The rights by statute of a child which

¹ *Blundell v. Dunn*, 1 Madd. 433 ;
Woodhouselee v. Dalrymple, 2
 Meriv. 419 ; s.c. 16 Rev. Rep.
 193.

² *Power v. Hafley*, 85 Ky. 571 ; s.c.
 4 S. W. Rep. 683.

See : *Humphries v. Davis*, 100
 Ind. 280 ;

Barnes v. Allen, 25 Ind. 222 ;

Wagner v. Varner, 50 Iowa 532 ;

Ross v. Ross, 129 Mass. 243 ;

Burrage v. Briggs, 120 Mass. 103.

³ *Newman's Estate*, 74 Cal. 213 ;
 s.c. 16 Pac. Rep. 887 ;

Wagner v. Varner, 50 Iowa 532 ;

Hosser's Succession, 37 La. An.
 839 ;

Vidal v. Commagere, 13 La. An.
 516 ;

Burrage v. Briggs, 120 Mass. 103 ;
Johnson's Appeal, 88 Pa. St. 346,
 353 ;

Lunay v. Vantyne, 40 Vt. 501.

⁴ *Sharkey v. McDermott*, 16 Mo.
 App. 80, aff'd 91 Mo. 647.

⁵ *Reinders v. Koppelman*, 68 Mo.
 482, 494.

⁶ *Reinders v. Koppelman*, 68 Mo.
 482, 494.

In *Indiana* the same doctrine
 seems to prevail in the case of
Prug v. Davis, 87 Ind. 590.

See : *Paul v. Davis*, 100 Ind.
 482.

⁷ 85 Ky. 671 ; s.c. 4 S. W. Rep.
 683.

⁸ Under the civil law the adopted
 child was assimilated in many
 points to a child born in lawful
 matrimony. The adopted child
 retained all of the family rights
 resulting from its birth, and
 there was secured to it all the
 family rights procured by the
 adoption.

Power v. Hafley, 85 Ky. 671 ; s.c.
 4 S. W. Rep. 683.

See : *Vidal v. Commagere*, 13 La.
 An. 516, 517 ;

Sanders' Just. 103, 105, 107.

has been adopted follow it, and are valid in all other states ;¹ yet it is held that a devise to one for life with remainder to her "children" does not include an adopted child of such person.²

SEC. 2263. **Same—To lineal ancestors.**—In those cases where there is a failure of lineal descendants the property ascends to the parents, either first to the father and then to the mother, or to them jointly, under certain qualifications.³ Where there are no parents, the estate will go to the collateral line of brothers and sisters ;⁴ and in the absence of brothers and sisters, and their descendants, the inheritance ascends to the grandparents of the intestate, or to the survivors of them. Such was the rule at common law, but in this country it is regulated largely by statute in the various states.

SEC. 2264. **Same—Same—To fathers.**—Statutes directing the inheritance of an intestate, in default of any child or descendant, to go to the father, and if no father, to the mother, and if no mother, to the brothers and sisters in equal shares, and to the descendants collectively of deceased brothers or sisters, if any, the share the deceased brother or sister would have been entitled to if alive at the time of the intestate's death, have been adopted in Arkansas,⁵ Colorado,⁶ New York,⁷ and South

¹ Estate of Sunderland, 60 Iowa 732 ; s.c. 13 N. W. Rep. 455 ;

Ross v. Ross, 129 Mass. 243 ;

Keegan v. Grahty, 14 Chi. L. N. 84.

See : Smith v. Dorr, 34 Pa. St. 126, 128 ;

Doe v. Wadell, 7 Clarke & Ten. 895, 898.

² Shaffer v. Eneu, 54 Pa. St. 304, 306.

See : Wyeth v. Stone, 144 Mass. 441.

³ 4 Kent Com. (13th ed.) 393.

⁴ 4 Kent Com. (13th ed.) 407 ;

Quinby v. Higgins, 14 Me. 309.

⁵ Ark. Dig. 1884, § 2529.

⁶ Colo. Gen. Stat. 1883, § 1039.

⁷ 4 N. Y. Rev. Stat. (8th ed.), § 2463 ;

1 Rev. Stat. Code & L. of N. Y. 858.

* After this section was in type the New York Legislature amended this statute by the following provision :

§ 1. After this chapter shall take effect the real estate of every person who shall die without devising the same shall descend in manner following :

1. To his lineal descendants and widow ;

2. To his father ;

3. To his mother ; and

4. To his collateral relatives.

Subject in all cases to the rules and regulations hereinafter prescribed.

§ 30. Where the intestate leaves a widow she shall, in all cases, inherit as a lineal descendant ; if he leaves no lineal descendant living, she shall inherit the whole ; if he leaves lineal descendants living, all of equal degrees of consanguinity, she shall inherit a like share as each of such descendants ;

Carolina.¹ In default of descendants the father takes by statute in preference to the mother, brothers, or sisters of the intestate in California,² Florida,³ Maine,⁴ Maryland,⁵ Massachusetts,⁶ Michigan,⁷ Minnesota,⁸ Nebraska,⁹ Nevada,¹⁰ New Hampshire,¹¹ Oregon,¹² Rhode Island,¹³ Tennessee,¹⁴ Vermont,¹⁵ Virginia,¹⁶ and West Virginia. In the States of Iowa,¹⁷ Kansas,¹⁸ Kentucky,¹⁹ Pennsylvania,²⁰ Texas,²¹ and Wisconsin,²² the father takes equally with the mother, and if she be dead, her share also, in preference to brothers and sisters. In Georgia,²³ Illinois,²⁴ Indiana,²⁵ Louisiana,²⁶ and Missouri,²⁷ the father, mother, brothers, and sisters take equally; while in Alabama,²⁸ Delaware,²⁹ Mississippi,³⁰ New Jersey,³¹ North Carolina,³² and Ohio,³³ the father is preferred to the mother, but postponed to the brothers and sisters.

SEC. 2265. **Same—Same—To mother.**—From what has been said in the foregoing sections, it will be seen that in this country the mother is nowhere preferred to the father in inheritance from a child, though in some states she takes jointly with him; while in others she is postponed to him, though taking in preference to the brothers and sisters of the intestate, or takes equal

¹ S. C. Rev. Stat. 1882, § 1845.

² Cal. Civ. Code 1386.

³ McClell. Dig. 1881, p. 468, § 1.

⁴ Me. Rev. Stat. 1883, p. 610, § 1.

⁵ Hinck. Test. L., §§ 1182, 1255.

⁶ Smith Prob. L., p. 187.

⁷ How. Stat. 1882, § 5772a.

⁸ Minn. Stat. 1878, p. 565, § 3.

⁹ One-half vested in fee-simple in the widow (Consolidated Stats. 1893, § 1124).

¹⁰ Nev. Comp. L. 1873, § 794.

¹¹ N. H. Gen. L. 1878, § 476.

¹² After death of the wife (Oreg. Code 1887, § 3098).

¹³ R. I. Pub. Stat. 1882, § 2420.

¹⁴ Tenn. Code 1884, § 3268.

¹⁵ Vt. Rev. L. 1880, § 2230.

¹⁶ Va. Code 1887, §§ 2548, 2557.

¹⁷ Miller's Code, § 2455.

¹⁸ Dass. Comp. L., § 2258.

¹⁹ Ky. Gen. Stat., c. 31, § 1.

²⁰ Bright. Rev. Prud. Dig. 1883, p. 981, § 22.

²¹ Tex. Rev. Stat., § 1645.

²² Wis. Rev. Stat., § 2270.

²³ Ga. Code 1882, § 2484.

²⁴ Star & Curt. Stat. 1885, p. 879, par. 1.

²⁵ Ind. Rev. Stat., § 2469.

²⁶ La. Code 1870, art. 903.

²⁷ Mo. Rev. Stat. 2161.

²⁸ Ala. Code, § 1915.

²⁹ Del. Rev. Stat. 548, § 32.

³⁰ Miss. Rev. Code, § 1271.

³¹ N. J. Rev. Stat. 1877, p. 297, § 1.

³² N. C. Code, § 1281, rule 6.

³³ Ohio Rev. Stat., § 4159.

if he leaves descendants entitled to share, of unequal degrees of consanguinity, she shall inherit a like share as

the descendant living of nearest degree of consanguinity to the intestate. (Laws 1895, c. 171).

shares with them, but in others she is postponed to them also.¹ But where the estate is directed to be distributed in moieties, one moiety to next of kin of the father and to that of the mother, each moiety will pass as an independent estate to the next of kin in its respective lines, without regard to the relative relations by consanguinity or affinity of the deceased.²

SEC. 2266. **Same—Same—To brothers and sisters.**—According to the statutory provisions of some of the states, after father and mother brothers and sisters are the next degree in the order of succession. These are not in the descending or ascending line of propinquity, but collateral to the estate.³ The brothers and sisters being members of the intestate's immediate family, are more nearly interested in the estate than any other relative, aside from the father and mother, and for this reason the law casts upon them the descent of the property, subject to the right of the surviving husband or wife, and frequently in connection with the father and mother.⁴ Brothers and sisters thus take in Alabama,⁵ Connecticut,⁶ Delaware,⁷ Mississippi,⁸ New Jersey,⁹ North Carolina,¹⁰ Ohio,¹¹ and Pennsylvania.¹² In Georgia,¹³ Illinois,¹⁴ Indiana,¹⁵ Louisiana,¹⁶ and Missouri,¹⁷ brothers and sisters inherit with the parents, excluding more remote kin; while they are postponed to the father, and with the mother exclude remote kindred in Florida,¹⁸ Kentucky,¹⁹ Maine,²⁰ Maryland,²¹ Massachusetts,²² Michigan,²³ Minnesota,²⁴ Nebraska,²⁵ Nevada,²⁶ New Hamp-

¹ 1 Woerner L. Admr. 139, § 69.

² McKinney v. Abbott, 49 Tex. 371, 375;

Jones v. Bennett, 30 Tex. 637, 642.

³ See: 1 Woerner's Am. L. Admr. 141, § 70.

⁴ 1 Woerner's Am. L. Admr., 141, § 70.

⁵ Ala. Code, § 6915.

⁶ Conn. Gen. Stat., 1888, § 632.

⁷ Del. Laws, 548, § 32.

⁸ Miss. Rev. Code, § 1271.

⁹ N. J. Rev. Stat. 1877, 279, § 1.

¹⁰ N. C. Code, § 1281, rule 6.

¹¹ Ohio Rev. Stats., § 4159.

¹² Bright. Prud. Dig. 931, §§ 22, 23.

¹³ Ga. Code, § 2484.

¹⁴ Star & Curt. Stat. 1885, p. 879, par. 1.

¹⁵ Ind. Rev. Stat., § 2469.

¹⁶ La. Code 1870, art. 903.

¹⁷ Mo. Rev. Stat., § 2161.

¹⁸ Fla. Dig. 468, § 1.

¹⁹ Ky. Gen. Stat. 480, § 1.

²⁰ Me. Rev. Stat. 1883, p. 610, § 1.

²¹ Md. Hink. Pr. L., § 1185.

²² Smith Prob. L. 187, pl. 3.

²³ How. Stat., § 5772a.

²⁴ Minn. Stat., p. 565, § 3.

²⁵ Neb. Stat. Comp. 1891, 1127.

²⁶ Nev. Comp. L., § 794.

shire,¹ Oregon,² Rhode Island,³ South Carolina,⁴ Vermont,⁵ Virginia,⁶ and West Virginia.⁷ In the states of Arkansas,⁸ Colorado,⁹ Iowa,¹⁰ Kansas,¹¹ New York,¹² Pennsylvania,¹³ Tennessee,¹⁴ Texas,¹⁵ and Wisconsin,¹⁶ brothers and sisters and their descendants are postponed to father and mother, but take to the exclusion of remote kin.¹⁷

SEC. 2267. **Same—Same—Same—Of whole and half-blood.**—There is a distinction between the claims of brothers and sisters of the whole-blood and those of the half-blood in collateral succession to real estate. The rule in regard to this is not the same in all the states. In some no essential distinction is made, the statute declaring collaterals of the half-blood to be entitled equally with those of the full-blood in the same degree, as in Illinois,¹⁸ Indiana,¹⁹ Maine,²⁰ Massachusetts,²¹ New York,²² North Carolina,²³ Rhode Island,²⁴ Tennessee,²⁵

¹ N. H. Gen. L. 476, § 1.

² Oreg. Code, § 3098.

³ R. I. Pub. Stats. 489, § 2.

⁴ S. C. Rev. Stat., § 1845.

⁵ Vt. Rev. L., § 2230.

⁶ Va. Code, § 2548.

⁷ Kelley's Rev. St. W. Va., c. 66, § 1.

⁸ Ark. Dig., § 2162.

⁹ Colo. Gen. Stats. 1883, § 1039.

¹⁰ Miller's Code, § 2457.

¹¹ Dass. Comp. L. 1885, c. 33, § 21.

¹² N. Y. Rev. Stat. (8th ed.) 2463, *et seq.*; 9 Rev. Stats. Codes & L. 858.

¹³ Bright Prud. Dig., p. 931, § 22.

¹⁴ Tenn. Stats., § 3269.

¹⁵ Tex. Rev. Stat., § 1645.

¹⁶ Wis. Rev. Stat., § 2270, pl. 3.

¹⁷ Woerner Am. L. Admr. 142, 143.

¹⁸ Star. & Curt. Stats., p. 879, par. 1. See: *Tyson v. Postlethwaite*, 13 Ill. 732.

¹⁹ See: *Moore v. Abernathy*, 7 Blackf. (Ind.) 442.

²⁰ Me. Rev. Stats. 611, § 2.

²¹ Mass. Pub. Stats. 743, § 2.

See: *Larrabee v. Tucker*, 116

Mass. 562;

Sheffield v. Lovering, 12 Mass. 490.

²² 4 N. Y. Rev. Stats. (8th ed.) 2465, § 15;

1 N. Y. Rev. Stats. Codes & L. 860, § 15.

See: *Wood v. Mitcham*, 92 N. Y. 374, 379;

Wheeler v. Clutterbuck, 52 N. Y. 67;

Beebee v. Griffing, 14 N. Y. 235.

²³ N. C. Code, § 1281, rule 6.

See: *Alston v. Alston*, 7 Ired. (N. C.) L. 172.

²⁴ See: *Gardner v. Collins*, 27 U. S. (2 Pet.) 58; bk. 7 L. ed. 347; s.c. 3 Mas. C. C. 398; Fed. Cas. No. 5223.

Construction on whole-blood and half-blood.—In this case Justice STORY, in *Gardner v. Collins*, *supra*, says: "We think that the phrase 'of the blood' in the statute includes the half-blood. This is the natural meaning of the word 'blood' standing alone, and unexplained by any

⁸ *Baker v. Heiskell*, 1 Coldw. (Tenn.) 641;

Nichol v. Dupree, 7 Yerg. (Tenn.) 415.

Oregon,¹ and Vermont.² In other states the preference is given to collaterals of the whole-blood, as in Connecti-

context. A half brother or sister is of the blood of the intestate, for each of them has some of the blood of a common parent in his or her veins. A person is with the most strict propriety of language affirmed to be of the blood of another who has any, however small a portion, of the same blood derived from a common ancestor. In the common law, the word 'blood' is used in the same sense. Whenever it is intended to express any qualification, the word whole, or half blood, is generally used to designate it, or the qualification is implied from the context on known principles of law. Thus, Littleton in his sixth section says, that none shall inherit 'as heir to any man, unless he be his heir of the whole blood; for if a man hath issue two sons by divers *ventres*, and the eldest purchase lands, etc., etc., the younger brother shall not have the land, etc., because the younger brother is but of the half-blood to the elder.' The same distinction is found in section eight of the same author; and Lord Coke in his commentary on the text constantly takes it. So Robinson, in his Treatise on Inheritances, p. 45, after laying down the rule, that the person who is to inherit must be of the whole-blood to the person from whom he proximately and immediately inherits, adds, that he must also be of the blood of the first purchaser; but that it is sufficient to satisfy this that he is of the half-blood of such purchaser."

Same—The legislation of Rhode Island leads to the same result as to the meaning of the word "blood." That colony was governed by the English law of descents from its first settle-

ment until the year 1718, a period of more than half a century. By an act passed in 1718 the real estate of the intestate was divided among all his children, giving the eldest son a double share, etc., and in default of issue, the same was distributable among the next of kin of the intestate, within equal degree, etc. This act was repealed in 1728, and the common-law course of descents was revived and remained in force until 1770, when an act was passed, providing substantially for the same distribution as the act of 1718. It contained, however, this remarkable proviso, "that no distribution of any real estate in consequence of this act shall extend or be made in the collateral line beyond the brothers and sisters of such intestate and their children and to those only of the whole-blood. * * * If the half-blood were not permitted to inherit cases of this sort, this anomaly might occur that a son might inherit from his parent the moiety of an estate directly, which he could not inherit from his brother of the half-blood, to whom it has passed by descent from the same parent, if such brother should die without issue. We see no reason, then, to doubt that the words 'of the blood' include the half as well as the whole blood. The plaintiff, then, as those from whom he claims being the next of kin of the intestate (see: *Smith v. Tracey*, 2 Mod. 204; *Crook v. Watts*, 2 Vern. 124; s.c. *Shower. Parl. Cas.* 108), and of the blood of her two brothers (see: *Cowper v. Cowper*, 2 Pr. Wm. 720, 735; *Collingwood v. Pace*, 1 Vent. 424; *Watkins on Descents* 227, 228, (153), note; *Reeves on Descents*, 176, from whom she

¹ Oreg. Gen. L., 1887, § 8103.

² Vt. Rev. L., § 2231.

See: *Hatch v. Hatch*, 21 Vt. 450, 454.

cut,¹ Delaware,² Georgia,³ Maryland,⁴ Mississippi,⁵ New Jersey,⁶ Ohio,⁷ Pennsylvania,⁸ and South Carolina.⁹ In still other of the states, as in Colorado,¹⁰ Florida,¹¹ Kentucky,¹² Missouri,¹³ Texas,¹⁴ Virginia and West Virginia,¹⁵ collaterals of the full-blood take full shares, and of the half-blood half shares ; but in none of the states of the Union are the half-blood wholly excluded.¹⁶

SEC. 2268. **Law governing descent of real property.**—Real property, and all instruments affecting the same, are exclusively subject to the laws of the state within whose territory the land is situated,¹⁷ and the title thereto

immediately derived that part of the estate which is now in controversy, is entitled to recover, unless the statute in the other part of the clause defeats the descent."

¹ Conn. Gen. Stats. 1888, § 632.

² Del. L. 1874, p. 548, § 32.

See : *Kean v. Hoffercker*, 2 Harr. (Del.) 103; s.c. 29 Am. Dec. 336.

³ Geo. Code, § 2484.

⁴ Md. Rev. Code 405, § 19.

See : *Stewart v. Jones*, 8 Gill & J. (Md.) 1.

⁵ Miss. Rev. Code, § 1271.

See : *Scott v. Terry*, 37 Miss. 65; *Whitcomb v. Reid*, 31 Miss. 567.

⁶ N. J. Rev. Stats. 1877, pp. 297, 298.

⁷ Ohio Rev. Stats., § 4159.

⁸ Buglet Prud. Dig. 932, § 1.

See : *Stark v. Stark*, 55 Pa. St. 62;

Walker v. Dunshee, 38 Pa. St. 430.

⁹ S. C. Rev. Stats., § 1845.

¹⁰ Colo. Gen. Stats., § 1041.

¹¹ McClell. Dig. 469, § 4.

¹² Ky. Gen. Stat. 1887, p. 481, § 3.

See : *Petty v. Malier*, 15 B. Mon. (Ky.) 591.

¹³ Mo. Rev. Stat., § 2164.

¹⁴ Tex. Rev. Stat., § 1648.

See : *Lee v. Smith*, 18 Tex. 141.

¹⁵ See : Va. Code 1887, § 2549.

¹⁶ See : *Kean v. Hoffercker*, 2 Harr. (Del.) 103; s.c. 29 Am. Dec. 336; 4 Kent Com. (13th ed.) 404.

¹⁷ *Augusta Ins. Co. v. Morton*, 3 La. An. 418;

Harper v. Hampton, 1 Har. & J.

(Md.) 622, 687;

Blake v. Williams, 23 Mass. (6 Pick.) 286;

Cutter v. Davenport, 18 Mass. (1 Pick.) 81, 86;

Goodwin v. Jones, 3 Mass. 514, 518;

Andrews v. Herriot, 4 Cow. (N. Y.) 510, 527;

Holmes v. Remsen, 4 John. Ch. (N. Y.) 460; s.c. 20 John. (N. Y.) 254;

Chapman v. Robertson, 6 Paige Ch. (N. Y.) 627;

Hosford v. Nichols, 1 Paige Ch. (N. Y.) 220;

Nicholson v. Leavitt, 4 Sandf. (N. Y.) 276;

Wills v. Cowper, 2 Ohio 124;

Milne v. Moreton, 6 Binn. (Pa.) 353;

American & F. Christian Union v. Yount, 101 U. S. 352; bk. 25 L. ed. 388;

Oakey v. Bennett, 52 U. S. (11 How.) 33; bk. 13 L. ed. 593;

McCormick v. Sullivant, 23 U. S. (10 Wheat.) 192; bk. 6 L. ed. 300;

Kerr v. Moon, 22 U. S. (9 Wheat.) 566; bk. 6 L. ed. 161;

Clark v. Graham, 19 U. S. (6 Wheat.) 577; bk. 5 L. ed. 334;

United States v. Crosby, 11 U. S. (7 Cr.) 115; bk. 3 L. ed. 287;

Doe d. Birtwhistle v. Vardill, 5 Barn. & Cress. 438; s.c. 9 Bligh 32, 88; 11 Eng. C. L. 531;

Hunter v. Potts, 4 Durnf. & E. (4 T. R.) 182; s.c. 2 Rev. Rep. 353.

Phillips v. Hunter, 2 H. Bl. 402;

Sill v. Worswick, 1 H. Bl. 665; s.c. 2 Rev. Rep. 816;

can be acquired and lost, devised and inherited, only according to the law of such state ;¹ but it has been said that the status of any person, with the inherent capacity of succession or inheritance, is to be ascertained by the law of the domicile which creates the status, at least when the status is one which may exist under the laws of the state in which it is called in question, and when there is nothing in those laws to prevent giving full effect to the status and capacity acquired in the state of the domicile.²

SEC. 2269. **Alienage as a bar.**—We have already discussed the disabilities of aliens and their right to hold and inherit real property.³ The common law regarding the disability of aliens, depriving them of the right to inherit lands, has been modified by statute in most of the states of the Union to such an extent that they may take lands by descent, the disability of alienage being removed.⁴

- Elliott v. Minto*, 6 Madd. 16 ;
Cockerell v. Dickens, 3 Moore P. C. 98, 131, 132 ;
Coppin v. Coppin, 2 Pr. Wms. 290, 293 ;
Selkrig v. Davies, 2 Rose 97 ; s.c. 2 Dow. 230 ;
Curtis v. Hutton, 14 Ves. 537, 541 ;
Brodie v. Barry, 2 Ves. & B. 36 ; s.c. 13 Rev. Rep. 6 ;
Tulloch v. Hartley, 1 Younge & C. 114.
¹ *Potter v. Titcomb*, 22 Me. 300 ;
White v. Howard, 46 N. Y. 144 ;
Giddings v. Eastman, 1 Clarke Ch. (N. Y.) 19 ;
Abell v. Douglass, 4 Den. (N. Y.) 305 ;
Mills v. Fogal, 4 Edw. Ch. (N. Y.) 559 ;
Hawley v. James, 7 Paige Ch. (N. Y.) 213 ;
Chapman v. Robertson, 6 Paige Ch. (N. Y.) 627, 630 ;
Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126 ; s.c. 5 N. Y. 447 ;
Jeter v. Fellowes, 32 Pa. St. 465 ;
Donaldson v. Phillips, 18 Pa. St. 170 ;
Watts v. Waddle, 31 U. S. (6 Pet.) 389 ; bk. 8 L. ed. 437 ;
Darby v. Mayer, 23 U. S. (10 Wheat.) 465 ; bk. 6 L. ed. 367 ;
McCormick v. Sullivant, 23 U. S. (10 Wheat.) 192 ; bk. 6 L. ed. 300 ;
Kerr v. Moon, 32 U. S. (9 Wheat.) 565 ; bk. 6 L. ed. 161 ;
Clark v. Graham, 19 U. S. (6 Wheat.) 577 ; bk. 5 L. ed. 334 ;
United States v. Crosby, 11 U. S. (7 Cr.) 115 ; bk. 2 L. ed. 287 ;
Doe d. Birtwhistle v. Vardill, 5 Barn. & Cr. 438 ; s.c. 9 Bligh 32-88 ; 11 Eng. C. L. 531 ;
Elliott v. Minto, 6 Madd. 16 ;
Curtis v. Hutton, 14 Ves. 537, 541.
² *Ross v. Ross*, 129 Mass. 243.
³ See : Index, " Alienage " and " Aliens."
⁴ See : *McLean v. Swanton*, 13 N. Y. 535 ;
McGregor v. Comstock, 3 N. Y. 408 ;
Parish v. Ward, 28 Barb. (N. Y.) 328 ;
Horser v. Hoag, 3 Hill (N. Y.) 79 ;
Jackson v. Jackson, 16 John. (N. Y.) 214 ;
People v. Irvin, 21 Wend. (N. Y.) 128.

SECTION II.—ORIGINAL ACQUISITION.

- SEC. 2270. Introductory.
- SEC. 2271. By prescription.
- SEC. 2272. By accretion.
- SEC. 2273. By adverse provision.
- SEC. 2274. By statute of limitations.
- SEC. 2275. By estoppel.
- SEC. 2276. By abandonment.

SECTION 2270. **Introductory.**—Title by original acquisition may be secured in several ways : as by occupancy, that is, taking individual possession of land which was before the common property of the people or community ;¹ by prescription ;² by accretion ;³ by adverse possession ;⁴ by statute of limitations ;⁵ by estoppel ;⁶ and by abandonment.⁷ Each of these methods of original acquisition have their distinct features, as will more fully appear by the discussion which follows.

SEC. 2271. **By prescription.**—Possession was the first act from which the right to property was originally derived. By the law of nature, occupancy not only gave the right to the temporary use of the soil, but also the permanent property in the substances in the earth itself, as well as anything annexed to or arising out of it ; and it has been established as a rule of law, in every civilized country, that a long and continued possession gives a title to real property. The doctrine of prescription appears to have been longer established in England.⁸ Title thus acquired being founded on the presumption that the uninterrupted possession for a long period of years is established on a just right without which the person would not have been suffered to continue in the enjoyment of the land.⁹ Yet title by prescription can be

¹ 2 Bl. Com. 257.

See : *Ante*, § 13.

² See : *Post*, § 2270.

³ See : *Post*, § 2271.

⁴ See : *Post*, § 2272.

⁵ See : *Post*, § 2273.

⁶ See : *Post*, § 2274.

⁷ See : *Post*, § 2275.

⁸ Bract., lib. 2, c. 22.

⁹ See : *Valentine v. Piper*, 39 Mass. (22 Pick.) 85 ;

Coolidge v. Learned, 25 Mass. (8 Pick.) 503 ;

Ricard v. Williams, 20 U. S. (7

acquired only by possession accompanied by the claim to ownership.¹ Mere possession without claim to title, however long continued, is not sufficient;² but on the contrary an entry under color of title, however groundless the title may be, is sufficient, if *bona fide*,³ possession and a *quo animo* being the only tests.⁴ To establish title to land requires the highest evidence of corporeal seisin and inheritance.⁵ In this country titles by prescription rest upon the presumption of the previous grant or agreement which has been lost by lapse of time.⁶ The time for which the party must have possession or use requisite to raise title by prescription was, according to English law, for a term beyond the memory of man,⁷

- Wheat.) 509; bk. 5 L. ed. 398, 410.
- ¹ *Wafer v. Pratt*, 1 Rob. (La.) 41; s.c. 36 Am. Dec. 681.
See: *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589; s.c. 18 Am. Dec. 463;
Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 473;
Miller v. Platt, 5 Duer (N. Y.) 277;
Bowie v. Brahe, 3 Duer (N. Y.) 40;
Mitchell v. Walker, 2 Aik. (Vt.) 226; s.c. 16 Am. Dec. 710.
- ² *People v. Fields*, 1 Lans. (N. Y.) 243.
- ³ *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589; s.c. 18 Am. Dec. 463.
- ⁴ *Bradstreet v. Clarke*, 12 Wend. (N. Y.) 602, 674;
Bunce v. Gallagher, 5 Blatchf. C. C. 481; s.c. 7 Am. L. Reg. N. S. 32; 4 Fed. Cas. 660.
- ⁵ *Cortelyou v. Van Brundt*, 2 John. (N. Y.) 357.
- ⁶ *Casey v. Inloes*, 1 Gill (Md.) 430;
Common v. Coupe, 128 Mass. 63;
Edson v. Munsell, 92 Mass. (10 Allen) 568;
Powell v. Bogg, 74 Mass. (8 Gray) 443;
Valentine v. Piper, 39 Mass. (22 Pick.) 85; s.c. 33 Am. Dec. 715;
Coolidge v. Learned, 25 Mass. (8 Pick.) 503;
Charles River Bridge Co. v. Warren Bridge Co., 24 Mass. (7 Pick.) 449;
- Wallace v. Fletcher*, 30 N. H. 446;
Den v. Mulford, 1 N. J. L. (Coxe) 500;
Burbank v. Fay, 5 Lans. (N. Y.) 397;
Roods v. Symmes, 1 Ohio 216;
Chew v. Morton, 10 Watts (Pa.) 321;
Tracy v. Atherton, 36 Vt. 503;
Tyler v. Wilkinson, 4 Mason C. C. 397; s.c. Fed. Cas. No. 14312;
Campbell v. Wilkinson, 3 East 294; s.c. 7 Rev. Rep. 462;
Hillary v. Waller, 12 Ves. 239.
See: *Webb v. Bird*, 13 C. B. N. S. (13 J. Scott N. S.) 841; s.c. 106 Eng. C. L. 839.
- The Supreme Judicial Court of Massachusetts say, in the case of *Valentine v. Piper*, *supra*, that a jury may presume a conveyance from long-continued and uninterrupted possession by the presumed grantee without any adverse claim on the part of the presumed grantor or his heirs, and from other circumstances rendering such presumption reasonable, although no record of such conveyance can be found. Also that it has often been said by judges, that where there is a proper case for presumption, everything will be presumed necessary to give it effect, even letters patent, deeds, records, by-laws, or an act of Parliament.
- Mayor of Hull v. Horner*, Cowp. 102.
- ⁷ 1 Co. Litt. 115a;
Pringe v. Child, Rol. Abr. 269.

but was subsequently fixed at twenty years, by analogy, from the limit prescribed by statute,¹ for bringing an action in ejectment.² The enjoyment of the estate for such a term of years raised the legal presumption that the right was originally acquired by title.³ This presumption being founded on belief that a man will naturally enjoy that which belongs to him, and the policy of not disturbing long-continued possession.⁴ In this country the period of prescription in most of the states is twenty years, as in England,⁵ but varies in

¹ 21 Jac. 1, c. 21.

The Supreme Judicial Court of Massachusetts say, in the case of *Coolidge v. Learned*, 25 Mass. (8 Pick.) 503, that the period of twenty years was adopted in analogy to the statute of limitations, by which an adverse possession of twenty years was a bar to an action of ejectment, and gave a possessory title to the land. Thus it appears that although prescriptive rights commencing after the reign of Richard I. are not sustained in England, yet a possession of twenty years only is sufficient to warrant the presumption of a grant; which is the foundation of the doctrine of prescription. In the one case the grant is presumed by the court, or rather is presumed by the law, and in the other case it is presumed by the jury under the direction of the court. The presumption in the latter case is in theory, it is true, a presumption of fact, but in practice and for all practical purposes it is a legal presumption, as it depends on pure legal rules; and as Starkie remarks, "it seems to be very difficult to say why such presumptions should not at once have been established as mere presumptions of law, to be applied to the facts by the courts, without the aid of a jury. That course would certainly have been more simple, and any objection, as to the want of authority, would apply with equal if not superior force to the es-

tablishing such presumptions indirectly through the medium of a jury."

- ² *Brubaker v. Paul*, 7 Dana (Ky.) 428; s.c. 32 Am. Dec. 111; *Edson v. Munsell*, 92 Mass. (10 Allen) 568; *Currier v. Gale*, 85 Mass. (3 Allen) 330; *Coolidge v. Learned*, 25 Mass. (8 Pick.) 508.
- ³ *Coe v. Wolcottville Manuf. Co.*, 35 Conn. 175; *Manier v. Myers*, 4 B. Mon. (Ky.) 514; *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. (14 Vr.) 604; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Hoy v. Sterrett*, 2 Watts (Pa.) 330; *Ricard v. Williams*, 20 U. S. (7 Wheat.) 109; bk. 5 L. ed. 198; *Bright v. Walker*, 1 Crompt. M. & R. 217.
- ⁴ *Coolidge v. Learned*, 25 Mass. (8 Pick.) 503, 508; *Melvin v. Waddell*, 75 N. C. 361; *Strickler v. Todd*, 10 Serg. & R. (Pa.) 63; *Ricard v. Williams*, 20 U. S. (7 Wheat.) 109; bk. 5 L. ed. 198; *Tyler v. Wilkinson*, 4 Mas. C. C. 402; s.c. Fed. Cas. No. 14812; *Hillary v. Waller*, 12 Ves. 239.
- ⁵ *Stein v. Burden*, 24 Ala. 130; *Webbs v. Hynes*, 9 B. Mon. (Ky.) 388; *Trask v. Ford*, 39 Me. 437; *Edson v. Munsell*, 92 Mass. (10 Allen) 566; *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605; *Miller v. Garlock*, 8 Barb. (N. Y.) 153.

others according to the period fixed by law as the limitation of all real actions.¹

SEC. 2272. **By accretion.**—Another method of original acquisition is by accretion. By accretion is understood the adding of portions of the soil by gradual deposit, through the operation of natural causes, to land already in possession of the owner.² A† common law imperceptible increase to the land on the bank of a river of an alluvial formation, occasioned by the washing up of the sand or earth, or dereliction, as where the river or waters sinking remained above the usual water-mark, constitute an accretion to the land of the riparian owner, and the property thus formed belongs to him ;³ the right to such alluvial formation being a right inherent in the property and an essential attribute to it,⁴ and the title thereto resulting by natural law and in consequence of the local

¹ See : *Salle v. Primm*, 3 Mo. 529 ;
Mead v. Leffingwell, 83 Pa. St. 74 ;

Washabaugh v. Entriiken, 34 Pa. St. 74 ;

Okeson v. Patterson, 29 Pa. St. 22 ;

Arbuckle v. Ward, 29 Vt. 43 ;

Fox v. Blossom, 17 Blatchf. C. C. 352 ; s.c. 9 Fed. Cas. 624.

² 4 Kent Com. (13th ed.) 428.

See : *Lovington v. County of St. Clair*, 64 Ill. 56 ; s.c. 16 Am. Rep. 516.

The court say, in the case of *Lovington v. County of St. Clair*, *supra*, that "if portions of soil were added to real estate already possessed, by gradual deposition, through the operation of natural causes, or by slow and imperceptible accretion, the owner of the land to which the addition has been made has a perfect title to the addition. Upon no principle of reason or justice should he be deprived of accretions forced upon him by the labor of another without his consent or connivance, and thus cut off from the benefits of his original proprietorship. If neither the state nor any other individual can divert the water from him, artificial structures, which cause de-

posits between the old and new bank, should not divest him of the use of the water. Otherwise ferry and wharf privileges might be utterly destroyed, and towns and cities, built with sole reference to the use and enjoyment of the river, might be entirely separated from it."

³ See : *Warren v. Chambers*, 25 Ark. 120 ;

Lovington v. County of St. Clair, 64 Ill. 56 ; s.c. 16 Am. Rep. 523 ;

Adams v. Frothingham, 3 Mass. 352 ; s.c. 3 Am. Dec. 151 ;

Lammer v. Nissen, 4 Neb. 250 ;

New Orleans v. United States, 35 U. S. (10 Pet.) 662 ; bk. 9 L. ed. 573 ;

Banks v. Ogden, 69 U. S. (2 Wall.) 57 ; bk. 17 L. ed. 818 ;

King v. Yarborough, 3 Barn. & C. 91 ; s.c. 2 Bligh N. S. 147 ; 10 Eng. C. L. 51 ;

Atty.-Gen. v. Chambers, 4 DeG. & J. 55 ;

Ford v. Lacy, 7 Hurl. & N. 151 ;
Middleton v. Pitchard, 4 Ill. (3 Scam.) 510.

⁴ *Municipality No. 2 v. Orleans Cotton Press*, 18 La. An. 122 ;

King v. Yarborough, 3 Barn. & C. 91 ; s.c. 2 Bligh N. S. 147 ; 10 Eng. C. L. 51.

situation of the land.¹ The general doctrine is that the riparian owner of lands bounded upon a stream is entitled to all accretion thereto, caused by the deposit of an alluvion thereon, whether the reason be natural or artificial causes ; but at common law when the accretion is sudden or considerable, if the addition is to lands in navigable waters, the new land will belong to the state.² The reason upon which this rule rests is the common-law doctrine that the land under water and the shore below ordinary high water-mark, in navigable rivers and arms of the sea, vests in the sovereign for the public use and benefit.³ On the same principle all islands and other increase, if sudden and considerable, if arising in the sea or navigable stream, belong to the state,⁴ but islands formed in non-navigable streams, lying partly on either side of the thread of the stream, will belong to the riparian proprietors opposite to where the island appears, according to the original thread of the stream.⁵

SEC. 2273. By adverse possession.—Title to land may also be acquired by adverse possession. Adverse possession is the holding of property in the manner in which

¹ *Lovington v. County of St. Clair*, 64 Ill. 56 ; s.c. 16 Am. Rep. 516 ; 23 Wall. 68 ;

Municipality No. 2 v. Orleans Cotton Press, 18 La. An. 122.

² *Steers v. City of Brooklyn*, 101 N. Y. 51, 56 ; s.c. 4 N. E. Rep. 7 ;

Mulry v. Norton, 100 N. Y. 424 ; s.c. 3 N. E. Rep. 581 ;

Langdon v. Mayor, 93 N. Y. 129 ;

Ledyard v. Ten Eyck, 36 Barb. (N. Y.) 102, 125 ;

Angell on Tide Waters 249 ;

Gould on Waters, §§ 123, 124, 128, 148, 158.

When soil is by natural causes gradually deposited in the water opposite upland, and thus the water-line is carried further out into the ocean or other public water, it becomes attached to the upland, and the title of the upland owner is still extended to the water-line, and the accretion thus becomes his property. Natural justice requires that such accretion should belong to the upland

owner, so that he will not be shut off from the water, and thus converted into an inland rather than a littoral owner. The same rule should be applied for the same reason where the soil in front of the upland has been wrongfully placed there by human hands. The wrongdoer should gain nothing by his wrong, and justice cannot be done to the upland owner except by awarding to him, as against the wrongdoer, the accretion attached to his soil as an extension thereof.

³ *Barney v. Keokuk*, 94 U. S. 324, 337 ; bk. 24 L. ed. 224.

⁴ 2 Bl. Com. 262.

⁵ *Girard v. Hughes*, 1 Gill & J. (N. Y.) 249 ;

Trustees v. Dickinson, 63 Mass. (9 Cush.) 548 ;

Deerfield v. Arms, 34 Mass. (17 Pick.) 41 ; s.c. 28 Am. Dec. 276 ;

People v. Canal Appraisers, 13 Wend. (N. Y.) 355.

the person is not entitled to hold it, and receiving rents and profits thereof, with the purpose of excluding all other persons, including the rightful owner, therefrom. What constitutes adverse possession is a question of law for the court; but the facts supporting the claim must be established to the satisfaction of the jury, like any other question of fact.¹ The reason for this rule is the fact that title being shown, the law presumes the true owner to be in possession until adverse possession is proved to begin.² In order to support an adverse possession, and set the statute of limitations running, there

- ¹ *Russell v. Davis*, 39 Conn. 562;
Beverly v. Burke, 9 Ga. 440; s.c.
 54 Am. Dec. 351;
Shackelford v. Bailey, 35 Ill. 387;
Woodward v. Blanchard, 16 Ill.
 424;
Wriggins v. Holley, 11 Ind. 2;
Grube v. Wells, 34 Iowa 148;
Dubois v. Marshall, 3 Dana (Ky.)
 336;
Kinsell v. Daggett, 11 Me. 309;
Schwartz v. Kuhn, 10 Me. 274;
Baker v. Swan, 32 Md. 355;
Fitchburg R. Co. v. Page, 131
 Mass. 391;
Magee v. Magee, 37 Mass. (20
 Pick.) 490;
Poignard v. Smith, 23 Mass. (6
 Pick.) 172;
Grafton v. Grafton, 16 Mass. 77;
Gayetty v. Bethune, 14 Mass. 49;
Cummings v. Wyman, 10 Mass.
 464;
Iler v. Routh, 3 Mass. 276;
Washburn v. Cutter, 17 Minn.
 361;
Boogher v. Neece, 75 Mo. 384;
Musick v. Barney, 49 Mo. 458;
Macklot v. Dubreuil, 9 Mo. 473;
 s.c. 43 Am. Dec. 550;
McNair v. Funt, 5 Mo. 300;
Atherton v. Johnson, 1 N. H. 34;
Den v. Sinnickson, 9 N. J. L. (4
 Halst.) 149;
Gross v. Welwood, 90 N. Y. 638;
Madison Ave. Church v. Oliver
St. Church, 73 N. Y. 82;
Trim v. Marsh, 54 N. Y. 599; s.c.
 13 Am. Rep. 623;
Clap v. Bromagham, 9 Cow. (N.
 Y.) 530;
Jackson v. Wheat, 18 John. (N.
 Y.) 496;
Jackson v. Stephens, 13 John. (N.
 Y.) 496;
Jackson v. Sharp, 9 John. (N. Y.)
 163; s.c. 6 Am. Dec. 627;
Jackson v. Joy, 9 John. (N. Y.)
 102;
Jackson v. Parker, 3 John. Ch.
 124;
Workman v. Guthrie, 29 Pa. St.
 495;
Hoopes v. Garver, 15 Pa. St. 517;
Hatch v. Smith, 4 Pa. St. 109;
Read v. Goodyear, 17 Serg. & R.
 (Pa.) 350;
Mushawer v. Patten, 10 Serg. &
 R. (Pa.) 334;
Overfield v. Christie, 7 Serg. & R.
 (Pa.) 172;
Wallace v. Duffield, 2 Serg. & R.
 (Pa.) 527;
Bell v. Hurtley, 4 Watts & S. (Pa.)
 132;
Hopkins v. Robinson, 3 Watts
 (Pa.) 205;
Rogers v. Madden, 2 Bail. (S. C.)
 L. 321;
Harrington v. Wilkins, 2 McC.
 (S. C.) L. 289;
Bracken v. Martin, 3 Yerg.
 (Tenn.) 55;
Holliday v. Cromwell, 37 Tex.
 437;
Bolling v. Petersburg, 3 Rand.
 (Va.) 536;
Webb v. Richardson, 42 Vt. 465;
Hall v. Dewey, 10 Vt. 593;
McPherson v. Featherston, 37
 Wis. 632;
McClung v. Ross, 10 U. S. (5
 Wheat.) 116; bk. 5 L. ed. 46.
² *Jackson v. Sharp*, 9 John. (N. Y.)
 163; s.c. 6 Am. Dec. 627;
Minor v. Mayor, 5 Jones & S. (N.
 Y.) 171;
Carson v. Burnet, 1 Dev. & B.
 (N. C.) L. 546; s.c. 30 Am. Dec.
 143.

must be an actual entry and usure of the property such as the true owner thereof might make, without leave or permission,¹ with the intention to retain the possession and profits thereof as his own.² This intention, though it need not be expressed, must be manifest,³ and may be inferred from the manner of occupancy.⁴ The essentials to constitute an adverse possession are : (1) actual possession, which shall be (2) hostile and adverse, (3) continuous, (4) visible, open, notorious, and exclusive, and (5) shall be held under color or claim of title.⁵ The latter is absolutely indispensable to the creation of an estate by

¹ *Blanchard v. Moulton*, 63 Me. 434.

² *Brown v. Cockrell*, 30 Ala. 45 ;
Russell v. Davis, 38 Conn. 562 ;
Carroll v. Gillion, 33 Ga. 539 ;
Howard v. Reedy, 29 Ga. 154 ;
Bartholomew v. Edwards, 1
 Houst. (Del.) 217 ;
McNamara v. Seaton, 92 Ill. 498 ;
Jackson v. Berner, 48 Ill. 203 ;
Skinner v. Crawford, 54 Iowa
 119 ; s.c. 6 N. W. Rep. 144 ;
Grube v. Wells, 34 Iowa 148 ;
Jones v. Hockman, 12 Iowa 108 ;
McGee v. Morgan, 1 A. K. Marsh.
 (Ky.) 62 ;
Dow v. McKenney, 64 Me. 138 ;
Blanchard v. Moulton, 63 Me.
 434 ;
Waltmeyer v. Baughman, 63 Md.
 200 ;
Worcester v. Lord, 56 Me. 265 ;
Putnam School v. Fisher, 38 Me.
 324 ;
Brown v. Gay, 3 Me. (3 Greenl.)
 126 ;
Beatty v. Mason, 30 Md. 409 ;
Cook v. Babcock, 65 Mass. (11
 Cush.) 210 ;
Cleveland v. Flogg, 58 Mass. (4
 Cush.) 76 ;
Allen v. Holton, 37 Mass. (20
 Pick.) 458 ;
Church v. Burghart, 25 Mass. (8
 Pick.) 328 ;
Davis v. Bowmar, 55 Miss. 671 ;
Magee v. Magee, 37 Miss. 152 ;
Musick v. Barney, 47 Mo. 458 ;
St. Louis University v. McClune,
 28 Mo. 481 ;
Betts v. Brown, 3 Mo. App. 20 ;
Jackson v. Wheat, 18 John. (N.
 Y.) 44 ;
Jackson v. Thomas, 16 John. (N.
 Y.) 293 ;
Grant v. Fowler, 39 N. H. 101 ;

Green v. Harman, 4 Dev. (N. C.)
 L. 158 ;

Humphries v. Hoffman, 35 Ohio
 St. 395 ;

Morse v. Churchill, 41 Vt. 649 ;

Hodges v. Eddy, 41 Vt. 488 ;

Core v. Faupel, 24 W. Va. 238 ;

Ewing v. Burnet, 36 U. S. (11
 Pet.) 41 ; bk. 9 L. ed. 624 ;

Larwell v. Stevens, 2 McC. C. C.
 311 ; s.c. 12 Fed. Rep. 559 ;

Jackson v. Porter, 1 Paine C. C.
 457 ; s.c. Fed. Cas. No. 7143.

³ *Marcy v. Marcy*, 47 Mass. (96 Met.)
 360 ;

Lawry v. Tilleny, 31 Me. 502 ;

Culver v. Rhodes, 87 N. Y. 384 ;
Hart v. Gregg, 10 Watts (Pa.)
 185 ;

Prescott v. Nevers, 4 Mas. C. C.
 326, 330 ; s.c. Fed. Cas. No.
 11390.

⁴ *Conyers v. Kenan*, 4 Ga. 308 ; s.c.
 48 Am. Dec. 226.

⁵ *Dothard v. Denson*, 75 Ala. 541 ;
Ringo v. Woodruff, 43 Ark. 469 ;
Unger v. Mooney, 63 Cal. 586 ;
Flaherty v. McCormick, 113 Ill.
 538 ;

Cook v. Babcock, 65 Mass. (11
 Cush.) 209 ;

Washburn v. Cutter, 17 Minn.
 361 ;

Davis v. Bowmar, 55 Miss. 671 ;

Dietrick v. Noel, 42 Ohio St. 18 ;
 s.c. 51 Am. Rep. 788 ;

Hawk v. Senseman, 6 Serg. & R.
 (Pa.) 21 ;

Bracken v. Jones, 63 Tex. 184 ;

Partch v. Spooner, 57 Vt. 583 ;

Creekmur v. Creekmur, 75 Va.
 430 ;

Taylor v. Burnsides, 1 Gratt.
 (Va.) 165 ;

Core v. Faupel, 24 W. Va. 230.

adverse possession, and must be continuous because the presumption is in favor of the true owner.¹ Such possession must be hostile at its inception and continue for the requisite period uninterrupted, with the knowledge and acquiescence of the owner.² If the continuity of the possession shall be broken either by lawful entry or by fraud, the protection given by the statute of limitations will be lost.³ Where the property is claimed by adverse possession without color or claim of title, and naked possession alone is relied on as constituting the title to the land, there must be actual occupancy of the land and not a constructive possession.⁴

- ¹ *Potts v. Cloeman*, 67 Ala. 221 ;
Herbert v. Haurick, 16 Ala. 581 ;
Ringo v. Woodruff, 43 Ark. 469 ;
Unger v. Mooney, 63 Cal. 586 ;
s.c. 49 Am. Rep. 100 ;
Russell v. Davis, 39 Conn. 562 ;
O'Daniel v. Bakers' Union, 4
Houst. (Del.) 488 ;
Carroll v. Gillion, 33 Ga. 539 ;
Jackson v. Berner, 48 Ill. 203 ;
Wiggins v. Holly, 11 Ind. 2 ;
De Long v. Mulcher, 47 Iowa
445 ;
Grube v. Wells, 34 Iowa 150 ;
Jones v. Hockman, 12 Iowa 108 ;
McGee v. Morgan, 1 A. K. Marsh.
(Ky.) 62 ;
Putnam School v. Fisher, 38 Me.
324 ;
Beatty v. Mason, 30 Md. 409 ;
Cook v. Babcock, 65 Mass. (11
Cush.) 209 ;
Slater v. Rawson, 47 Mass. (6
Met.) 439 ;
Colburn v. Hollis, 44 Mass. (3
Met.) 125 ;
Church v. Burghart, 25 Mass. (8
Pick.) 328 ;
Newhall v. Wheeler, 7 Mass. 189 ;
Sparrow v. Hovey, 44 Mich. 63 ;
s.c. 6 N. W. Rep. 93 ;
Yelverton v. Steele, 40 Mich. 538 ;
Washburn v. Cutter, 17 Minn.
361 ;
Gordon v. Sizer, 39 Miss. 805 ;
Magee v. Magee, 37 Miss. 152 ;
Musick v. Barney, 49 Mo. 458 ;
Wall v. Shindler, 47 Mo. 282 ;
Grant v. Fowler, 39 N. H. 101 ;
Laud v. Parker, 3 N. H. 49 ;
Jackson v. Wheat, 18 John. (N.
Y.) 40 ;
Smith v. Burtis, 6 John. (N. Y.)
- 218 ;
Jones v. Porter, 3 Pen. & W.
(Pa.) 132 ;
Hawk v. Senseman, 6 Serg. & W.
(Pa.) 21 ;
Rung v. Shoneberger, 2 Watts
(Pa.) 23 ; s.c. 26 Am. Dec. 95 ;
Snoddy v. Kreutch, 3 Head
(Tenn.) 304 ;
Cracken v. Jones, 63 Tex. 184 ;
Shatterwhite v. Rosser, 61 Tex.
166 ;
Soule v. Barlow, 49 Vt. 329 ;
Morse v. Churchill, 41 Vt. 649 ;
Hodges v. Eddy, 38 Vt. 344 ;
Creekmur v. Creekmur, 75 Va.
430 ;
Clark v. McClure, 10 Gratt. (Va.)
305 ;
Core v. Faupel, 24 W. Va. 238 ;
Hudson v. Putney, 14 W. Va.
561 ;
Pepper v. O'Dowd, 39 Wis. 548.
- ² *Thompson v. Pioche*, 44 Cal. 508 ;
Arrington v. Liscom, 34 Cal. 365 ;
Jackson v. Birner, 48 Ill. 203 ;
Winslow v. Winslow, 52 Ind. 8 ;
Gulf R. Co. v. Owen, 8 Kan. 409 ;
Gay v. Mottif, 2 Bibb (Ky.) 507 ;
Jackson v. Waters, 12 John. (N.
Y.) 365 ;
Rung v. Shoneberger, 2 Watts
(Pa.) 66 ; s.c. 26 Am. Dec. 95 ;
Union Canal Co. v. Young, 1
Whart. 410 ; s.c. 30 Am. Dec.
212 ;
Gillespie v. Jones, 26 Tex. 343 ;
Wilson v. Henry, 40 Wis. 549.
- ³ *Livingston v. Peru Iron Co.*, 9
Wend. (N. Y.) 511 ;
Pedrick v. Searle, 5 Serg. & R.
(Pa.) 240.
- ⁴ *Burks v. Mitchell*, 78 Ala. 61 ;

SEC. 2274. **By statute of limitations.**—In this country it is provided in all of the states that action for the possession of real property shall be instituted within the period limited by the statute after the right of action shall have occurred. These statutes vary widely in detail, and the local statute must be consulted in each instance. But in all the states, in order to give title to the lands, the person claiming the benefit of the statute must have held absolute possession in himself and his privies for the entire

- Dothard v. Denson*, 75 Ala. 482 ;
Bell v. Denson, 56 Ala. 444 ;
Hawkins v. Hudson, 45 Ala. 482 ;
Ferguson v. Peden, 33 Ark. 150 ;
Kimball v. Stormer, 65 Cal. 116 ;
Kimball v. Lohmas, 31 Cal. 154 ;
Tracy v. Norwich, etc., R. Co.,
 39 Conn. 382 ;
French v. Pearce, 8 Conn. 439 ;
 s.c. 21 Am. Dec. 680 ;
Bryan v. Atwater, 5 Day (Conn.)
 181 ; s.c. 5 Am. Dec. 136 ;
Hammond v. Crosby, 68 Ga. 767 ;
Hall v. Gay, 68 Ga. 442 ;
Anderson v. Dodd, 65 Ga. 402 ;
Whittington v. Wright, 9 Ga. 23 ;
Bristol v. Carroll County, 98 Ill.
 84 ;
Schneider v. Botsch, 90 Ill. 577 ;
Coleman v. Billings, 89 Ill. 183 ;
Weber v. Anderson, 73 Ill. 439 ;
Paterson v. McCullough, 50 Ind.
 35 ;
Hamilton v. Wright, 30 Iowa
 480 ;
Booth v. Small, 25 Iowa 177 ;
Smith v. Morrow, 5 Litt. (Ky.)
 210 ;
McKinny v. Kenny, 1 A. K.
 Marsh. (Ky.) 343 ;
Hunter v. Chrisman, 6 Mon. (Ky.)
 465 ;
Hitchings v. Morrison, 72 Me.
 334 ;
Jewett v. Hussey, 70 Me. 433 ;
Abbott v. Abbott, 51 Me. 584 ;
Lincoln v. Edgecomb, 51 Me.
 345 ;
Otis v. Moulton, 20 Me. 203 ;
Melvin v. Proprietors, 46 Mass. (5
 Met.) 5 ; s.c. 38 Am. Dec.
 384 ;
Burrell v. Burrell, 11 Mass. 297 ;
Proprietors v. Springer, 4 Mass.
 416 ; s.c. 3 Am. Dec. 227 ;
Marble v. Price, 54 Mich. 466 ;
Seymour v. Carli, 31 Minn. 81 ;
 s.c. 16 N. W. Rep. 495 ;
Washburn v. Cutter, 17 Minn.
 335 ;
Huntington v. Allen, 44 Miss.
 654 ;
Alexander v. Polk, 39 Miss. 737 ;
Haywood v. Thomas, 17 Neb.
 237 ; s.c. 22 N. W. Rep. 460 ;
Boynton v. Hodgdon, 59 N. H.
 247 ;
Wells v. Jackson Mfg. Co., 48 N.
 H. 491 ;
Hale v. Glidden, 10 N. H. 401 ;
Enfield v. Day, 7 N. H. 457 ;
Smith v. Hosmer, 7 N. H. 436 ;
 s.c. 28 Am. Dec. 354 ;
Crary v. Goodman, 22 N. Y.
 170 ;
Baldwin v. Brown, 16 N. Y. 359 ;
Robinson v. Phillips, 65 Bradf.
 (N. Y.) 429 ; s.c. 56 N. Y. 634 ;
Scott v. Elkins, 83 N. C. 424 ;
Parker v. Banks, 79 N. C. 480 ;
Clarke v. Wagner, 74 N. C. 791 ;
Moore v. Thompson, 69 N. C.
 120 ;
Humphries v. Hoffman, 30 Ohio
 St. 395 ;
Wilson v. McEwan, 7 Oreg. 87 ;
Meade v. Leffingwell, 83 Pa. St.
 187 ;
Ege v. Medlar, 82 Pa. St. 86 ;
Jones v. Porter, 3 Pa. St. 134 ;
Brown v. McKinney, 9 Whart.
 (Pa.) 567 ;
Bracken v. Jones, 63 Tex. 184 ;
Cantagrel v. Van Lupin, 58 Tex.
 570 ;
Paine v. Hutchens, 49 Vt. 314 ;
Hodges v. Eddy, 38 Vt. 327 ;
Spaulding v. Warren, 25 Vt. 316 ;
Stevens v. Hollister, 18 Vt. 294 ;
Creekmur v. Creekmur, 75 Va.
 431 ;
Kincheloe v. Tracewell, 11 Gratt.
 (Va.) 587 ;
Core v. Faupel, 24 W. Va. 238 ;
Brown v. Leete, 6 Sawy. C. C.
 332 ; s.c. 2 Fed. Rep. 440.

period prescribed ; and any discontinuance or interruption of the possession will prevent the statute from operating ;¹ yet the possession need not be continuous and adverse in one person, two or more disseisors may hold land successively in privity with each other either by purchase or by descent, and if the parties together hold for the length of time prescribed by statute, the owner will be as inevitably barred as though the property had been held throughout the entire time by one person.² The statute will run against the true owner and all persons claiming under him, and will be a bar when the prescribed period has elapsed. Where possession of land has been held for a prescribed time it may be set up even against one who has a clear paper title.³ It was formerly held that the effect of the running of the statute of limitations was to bar the remedy which the rightful owner had against the occupant, but did not affect the substantial right to the premises ;⁴ but the later decisions seem to hold that it affects the right to title also.⁵

¹ *San Francisco v. Fulde*, 37 Cal. 349 ;

School District v. Lynch, 33 Conn. 380 ;

Denham v. Holean, 26 Ga. 191 ;

Winslow v. Winslow, 52 Ind. 8 ;

McNamee v. Moreland, 26 Iowa 96 ;

Peabody v. Hewett, 52 Me. 46 ;

Thomas v. Marshfield, 30 Mass. (13 Pick.) 250 ;

Bowman v. Lee, 48 Mo. 335 ;

Den v. Mulford, 1 Hayw. (N. C.) 320 ;

Pederick v. Searle, 5 Serg. & R. (Pa.) 240 ;

Doswell v. De la Lanza, 61 U. S. (20 How.) 32 ; bk. 15 L. ed. 824.

² *Clock v. Gilbert*, 39 Conn. 94 ;

Doe v. Brown, 4 Ind. 143 ;

Armstrong v. Ristean, 5 Md. 256 ;

Leonard v. Leonard, 89 Mass. (7 Allen) 227 ;

Sawyer v. Kendall, 64 Mass. (10 Cush.) 241 ;

Melvin v. Proprietors, etc., 46 Mass. (5 Met.) 15 ;

Outcalt v. Ludlow, 32 N. J. L. (3 Vr.) 239 ;

Jackson v. Leonard, 9 Cow. (N. Y.) 653 ;

Doe v. Campbell, 10 John. (N. Y.) 477 ;

Simpson v. Downing, 23 Wend. (N. Y.) 316 ;

Shrank v. Zubler, 34 Pa. St. 38 ;

Chilton v. Wilson, 9 Humph. (Tenn.) 399 ;

Johnson v. Nash, 15 Tex. 419 ;

Christy v. Alfred, 58 U. S. (17 How.) 601 ; bk. 15 L. ed. 256 ;

Alexander v. Pendleton, 12 U. S. (8 Cranch.) 462 ; bk. 3 L. ed. 624 ;

Doe d. Carter v. Barnard, 13 Ad. & E. N. S. (13 Q. B.) 945 ; s.c. 66 Eng. C. L. 945.

³ *Phillips v. Kent*, 23 N. J. L. (3 Zab.) 155 ;

Hughes v. Graves, 39 Vt. 365.

⁴ *Bulger v. Roche*, 28 Mass. (11 Pick.) 36 ;

Townsend v. Jemison, 29 How. (N. Y.) Pr. 407 ;

McElmoyne v. Cohen, 38 U. S. (13 Pet.) 312 ; bk. 10 L. ed. 177 ;

Davenport v. Tyrrell, 1 W. Bl. 975.

⁵ *School District v. Benson*, 31 Me. 384 ;

Armstrong v. Ristean, 5 Md. 256 ;

Steele v. Johnson, 86 Mass. (4 Allen) 426 ;

SEC. 2275. **By estoppel.**—Title to real property may also be acquired by adverse possession through the estoppel of the rightful owner to set up his right as against the person in possession and those claiming under him. This estoppel occurs only where the true owner does some act which in equity “shuts his mouth from speaking the truth.”¹ A man is always estopped by his own deed and not permitted to aver or prove anything in contradiction to that which he has solemnly and deliberately avowed.² The office of an estoppel is to preclude the exercise of the right that cannot be exercised consistently with justice and good faith, and thereby prevent wrongs for which there might be no adequate remedy.³ Estoppels affecting and confirming title to lands are of two kinds, to wit: by matters in deed and by matters *in pais*. Where the grantor, either with or without title, conveys land by deed, with the usual covenant of title and warranted, he will not be allowed subsequently to allege or prove anything contrary to that which he has thus solemnly declared under seal.⁴ Thus he will not be heard to assert that the deed is inoperative by reason of informality or defective execution;⁵ and if he has no title at the time, but subsequently acquires the title, it will inure by way of estoppel to the benefit of the grantor and those claiming under him.⁶ In some of the states the same is true

Ford v. Wilson, 35 Miss. 504;

Blair v. Smith, 16 Mo. 273;

Grant v. Fowler, 39 N. H. 103;

Schall v. Williams Valley R. Co.,
35 Pa. St. 191;

Moore v. Luce, 29 Pa. St. 262;

Pederick v. Searle, 5 Serg. & R.
(Pa.) 240.

¹ Owen v. Berthalamew, 26 Mass.
(9 Pick.) 520;

Armfield v. Moore, 1 Bush (N.
C.) L. 161;

Watt's Appeal, 35 Pa. St. 527;
2 Co. Litt. (19th ed.) 352.

² 2 Bl. Com. 295.

³ Andrews v. Ætna Life Ins. Co.,
85 N. Y. 334;

Buckingham v. Hanna, 2 Ohio
St. 551;

Van Rensselaer v. Kearney, 52
U. S. (11 How.) 297; bk. 13 L.
ed. 703;

Carver v. Jackson ex d. Astor,

29 U. S. (4 Pet.) 1, 83; bk. 7 L.
ed. 761, 790.

⁴ Clark v. Baker, 14 Cal. 629;

Doe v. Dowall, 3 Houst. (Del.) 369;
s.c. 11 Am. Rep. 757;

Taylor v. Sangrain, 1 Mo. App.
312;

Sinclair v. Jackson, 8 Cow. (N.
Y.) 586;

Douglas v. Scott, 5 Ohio 199.

⁵ Taylor v. Sangrain, 1 Mo. App.
312.

⁶ Blakeslee v. Mobile Ins. Co., 57
Ala. 205;

Watkins v. Wassell, 15 Ark. 73;

Klumpe v. Baker, 68 Cal. 559;

Dudley v. Cadwell, 19 Conn. 226;

Doe v. Dowdall, 3 Houst. (Del.)
369; s.c., 11 Am. Rep. 759;

O'Bannon v. Faremour, 24 Ga.
403;

Dickerson v. Talbot, 14 B. Mon.
(Ky.) 164;

of a mere release or quit-claim deed.¹ Where the clear intention of the parties, as shown by the deed, was to convey an estate greater than was possessed by the grantor at the time, the latter will be estopped from setting up an after-acquired title.² Where the conveyance is by means of a sealed lease, the grantor will be estopped to set up a subsequently acquired title against the lease,³ except in those cases where no interest passes by the lease.⁴ The principle underlying an estoppel *in pais* is that it would be a fraud to allow a party to assert a right which his previous conduct and admission have denied, and on the faith of which conduct and admission others have acted.⁵ But in order to constitute

- Wadhams v. Swan, 109 Ill. 46 ;
 Randall v. Lower, 98 Ind. 255 ;
 Thomas v. Stickle, 32 Iowa 72 ;
 Read v. Flogg, 60 Me. 479 ;
 Funk v. Newcomer, 10 Md. 316 ;
 Farnum v. Peterson, 111 Mass.
 148 ;
 Smith v. Williams, 44 Mich. 240 ;
 s.c. 6 N. W. Rep. 662 ;
 Hooper v. Henry, 31 Minn. 264 ;
 s.c. 17 N. W. Rep. 476 ;
 Mitchell v. Woodson, 37 Miss.
 578 ;
 Bell v. Adams, 81 N. C. 118 ;
 Hayes v. Tabor, 41 N. H. 521 ;
 Smith v. De Russy, 29 N. J. Eq.
 (2 Stew.) 407 ;
 Mickler v. Dillaye, 15 Hun (N.
 Y.) 236 ;
 Hart v. Gregg, 32 Ohio St. 502 ;
 Wilson v. McEwan, 7 Oreg. 87 ;
 Bailey v. Hoppin, 12 R. I. 560 ;
 Graffney v. Peeler, 21 S. C. 55 ;
 Coal Creek Mining Co. v. Ross, 12
 Lea (Tenn.) 1 ;
 Robinson v. Douthit, 64 Tex. 101 ;
 Kelly v. Seward, 51 Vt. 436 ;
 Raipes v. Walker, 77 Va. 92 ;
 Mann v. Young, 1 Wash. Tr. 454 ;
 Western Mfg. Co. v. Peytonia
 Cannel Coal Co., 8 W. Va. 406 ;
 Wiesner v. Zann, 39 Wis. 188 ;
 Irvine v. Irvine, 79 U. S. (9
 Wall.) 617 ; bk. 19 L. ed. 800 ;
 Trust & Loan Co. v. Covert, 32
 Up. Can. Q. B. 222 ;
 Davenport v. Tyrrell, 1 W. Bl.
 975.
 • Tillotson v. Kennedy, 5 Ala. 413 ;
 Quiver v. Baker, 37 Cal. 465 ;
 Dart v. Dart, 7 Conn. 236 ;
 Bennett v. Waller, 23 Ill. 182 ;
 Locke v. White, 89 Ind. 492 ;
 Scoffins v. Grandstaff, 12 Kan.
 467 ;
 Bohon v. Bohon, 78 Ky. 408 ;
 Ham v. Ham, 14 Me. 351 ;
 Weed Sewing Machine Co. v.
 Emerson, 115 Mass. 554 ;
 Brown v. Phillips, 40 Mich. 264 ;
 Kimmel v. Benna, 70 Mo. 52 ;
 Harden v. Cullins, 8 Nev. 49 ;
 Bell v. Twilight, 26 N. H. (6
 Frost.) 401 ;
 Smith v. De Russy, 20 N. J. Eq.
 (5 C. E. Gr.) 407 ;
 Jackson v. Littell, 56 N. Y. 108 ;
 Hart v. Gregg, 32 Ohio St. 502 ;
 Burston v. Jackson, 9 Oreg. 275 ;
 Doswell v. Buchanan, 3 Leigh
 (Va.) 365 ;
 Kent v. Watson, 22 W. Va. 561.
² Smiley v. Fries, 104 Ill. 416 ;
 King v. Rea, 56 Ind. 1 ;
 Hannon v. Christopher, 34 N. J.
 Eq. (7 Stew.) 459 ;
 Rutherford v. Stamper, 60 Tex-
 447 ;
 Van Rensselaer v. Kearney, 53
 U. S. (11 How.) 297 ; bk. 13 L.
 ed. 703.
³ Trevivan v. Lawrence, 1 Salk.
 276 ; s.c. 2 Ld. Raym. 1036.
⁴ Blake v. Foster, 8 Durnf. & E.
 (8 T. R.) 487 ; s.c. 5 Rev. Rep.
 419 ;
 Langford v. Selmer, 3 Kay & J.
 220.
⁵ Chandler v. White, 84 Ill. 435 ;
 Simpson v. Pearson, 31 Ind. 1 ;
 Zuchtman v. Roberts, 100 Mass.
 53 ; s.c. 12 Am. Rep. 663 ;

an estoppel *in pais* there must have been a fraudulent representation, or a concealment of a material fact,¹ and mere silence where it is the duty of the party to speak is regarded as a fraudulent concealment of facts,² except in those cases where the party's rights in the property sufficiently appear of record, in which case there will be no estoppel by mere silence upon his part, for the reason that there is no violation of a duty.³ And in those cases where the acts of the party have led another, or the public, to expend money in an effort to procure title or to improve the property, he will be estopped from afterwards setting up title to defeat the rights sought to be acquired, or to benefit by the improvements; as where the true owner participates in inducing another to purchase from a third person the lands of which he holds the title;⁴ or dedicates the land to public use.⁵ But under the statute of fraud an estoppel *in pais* will not work a transfer of the legal title.⁶

Horn v. Cole, 51 N. H. 287; s.c.

12 Am. Rep. 111;

Chapman v. O'Brien, 2 Jones & S. (N. Y.) 524;

Bean v. Pettingill, 7 Rob. (N. Y.) 7;

Holmes v. Crowell, 73 N. C. 613;

Brant v. Virginia Coal, etc., Co.,

93 U. S. 326; bk. 23 L. ed. 927;

Cairncross v. Lorimer, 3 Macq.

829;

¹ Griffith v. Wright, 6 Colo. 248;

Pittsburg v. Danforth, 56 N. H. 272.

² Studdard v. Lemmond, 48 Ga. 100;

Janeson v. Janeson, 66 Ill. 259;

Markland Co. v. Kimmel, 87

Ind. 560;

Griffin v. Nichols, 51 Mich. 575;

s.c. 17 N. W. Rep. 63;

Niven v. Belknap, 2 John. (N. Y.) 573;

Cady v. Owen, 34 Vt. 598;

Wheeler v. New Brunswick C. R. Co., 115 U. S. 29; bk. 29 L. ed. 341.

³ Mayo v. Cartwright, 30 Ark. 407;

Neal v. Gregory, 19 Fla. 356;

Mason v. Philbrook, 70 Me. 57;

Sulphine v. Dunbar, 55 Miss. 232;

Rice v. Dewey, 54 Barb. (N. Y.) 455;

Knouff v. Thompson, 16 Pa. St.

357;

Kingman v. Graham, 51. Wis. 232; s.c. 8 N. W. Rep. 181.

⁴ Snodgrass v. Rickets, 13 Cal. 359;

Winchell v. Edwards, 57 Ill. 41;

Davidson v. Sillman, 24 La. An. 225;

Titus v. Morse, 40 Me. 348;

Gray v. Bartlett, 37 Mass. (20

Pick.) 193;

Moore v. Bowman, 47 N. H. 494;

Storrs v. Barker, 6 John. Ch. (N. Y.) 166; s.c. 10 Am. Dec. 316;

Sherill v. Sherill, 73 N. C. 8;

Pickard v. Sears, 6 Ad. & E. 469; s.c. 33 Eng. C. L. 257.

⁵ Noyes v. Ward, 19 Conn. 250;

Boyce v. Kalbaugh, 47 Md. 334; s.c. 28 Am. Rep. 464;

Hobbs v. Lowell, 36 Mass. (19

Pick.) 409;

State v. Trask, 6 Vt. 355.

⁶ Doe v. Walters, 16 Ala. 714;

Davis v. Davis, 26 Cal. 23;

McCune v. McMichael, 29 Ga. 312;

Mills v. Graves, 38 Ill. 466;

Bigelow v. Foss, 59 Me. 162;

Hayes v. Livingston, 34 Mich. 384; s.c. 22 Am. Rep. 533;

Ryder v. Flanders, 30 Mich. 344;

De Herques v. Marti, 85 N. Y. 609;

SEC. 2276. **By abandonment.**—It is a well-known principle of law that every owner of property, whether personal or real, may abandon it;¹ and while title to real property cannot be properly said to be vested in any one by abandonment, yet where a person abandons his lands, any one who has thereupon taken possession thereof cannot be required to relinquish them.² Whether there is an abandonment or not is a question of fact to be determined from the intention of the party³ and the circumstances of each particular case.⁴ The effect of an abandonment will be to bar the owner by estoppel, or by the statute of limitations, from claiming any right or interest in the property.⁵

Brown v. Brown, 30 N. Y. 519;
Shaw v. Beebe, 35 Vt. 205.

¹ *Holmes v. Cleveland, C. & C. R. Co.*, 8 Am. L. Reg. O. S. 716.

See: *Corning v. Gould*, 16 Wend. (N. Y.) 543;

Kingsman v. Loomis, 11 Ohio 479;

Chalmonally v. Clinton, 2 Jac. & W. 59.

² *Holmes v. Cleveland, C. & C. R. Co.*, 8 Am. L. Reg. O. S. 716.

See: *Hartford Bridge v. East Hartford*, 16 Conn. 149;

Goon v. Anthony, 11 Ill. 588;

Wright v. Freeman, 5 John. (N. Y.) 467;

Kirk v. King, 3 Pa. St. 436;

Taylor v. Hampton, 4 McC. (S. C.) L. 96, 102;

Pickett v. Dowdell, 2 Wash. 115.

³ *Myers v. Spooner*, 55 Cal. 257;

Marquart v. Bradford, 43 Cal. 526;

Smith v. Cushing, 41 Cal. 97;

Moon v. Rolling, 36 Cal. 333;

Bell v. Red Rock, etc., Co., 36 Cal. 214;

Roberts v. Unger, 30 Cal. 676;

Davis v. Perley, 30 Cal. 630;

Hazelbaker v. Goodfellow, 64 Ill. 238;

Wilson v. Pearson, 20 Ill. 81;

McGoon v. Ankeny, 11 Ill. 558;

Dyer v. Sanford, 50 Mass. (9 Met.) 395;

Landis v. Perkins, 14 Mo. 238;

Weill v. Lucerne M. Co., 11 Nev. 200;

Wiggins v. McCleary, 49 N. Y. 346;

Bell v. Smith, 2 John. (N. Y.) 98;

Banks v. Banks, 77 N. C. 186;

Sample v. Robb, 16 Pa. St. 305;

Heath v. Biddle, 9 Pa. St. 273;

Atchinson v. McCulloch, 5 Watts (Pa.) 13;

Miller v. Cresson, 5 Watts & S. (Pa.) 284;

Clemmins v. Gotshall, 4 Yeates (Pa.) 330;

Taylor v. Hampton, 4 McC. (S. C.) L. 96;

Parkins v. Dunham, 3 Strob. (S. C.) L. 224;

Masson v. Anderson, 59 Tenn. 290.

⁴ *Holmes v. Cleveland, C. & C. R. Co.*, 8 Am. L. Reg. O. S. 716;

Ward v. Ward, 14 Eng. L. & Eq. 414.

⁵ *Sumner v. Stevens*, 47 Mass. (6 Met.) 237;

Tolman v. Sparhawk, 46 Mass. (5 Met.) 476;

Barker v. Salmon, 43 Mass. (2 Met.) 32;

Jackson v. Bowen, 1 Cai. (N. Y.) 358;

Adams v. Rockwell, 16 Wend. (N. Y.) 307;

Allen v. Parish, 3 Ohio 107;

Gregg v. Blackmore, 10 Watts (Pa.) 192.

SECTION III.—BY PUBLIC GRANT.

- SEC. 2277. Introductory.
 SEC. 2278. Methods in which acquired.
 SEC. 2279. Same—By pre-emption.
 SEC. 2280. Same—By homestead entry.
 SEC. 2281. Same—By timber culture entry.
 SEC. 2282. Same—By desert land entry.
 SEC. 2283. Same—By entry under bounty or military land warrants.
 SEC. 2284. Same—By purchase at public auction or private sale.

SECTION 2277. **Introductory.**—Title to lands may also be acquired by public grant, either from the various states or from the federal government. In fact this is the only method of creating title in an individual of lands belonging to the government.¹ The title in such cases is evidenced by an instrument in writing termed a patent. A patent, when regularly and properly issued, invests the party in whose favor it is issued, called the patentee, with a perfect title.² The issuance of the

¹ See: *James v. Crawford*, 2 Bibb (Ky.) 412;

Coe v. Bradley, 49 Me. 388;

Lansing v. Smith, 4 Wend. (N. Y.) 9; s.c. 21 Am. Dec. 89;

Perkins v. Blood, 36 Vt. 273;

Rice v. Minnesota & N. W. R. Co., 66 U. S. (1 Black.) 358; bk. 17 L. ed. 147;

Godfrey v. Beardsley, 2 McL. C. C. 412; s.c. Fed. Cas. No. 5497.

Legislative grants are not warranties, and if the thing granted was not in the grantor at the time of the grant, no estate passes to the grantee.

Rice v. Minnesota & N. W. R. Co., 66 U. S. (1 Black.) 358; bk. 17 L. ed. 147.

² *Goodlet v. Smithson*, 5 Port. (Ala.) 245; s.c. 30 Am. Dec. 561;

Doe v. McKilvain, 14 Ga. 252;

Roads v. Symmes, 1 Ohio 281; s.c. 13 Am. Dec. 621;

Baldwin v. Stark, 107 U. S. 465; bk. 27 L. ed. 527;

Gibson v. Chouteau, 80 U. S. (13 Wall.) 92; bk. 20 L. ed. 534;

Grignon v. Astor, 43 U. S. (2 How.) 319; bk. 11 L. ed. 283;

Boardman v. Reed, 31 U. S. (6 Pet.) 328; bk. 8 L. ed. 415;

Hoofnagle v. Anderson, 20 U. S. (7 Wheat.) 212; bk. 5 L. ed. 437;

Green v. Siter, 12 U. S. (8 Cr.) 229; bk. 3 L. ed. 545;

Astrom v. Hammond, 3 McL. C. C. 107; s.c. 1 Fed. Cas. No. 596.

Conclusiveness of patent.—The patent, when regularly issued, is conclusive as to title.

See: *Smelting Co. v. Kemp*, 104 U. S. 645; bk. 26 L. ed. 878;

Spencer v. Lapsley, 61 U. S. (20 How.) 272; bk. 15 L. ed. 906;

Brush v. Ware, 40 U. S. (15 Pet.) 106; bk. 10 L. ed. 677;

Galloway v. Finley, 37 U. S. (12 Pet.) 298; bk. 9 L. ed. 1093;

United States v. Arredondo, 31 U. S. (6 Pet.) 732; bk. 8 L. ed. 563;

Lindsey v. Miller, 31 U. S. (6 Pet.) 677; bk. 8 L. ed. 542;

Stringer v. Young, 28 U. S. (3 Pet.) 341; bk. 7 L. ed. 700;

Hoofnagle v. Anderson, 20 U. S. (7 Wheat.) 212; bk. 5 L. ed. 437;

Chamberlain v. Marshall, 8 Fed. Rep. 409;

St. Louis Smelting & Refining Co. v. Green, 4 McL. C. C. 235;

s.c. 13 Fed. Rep. 210.

patent vests the title in the patentee,¹ except in those cases where the patent is absolutely void on its face, or the issuing thereof was without authority of law or prohibited by statute.² While the complete legal title does not vest until the issuing of the patent,³ yet prior to that time the interest of one who has paid the purchase-price and received his certificate of final payment is such that it may be levied upon and sold under execution.⁴

SEC. 2278. Methods in which acquired.—The principal methods in which private property in public lands can be acquired are as follows: (1) by pre-emption, (2) by homestead entry, (3) by timber culture entry, (4) by desert land entry, (5) by entry under bounty or military land warrants, and (6) by purchase at public auction or private sale.

¹ *Roads v. Symmes*, 1 Ohio 281; s.c. 13 Am. Dec. 621.

Title does not vest until patent has been regularly and legally issued.

See: *Dresbock v. McArthur*, 7 Ohio 152.

Roads v. Symmes, 1 Ohio 281; s.c. 13 Am. Dec. 621.

² *Rice v. Minnesota & N. Y. R. Co.*, 66 U. S. (1 Black.) 358; bk. 17 L. ed. 147.

³ *Roads v. Symmes*, 1 Ohio 281; s.c. 13 Am. Dec. 621.

⁴ *Goodlet v. Smithson*, 5 Port. (Ala.) 245; s.c. 30 Am. Dec. 561;

Roads v. Symmes, 1 Ohio 281; s.c. 13 Am. Dec. 621.

After-acquired title subject to execution. The general rule is that a judgment-lien binds subsequently acquired realty, even though aliened to a *bona-fide* purchaser before the issue or levy of an execution.

See: *Trustees v. Watson*, 13 Ark. 74;

Ralston v. Field, 32 Ga. 453;

Ridge v. Prathes, 1 Blackf. (Ind.) 401;

Ridgely's Exrs. v. Gartrell, 3 Har. & McH. (Md.) 449;

Steele v. Taylor, 1 Minn. 274;

Chafon v. Cassidy, 3 Humph. (Tenn.) 661;

Davis v. Benton, 2 Sneed (Tenn.) 665;

Handly v. Sydenstricker, 4 W. Va. 605.

Right of entry secured by payment of money and survey before patent issues. The Alabama Supreme Court say, in *Goodlet v. Smithson*, 5 Port. (Ala.) 245; s.c. 30 Am. Dec. 561, that "in Pennsylvania it has been repeatedly held, that the payment of the purchase-money and survey, though unaccompanied by patent, gives a legal right of entry."

Sims v. Irvine, 30 U. S. (3 Dall.) 457; bk. 1 L. ed. 665;

Penn v. Klync, 14 Dall. C. C. 403; s.c. 1 Wash. C. C. 207; 1 Fed. Cas. No. 10935;

Copely v. Riddle, 2 Wash. C. C. 354; 6 Fed. Cas. No. 3214.

In *Kentucky*, in the case of *Thomas v. Marshall*, 1 Hardin 19, it was held that an entry or survey of lands was an inchoate legal title, which would descend and might be aliened, and vested such a legal right as might be sold under execution.

SEC. 2279. **Same—By pre-emption.**—Strictly speaking, pre-emption is the right to purchase at a fixed price in a limited time in preference to others;¹ but as it is used in this connection it means the securing of an exclusive right to purchase a particular quantity of the public lands by complying with the requirements of the laws of Congress upon the subject.² By these laws any citizen of the United States, who comes within the statute, may exercise this right of pre-emption once;³ that is, may settle in person upon public lands subject to pre-emption, not exceeding the statutory limit, one hundred and sixty acres, improve the same, erect a house thereon, and dwell therein. By doing this he has the privilege of buying the land from the government at one dollar and twenty-five cents an acre in preference to any one else.⁴ And accrued rights of pre-emption cannot be defeated.⁵ All lands belonging to the United States, to which the Indian title has been or may hereafter be extinguished, are subject to the right of pre-emption, by complying with the requirements of law.⁶ But unless otherwise provided by law the following lands shall not be subject to the rights of pre-emption, to wit: (1) lands included in any reservation by any treaty, law, or proclamation of the president, for any purpose; (2) lands included within the limits of any incorporated town, or selected as the site of a city or town; (3) lands actually settled and occupied for purposes of trade or business, and not for agriculture; and (4) lands on which are situated any known salines or

¹ *Davenport v. Farrar*, 2 Ill. (1 Scam.) 317;

Bowers v. Keesecker, 14 Iowa 307.

² *Craig v. Tappan*, 2 Sandf. Ch. (N. Y.) 78;

Dillingham v. Fisher, 5 Wis. 480;

Quinby v. Conlan, 104 U. S. 420; bk. 26 L. ed. 800;

Hosmer v. Wallace, 97 U. S. 575; bk. 24 L. ed. 1130;

Lytle v. Arkansas, 50 U. S. (9 How.) 314, 328; bk. 13 L. ed. 153.

³ U. S. Rev. Stats. (2d ed.), § 2261.

⁴ U. S. Rev. Stats. (2d ed.), §§

2257–2288.

See: *Dillingham v. Fisher*, 5 Wis. 475;

Bohall v. Dilla, 114 U. S. 47; bk. 29 L. ed. 61;

United States v. Fitzgerald, 40 U. S. (15 Pet.) 407; bk. 10 L. ed. 785.

See also authorities last footnote.

⁵ *United States v. Fitzgerald*, 40 U. S. (15 Pet.) 407; bk. 10 L. ed. 785;

Johnson v. United States, 2 Ct. of Cl. 411.

⁶ U. S. Rev. Stats. (2d ed.), § 2257.

See: *Stapley v. Cowan*, 91 U. S. 330; bk. 23 L. ed. 424.

mines.¹ A pre-emption may be made by any person the head of a family, or widower, or single person, over the age of twenty-one years, and a citizen of the United States, or a person having filed a declaration of intention to become such, as required by the naturalization laws, who has made or hereafter makes a settlement in person on the public lands, subject to pre-emption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter with the register of the land office of the district in which such land lies, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter-section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land.² Unless it is otherwise provided by law, a right of pre-emption shall not be acquired by any person who is the proprietor of three hundred acres of land in any state or territory, or by any person who quits or abandons his residence on his own land to reside on the public lands in the same state or territory.³ Six months' actual and continuous residence on the land is necessary in order to constitute a settlement thereon within the meaning of the statute,⁴ and there must be actual settlement, habitation, and improvement by the party claiming the land under the right of pre-emption;⁵ but such evidence must not originate in an intrusion upon the possession of one

¹ U. S. Rev. Stats. (2d ed.), § 2258.

See: *Russell v. Beebe*, 1 Hempst. C. C. 704; s.c. Fed. Cas. No. 12153;

United States v. Railroad Bridge Co., 6 McL. C. C. 517; s.c. 3 Liv. L. Mag. 568; 10 Law Rep. N. S. 630; Fed. Cas. No. 16114; *Turner v. American Baptist Union*, 5 McL. C. C. 344; s.c. Fed. Cas. No. 14251.

² U. S. Rev. Stats. (2d ed.), § 2259. See: *Witherspoon v. Duncan*, 71 U. S. (4 Wall.) 218; bk. 18 L. ed. 339;

Harkness v. Underhill, 66 U. S. (1 Black.) 325; bk. 17 L. ed. ; *Garland v. Wynn*, 61 U. S. (20 How.) 6; bk. 15 L. ed. 801; *Barnard's Heirs v. Ashley's Heirs*, 59 U. S. (18 How.) 44; bk. 15

L. ed. 285.

³ U. S. Rev. Stats. (2d ed.), § 2260.

⁴ *Dillingham v. Fisher*, 5 Wis. 475; *Bohall v. Dilla*, 114 U. S. 417; bk. 29 L. ed. 61.

Right of pre-emption is not prejudicially a refusal to receive proof of settlement on the part of the officers under a mistaken sense of their duty.

Shepley v. Cowan, 91 U. S. 330; bk. 23 L. ed. 424; *Cunningham v. Ashley*, 55 U. S. (14 How.) 377; bk. 14 L. ed. 462;

Lytle v. Arkansas, 50 U. S. (9 How.) 314; bk. 13 L. ed. 153.

⁵ *Hambleton v. Duhain*, 71 Cal. 136; *Davis v. Scott*, 56 Cal. 165; *Hosmer v. Wallace*, 97 U. S. 575; bk. 24 L. ed. 1130.

who has already settled upon and improved the land as required by statute ; because such an intrusion is simply a naked trespass, which is unlawful, and cannot initiate a right of pre-emption.¹ By settling upon public lands, with a declared intention of obtaining title to the same under the pre-emption laws, a person does not acquire a vested interest in such premises, but simply a privilege that in case the lands are ever put up for sale, he may purchase at the price asked in preference to any other person ;² but there is no contract on the part of the government that the lands shall be offered for sale.³

SEC. 2280. **Same — By homestead entry.** — Another method of acquiring private property in public lands is by homestead entry. This is in every sense similar to the method discussed in the preceding section, the lands open to entry and the persons entitled to make entry being essentially the same in both instances. Any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, is entitled to enter one quarter of a section or less of any unappropriated public lands upon which such person may file a pre-emption claim, or which may, at the time the application is made, be subject to pre-emption at one dollar and twenty-five cents per acre ; or eighty acres or less of such unappropriated lands, subject to pre-emption at two dollars and fifty cents an acre ; in both instances

¹ See : *Weeks v. White*, 41 Kan.

569, 572 ; s.c. 21 Pac. Rep. 600 ;

Mower v. Fletcher, 116 U. S. 380 ;

bk. 29 L. ed. 593 ;

Quimby v. Conlan, 104 U. S. 420 ;

bk. 26 L. ed. 800 ;

Tremouth v. City and County of

San Francisco, 100 U. S. 251 ;

bk. 25 L. ed. 626 ;

Wirth v. Branson, 98 U. S. 118 ;

bk. 25 L. ed. 86 ;

Hosmer v. Wallace, 97 U. S. 575 ;

bk. 24 L. ed. 1030 ;

Atherton v. Fowler, 96 U. S. 513 ;

bk. 24 L. ed. 732 ;

Cowell v. Lammers, 10 Sawy. C.

C. 252 ; s.c. 21 Fed. Rep. 203.

² *Rector v. Gibbon*, 111 U. S. 276 ;

bk. 28 L. ed. 437 ;

Shepley v. Cowan, 91 U. S. 330 ;

bk. 23 L. ed. 424 ;

Hutchings v. Lowe, 82 U. S. (15

Wall.) 77 ; bk. 21 L. ed. 82 ;

Frisbie v. Whitney, 76 U. S. (9

Wall.) 187 ; bk. 19 L. ed. 668.

³ *Lamb v. Davenport*, 85 U. S. (18

Wall.) 307, 313 ; bk. 21 L. ed.

759 ;

Hutchings v. Lowe, 82 U. S. (15

Wall.) 77 ; bk. 21 L. ed. 82 ;

Lytle v. Arkansas, 50 U. S. (9

How.) 314 ; bk. 13 L. ed. 153.

to be located in a body, and in conformity with the legal subdivisions of the public lands, and after the same have been surveyed.¹ A person who is otherwise qualified to exercise the right of a homestead entry, who is in possession of land as a tenant in common and holds for himself and his co-tenants, cannot exercise the right of homestead in the lands so held.² Lands acquired by homestead entry under this act are held free from all debts contracted prior to the issuing of the patent therefor.³

SEC. 2281. **Same—By timber culture entry.**—Congress passed a statute in 1878,⁴ by which it was provided that any person entitled to pre-empt land or file upon a homestead claim, who should plant, protect, and keep in a healthy growing condition for eight years ten acres of timber on any quarter-section of any of the public lands, should be entitled to a patent for the whole of said quarter-section.⁵ One entry of a timber claim exhausts the party's right under the statute, so that only one quarter-section of land can be acquired by this means under the act ; and the land can only be acquired under the act for the personal use and benefit of the person making the entry.⁶

SEC. 2282. **Same—By desert land entry.**—Congress has passed an act⁷ which provides that any person who is entitled to pre-empt land or file upon a homestead claim is entitled to reclaim desert land by putting water thereon

¹ U. S. Rev. Stats. (2d ed.), § 2289.

² *Reinhardt v. Bradshaw*, 19 Nev. 255 ; s.c. 9 Pac. Rep. 245 ;

Nickals v. Wein, 17 Nev. 188 ; s.c. 30 Pac. Rep. 435 ;

Atherton v. Fowler, 96 U. S. 513 ; bk. 24 L. ed. 732.

³ U. S. Rev. Stats. (2d ed.), § 2296.

See : *Sharman v. Eakin*, 47 Ark. 351 ;

Sorrels v. Self, 43 Ark. 451, 453 ;

Miller v. Little, 47 Cal. 348 ;

Nycom v. McAllister, 33 Iowa 374 ;

Russell v. Lowth, 21 Minn. 167 ;

Baldwin v. Boyd, 18 Neb. 444 ; s.c. 25 N. W. Rep. 580 ;

Cheney v. White, 5 Neb. 261 ; s.c. 25 Am. Rep. 487 ;

Gile v. Hallock, 33 Wis. 523 ;

Seymour v. Sanders, 3 Dill. C. C. 437 ; s.c. Fed. Cas. No. 12690 ;

Webster v. Bowman, 85 Fed. Rep. 889.

⁴ Act June 14, 1878 ; 29 Stat. at L. 113.

⁵ Supp. U. S. Rev. Stats., vol. 1, p. 348.

⁶ *United States v. Shinn*, 14 Fed. Rep. 448.

⁷ See : Supp. U. S. Rev. Stats., vol. 1, p. 289, and amendments thereto.

within three years from the filing of his declaration, said land to be so reclaimed not to exceed three hundred and twenty acres. The person making such a filing is required to pay twenty-five cents an acre at the time of making such filing,¹ and one dollar an acre when the patent issues.² Under this act no entry can be made of lands reclaimed before the entering.³

SEC. 2283. **Same—By entry under bounty or military land warrants.**—A private right to public lands may also be acquired by location thereof under military bounty warrants, in accordance with act of Congress in relation thereto.⁴ Under this act any one holding bounty warrants is entitled to enter upon the quantity of public land subject to private entry called for in said warrants, and on compliance with the requirements of the act to have a patent issued therefor. A certificate of entry under such a warrant vests in the party an equitable title to the land and gives him a right to the patent when issued ; and should he sell the lands and assign the certificate, and subsequently obtain the patent, he will become the trustee of the person rightfully entitled to the patent.⁵

¹ Act March 9, 1877 ; 19 Stat. at Large 377 ;
Supp. U. S. Rev. Stats., vol. 1, p. 289, § 1.

² Supp. U. S. Rev. Stats., vol. 1, p. 290.

The declaration must contain a description of the land applied for, by legal subdivisions if surveyed, or, if unsurveyed, as nearly as possible without a survey, by giving, with as much clearness and precision as possible, the locality of the tract with reference to known and conspicuous landmarks or the established lines of survey, so as to admit of its being thereafter readily identified when the lines of survey come to be extended. As preliminary to the filing of such declaration, it must be satisfactorily shown that the land therein described is desert land as defined in the act. To this end the tes-

timony of at least two disinterested and credible witnesses is required, whose testimony will be reduced to writing in the usual manner ; or the evidence may be furnished in the form of affidavits executed before the clerk of any court of record having a seal, the credibility of the witnesses to be certified by said clerk. The witnesses must clearly state their acquaintance with the premises, and the facts as to the condition and situation of the land upon which they base their judgment.

³ 2 Copp's Land Laws 888, 909.

⁴ See : Act of March 22, 1852, c. 19 ;
U. S. Rev. Stats. (2d ed.), § 114, *et seq.*

⁵ U. S. Rev. Stats. (2d ed.), § 2414.
See : *Key v. Jennings*, 66 Mo. 356 ;
Wirth v. Branson, 98 U. S. 118 ;
bk. 25 L. ed. 86 ;
Gray v. Jones, 14 Fed. Rep. 83.

SEC. 2284. **Same—By purchase at public auction or private sale.**—A private right in public lands may also be acquired by purchase at public auction or private sale in the regular course of entry. Under authorization of Congress, the President may expose to sale at public auction certain of the public lands, under certain specified regulations.¹ Such lands are to be sold to the highest bidder, provided the highest bid is not below one dollar and twenty-five cents an acre,² except in those cases where the land to be sold lies along a railroad, within the limits granted by act of Congress, in which case the minimum price at which it can be sold is two dollars and fifty cents an acre.³

SECTION IV.—BY PRIVATE GRANT.

SEC. 2285. **Introductory.**

SEC. 2286. **Common-law conveyances—Classes of.**

SEC. 2287. **Same—By feoffment.**

SEC. 2288. **Same—By gift.**

SEC. 2289. **Same—By grant.**

SEC. 2290. **Same—By lease, etc.**

SEC. 2291. **Under statute of uses.**

SEC. 2292. **Same—Covenant to stand seized.**

SEC. 2293. **Same—Bargain and sale.**

SEC. 2294. **Same—Same—Limiting freehold to commence *in futuro*.**

SEC. 2295. **Same—Lease and re-lease.**

SEC. 2296. **Modern conveyances—By warranty deed.**

SEC. 2297. **Same—By quit-claim deed.**

SECTION 2285. **Introductory.**—After the title to land has passed from the public and vests in an individual, it can be transferred only by private grant, unless taken by the general government for public purposes under an exercise of the power of eminent domain,⁴ or is sold by order of court for the payment of debts, and the like.⁵ Conveyances by individual grant may be said to be of three kinds or classes, to-wit: common-law conveyances, conveyances under the statute of uses, and modern conveyances.

¹ See : U. S. Rev. Stats. (2d ed.), §§ 2353–2360. ³ U. S. Rev. Stats. (2d ed.), § 2357.

⁴ See : *Post*, § 2299.

² U. S. Rev. Stats. (2d ed.), § 2357.

⁵ See : *Post*, § 2302, *et seq.*

SEC. 2286. **Common-law conveyances—Classes of.**—A conveyance of lands by a private individual is the transfer of the legal title thereto, by means of an appropriate instrument in writing to another.¹ Using the term in this sense, a conveyance at common law is one which directly and by force of the conveyance itself transfers the legal title from one man to another. Used in this broad sense, the term includes statutory conveyances as well as those purely common law. Common-law conveyances were divided into two main classes or kinds, called (1) original or primary, and included those by means whereof the benefit or an estate is created or first arises ; and (2) derivative or secondary, which included all whereby the benefit or estate originally created is enlarged, restrained, transferred, or extinguished. Original or primary conveyances include feoffments, gifts, grants, leases, exchanges, and partitions ; the derivative or secondary conveyances include re-releases, confirmations, surrenders, assignments, and defeasances—each of which presupposes some precedent conveyance.²

SEC. 2287. **Same—By feoffment.**—The chief method at common law of transferring estates in freehold or incorporeal hereditaments was by feoffment. It was not only one of the chief but was one of the earliest modes of conveyance known in the common law, and signified originally the grant of a fee or feud ; but later it came to signify the grant of a free inheritance in fee, respect being had rather to the perpetuity of the estate granted than to the feudal tenure by which held.³ This method of conveyance was accompanied by livery of seisin, and has become infrequent if not obsolete in England, and never was practiced in this country, where land is conveyed only by deed or will.⁴

¹ *Abendroth v. Greenwich*, 29 Conn. 365 ;

Klein v. McNamara, 54 Miss. 105 ;

Brown v. Fitz, 13 N. H. 285 ;

Edelmen v. Yeakel, 27 Pa. St. 29 ;

2 Bl. Com. 309.

² *Anderson's L. Dict.* 254 ;

2 Bl. Com. 309, 324.

³ *Reeves' Hist. Eng. L.* (2d ed.) 90.

⁴ See : *Anderson's L. Dict.* 455 ;

2 Bl. Com. 20 ;

1 Co. Litt. (19th ed.) 9a ;

Deane Abr., c. 104 ;

4 Kent Com. (13th ed.) 467 ;

Shep. Touch., c. 9 ;

1 *Sullivan's Lect.* 143 ;

12 *Viner's Abr.* 167.

SEC. 2288. **Same—By gift.**—At common law a donation or gift was the name applied to the grant of an estate in tail, and differed from an estate conveyed by feoffment only in the character of the estate created or granted.¹ By gift is now understood a voluntary conveyance ; that is, a conveyance not founded on money or blood ; hence a feoffment or grant may be a gift where gratuitous.² A gift of land, as now known and understood, is complete when the legal title has actually vested in the donee ; and where the gift is from a husband to a wife, or from a parent to a child living at home, it is not requisite that there should be an actual change of possession.³

SEC. 2289. **Same—By grant.**—At common law, when an estate or interest could not be conveyed by enfeoffment and livery of seisin, it was conveyed by grant, which was the method of transferring the title to a property in incorporeal hereditaments, or such things whereof no livery could be had.⁴ The term grant has a much more comprehensive signification now, and includes a “ demise ” or “ lease ” also.⁵ At common law an incorporeal hereditament was said to lie in grant, and a corporeal hereditament to lie in livery.⁶ Conveyance by deed at common law could only be made by deed, and the same is true under the modern theory of conveyances. The form of conveyance by feoffment and by grant is substantially the same, the operative words in each being, “ have given and granted.” But there was an essential difference in the effect of a conveyance by feoffment and a conveyance by grant ; the former might work a disseisin of the reversioner, while the

¹ 2 Bl. Com. 316, 317.

² Watk. Conv. 199.

³ See : Crawford's Appeal, 61 Pa. St. 52 ; s.c. 100 Am. Dec. 609.

⁴ Dudley v. Sumner, 5 Mass. 438, 471 ;

Darby v. Callaghan, 16 N. Y. 71, 75 ;

2 Bl. Com. 317.

See : Rice v. Minnesota & N. W.

R. Co., 66 U. S. (1 Black.) 358 ; bk. 17 L. ed. 147.

⁵ Darby v. Callaghan, 16 N. Y. 71, 75.

See : Rice v. Minnesota & N. W. R. Co., 66 U. S. (1 Black.) 358 ; bk. 17 L. ed. 147.

⁶ Drake v. Wells, 93 Mass. (11 Allen) 143 ;

Huff v. McCauley, 53 Pa. St. 206 ; 2 Bl. Com. 317

latter conveyed only such estate and rights as the grantor had.¹

SEC. 2290. **Same—By lease.**—At common law the conveyance of a particular estate, for life, for years, or at will, was by lease. The distinguishing characteristic of such a conveyance is that the estate conveyed is always for a less time than the lessor has in the premises,² for if the conveyance is for the full term of the grantor the transaction becomes an assignment and not a leasing.³ A lease conveys an estate less than a freehold, and consists of a contract for the possession and profits of lands and tenements for a certain period in return for a certain compensation, usually known as rent.⁴ The estate thus granted passes without livery of seisin, it being perfected by the mere entering of the lessee.

SEC. 2291. **Under statute of uses.**—Under the statute of uses, in order that a deed of bargain and sale or a covenant to stand seized might operate, a consideration was required. This consideration must be either a valuable or a good consideration, or something equivalent thereto.⁵ From what has already been said in relation

¹ 2 Co. Litt. (19th ed.) 271a ;

4 Kent Com. (13th ed.) 353.

² 2 Bl. Com. 317.

³ Id.

⁴ Branch v. Doan, 17 Conn. 411 ;
Jackson ex d. Webber v. Harsen,
7 Cow. (N. Y.) 323, 326 ; s.c. 17
Am. Dec. 517 ;
Gray v. La Fayette Co., 65 Wis.
570 ; s.c. 27 N. W. Rep. 311 ;
Thomas v. West Jersey R. Co.,
101 U. S. 71, 78 ; bk. 25 L. ed.
950, 951 ;
United States v. Gratiot, 39 U. S.
(14 Pet.) 526, 538 ; bk. 10 L. ed.
573, 578.

⁵ See : Green v. Thomas, 11 Me. 321 ;
Wallis v. Wallis, 4 Mass. 135 ;
s.c. 3 Am. Dec. 210 ;
Rollins v. Riley, 44 N. H. 11 ;
Den v. Hanks, 5 Ired. (N. C.) L.
30.

This is on the general principle
that a court of equity will not

interfere to enforce a mere voluntary agreement or contract. There must be at least a good consideration.

See : Banks v. May, 3 A. K. Marsh. (Ky.) 436 ;
Onondaga County Milk Assoc. v. Wall, 17 Hun (N. Y.) 496 ;
McCotter v. Lawrence, 4 Hun (N. Y.) 107 ;
Minturn v. Seymour, 4 John. Ch. (N. Y.) 497 ;
Archer v. Phoenix, 4 Paige Ch. (N. Y.) 305 ;
Fraser v. McPherson, 3 Desau. (S. C.) Eq. 398 ;
Tufts v. Tufts, 3 Woodb. & M. C. C. 456, 509 ; s.c. Fed. Cas. No. 14233 ;
Colyear v. Mulgrave, 3 Keen 88.
The general rule of the common law is that a consideration is essential to the validity of every deed.

to uses¹ and trusts,² it is known that since the passage of the statute of uses,³ a conveyance of land can be made by a simple declaration of uses, thus dispensing with all the primary common-law methods required for the changing of the possession of real property. This simple declaration vested the use or equitable estate in the grantee, where made upon sufficient consideration, and under the statute became executed into a legal estate, and the seisin was transferred to him without feoffment or livery of seisin.

SEC. 2292. **Same—Covenant to stand seized.**—A covenant to stand seized to uses under the statute of uses was a covenant whereby a man, seized of lands, covenanted to stand seized of the same to the use of his child or his wife, or a kinsman in fee, for life, or in tail. This conveyance was founded upon the good consideration of natural love and affection—blood and marriage.⁴ This doctrine is founded upon the peculiar domestic character of this species of conveyance.⁵ It is a peculiar species of conveyance, confined entirely to family connections, and founded on the tender considerations of blood and marriage. No use can be raised for any purpose, in favor of a person not within the influence of that consideration. There is no cold, selfish, calculating motive to contaminate the contract, nor is the conveyance to be

See : *Hunt v. Johnson*, 44 N. Y. 27 ; s.c. 4 Am. Rep. 633 ;

Verplank v. Sterry, 12 John. (N. Y.) 557 ; s.c. 7 Am. Dec. 348 ;

Minturn v. Seymour, 4 John. Ch. (N. Y.) 497.

¹ See : *Ante*, bk. III., c. XXV.

² See : *Ante*, bk. III., c. XXVI.

³ Stat. 27 Hen. VIII., c. 10.

We have already seen (see : *Ante*, § 1642) that this statute has either been adopted as a part of the common law or substantially re-enacted in the different states of the Union.

See : *Bryan v. Bradley*, 16 Conn. 474 ;

Bowman v. Long, 26 Ga. 142 ;

McNab v. Young, 81 Ill. 11 ;

Booker v. Carlisle, 14 Bush (Ky.) 154 ;

Guest v. Farley, 12 Mo. 147 ;

Sherman v. Dodge, 28 Vt. 26, 31 ;

Gorham v. Daniels, 23 Vt. 600 ;

4 Kent Com. (13th ed.) 299.

⁴ *Emery v. Chase*, 5 Me. 232 ;

Rollins v. Riley, 44 N. H. 9 ;

Bell v. Scammon, 65 N. H. 381 ; s.c. 41 Am. Dec. 706 ;

2 Bl. Com. 338 ;

2 Rol. Abr. 784, pl. 244 ;

2 Saund. Uses 82 ;

⁵ *Trafton v. Howes*, 102 Mass. 533, 537 ; s.c. 3 Am. Rep. 494 ;

4 Kent Com. (13th ed.) 493.

performed by the footstep of a stranger.¹ In this form of conveyance it is usual for the covenant to be made with the person who is to receive the benefit of the use, though such is not absolutely necessary.² This mode of conveyance long since fell into desuetude, but the doctrine thereof is frequently resorted to by the courts in order to give effect to the intentions of the parties to a transfer of lands, in those cases where the deed is insufficient under the rules and forms of conveyance.³ Thus where a deed cannot take effect as a bargain and sale because the estate is limited to commence *in futuro*, or for want of a pecuniary consideration, in order to carry out the intentions of the parties, the court will hold the deed a covenant to stand seized, where there is a consideration of natural love and affection existing either upon blood or marriage.⁴ A recent Massachusetts decision, however, declares that the English rule requiring a consideration of blood or marriage as absolutely essential to the validity of a covenant to stand seized is "artificial and constructive, depending entirely upon the English

¹ Jackson ex d. Houseman v. Sebring, 16 John. (N. Y.) 515; s.c. 8 Am. Dec. 357.

See: Barrett v. French, 1 Conn. 354; s.c. 6 Am. Dec. 241;

Brewer v. Hardy, 39 Mass. (22 Pick.) 376;

Leavett v. Leavett, 47 N. H. 329;

Hayes v. Kershaw, 1 Sandf. Ch. (N. Y.) 258;

Bedill's Case, 7 Co. 40;

1 Co. Litt. (19th ed.) 112a.

² See: Horton v. Sledge, 29 Ala. 478;

Hall v. Bliss, 118 Mass. 554, 560; s.c. 19 Am. Rep. 476;

Trafton v. Homes, 102 Mass. 533, 541; s.c. 3 Am. Rep. 494;

Russell v. Coffin, 25 Mass. (8 Pick.) 143, 151;

Pray v. Pierce, 7 Mass. 381; s.c. 5 Am. Dec. 50;

Exum v. Canty, 34 Miss. 569;

Wall v. Wall, 30 Miss. 92; s.c. 64 Am. Dec. 147;

Rogers v. Eagle Fire Inc. Co., 9 Wend. (N. Y.) 611.

Chief Justice BIGELOW says, in

the case of *Chenery v. Stevens*, 97 Mass. 77, 86, that "a conveyance of land may always be construed to be that kind or species of conveyance which may be necessary to vest the title according to the intention of the parties, if such interpretation is not repugnant to the terms of the grant."

Citing: *Marshall v. Fisk*, 6 Mass. 24, 32; s.c. 4 Am. Dec. 76.

⁴ *Ganet v. Hall*, 26 Me. 561;

Emery v. Chase, 5 Me. 232;

Brewer v. Hardy, 39 Mass. (22 Pick.) 376; s.c. 33 Am. Dec. 747;

Wallis v. Wallis, 4 Mass. 135; s.c. 3 Am. Dec. 210;

Jackson ex d. Wood v. Smart, 20 John. (N. Y.) 84;

Jackson v. Sebring, 16 John. (N. Y.) 515; s.c. 8 Am. Dec. 357;

Bank v. Houseman, 6 Paige Ch. (N. Y.) 526;

Bell v. Scammon, 15 N. H. 381; s.c. 41 Am. Dec. 706;

Eckman v. Eckman, 68 Pa. St. 460.

statute of enrollment,¹ and has no pretext for continued existence where the provisions of that statute do not apply." The court say in that case that the covenant in a deed to stand seized might be maintained as a covenant to stand seized, even in the absence of the relation of blood or marriage between the grantee and the grantor.² Judge WELLS, who wrote the opinion of the court, says: "In this country there is much confusion and uncertainty in the law upon this subject, whether sought in the announcements of judicial opinion or in the discussion of text writers. The doctrine that a bargain and sale, as well as common-law conveyance, is valid to create a future interest in lands of the grantor, has been recognized and repeatedly declared to be the law in Massachusetts.³ Also in Maine.⁴ In several of the cases⁵ the court may be said to have impliedly recognized the doctrine that a covenant to stand seized requires a consideration of blood or marriage, by looking to the existence of such a fact in the case for the support of the deed, notwithstanding the recital of a pecuniary consideration in the deed itself. But we are not aware that the court has ever declared such a consideration to be necessary. In *Park v. Nichols*,⁶ Mr. Justice PUTNAM, after pointing out the existence of the relation, remarked: 'So that, if it were necessary in this state, as it seems to be in England, to prove a consideration of blood or marriage to support a covenant to stand seized to uses, it might be presumed.'"⁷

¹ Stat. 27 Henry VIII., c. 16.

² *Trafton v. Homes*, 102 Mass. 533; s.c. 3 Am. Rep. 494; and this case is affirmed in *Hall v. Bliss*, 118 Mass. 554; s.c. 19 Am. Rep. 476.

³ The court cites the following cases:

Brewer v. Hardy, 39 Mass. (22 Pick.) 376; s.c. 33 Am. Dec. 747;

Gale v. Coburn, 35 Mass. (18 Pick.) 397;

Parker v. Nichols, 24 Mass. (7 Pick.) 111;

Welsh v. Foster, 12 Mass. 93;

Pray v. Pierce, 7 Mass. 381; s.c. 5 Am. Dec. 59;

Wallis v. Wallis, 4 Mass. 135; s.c. 3 Am. Dec. 210.

⁴ See: *Marden v. Chase*, 32 Me. 329;

Emery v. Chase, 5 Me. (5 Greenl.) 232.

⁵ Also in *Miller v. Goodwin*, 74 Mass. (8 Gray) 542.

⁶ 24 Mass. (7 Pick.) 111.

⁷ This sentence is also quoted by Chief Justice SHAW in the case of *Gale v. Coburn*, 35 Mass. (18 Pick.) 397, 402.

SEC. 2293. **Same—Bargain and sale.**—By bargain and sale was understood a contract whereby the bargainor, for a stated pecuniary consideration¹ or other valid consideration² expressed in the deed,³ contracted to convey designated lands to the bargainee, to whom the seisin was transferred by force of the statute of uses, thereby obviating the necessity of livery of seisin.⁴ But the statute of enrollment, heretofore referred to,⁵ provided that such conveyances must be by deed, which must be enrolled within six months from the time of its execution in order to pass the freehold.⁶ This statute was never in force in the United States.⁷

SEC. 2294. **Same—Same—Limiting freehold to commence in futuro.**—Whether a freehold estate can be limited to commence *in futuro* by a deed of bargain and sale is one upon which there is a diversity of decision, some well-considered cases by able courts holding it to be invalid,⁸

¹ Wood v. Chapin, 13 N. Y. 509 ;

Corwin v. Corwin, 6 N. Y. 342 ;
s.c. 57 Am. Dec. 457 ;

Jackson ex d. Saunders v. Caldwell, 1 Cow. (N. Y.) 622, 639.

A pecuniary consideration, however small, is sufficient.

Bell v. Scammon, 15 N. H. 381 ;
s.c. 41 Am. Dec. 706.

Judge DENIO says, in Wood v. Chapin, 1 Cow. (N. Y.) 622, 639, that "it is perfectly well settled in this state that, to constitute a good conveyance by way of bargain and sale, there must be a valuable consideration expressed in the deed or proved independently of it. If one is expressed, no proof of its actual payment need be given, and it cannot be controverted by evidence, and it is sufficient though the amount be merely nominal." The judge cites the following cases :

Jackson ex d. Saunders v. Caldwell, 1 Cow. (N. Y.) 622 ;

Jackson ex d. Houseman v. Sebring, 16 John. (N. Y.) 515 ;
s.c. 8 Am. Dec. 357 ;

Jackson ex d. Allen v. Florence, 16 John. (N. Y.) 47 ;

Jackson ex d. Salisbury v. Fish,

10 John. (N. Y.) 456 ;

Jackson ex d. Hudson v. Alexander, 3 John. (N. Y.) 484 ; s.c. 3 Am. Dec. 517.

A consideration is unnecessary in Illinois (Fetrow v. Merriwether, 53 Ill. 278), in Missouri (Perry v. Price, 1 Mo. 553), and in Tennessee (Jackson v. Dillon, 2 Overt. (Tenn.) 261).

² Burey v. Reese, 38 Md. 264 ;

Jackson ex d. Hopkins v. Leek, 19 Wend. (N. Y.) 339 ;

Den v. Hanks, 5 Ired. (N. C.) L. 30 ;

Wood v. Beach, 7 Vt. 522.

³ Wood v. Chapin, 13 N. Y. 509.

⁴ Chenery v. Stevens, 97 Mass. 77.

⁵ Stat. 27 Hen. VIII., c. 16.

⁶ See : 2 Bl. Com. 338.

⁷ Given v. Doe, 7 Blackf. (Ind.) 260 ;

Welch v. Foster, 12 Mass. 96 ;
s.c. 7 Am. Dec. 315 ;

Jackson v. Wood, 12 John. (N. Y.) 74 ;

Jackson v. Dunsbagh, 1 John. (N. Y.) 97 ;

Rogers v. Eagle Fire Ins. Co., 9 Wend. (N. Y.) 611 ;

Report of Judges, 3 Binn. (Pa.) 156.

⁸ See : Marden v. Chase, 32 Me. 329 ;

Trafton v. Homes, 102 Mass. 333 ;
s.c. 3 Am. Rep. 494 ;

but the weight of the modern cases, as well as the better opinion, is thought to be to the effect that the conveyance of a freehold for a good and valuable consideration is valid.¹ The doctrine that a deed of bargain and sale can-

- Chenery v. Stevens, 97 Mass. 77, 86 ;
 Brewer v. Hardy, 39 Mass. (22 Pick.) 376 ; s.c. 33 Am. Dec. 747 ;
 Gale v. Coburn, 35 Mass. (18 Pick.) 397 ;
 Parker v. Nichols, 24 Mass. (7 Pick.) 115 ;
 Welsh v. Faster, 12 Mass. 96 ;
 Perry v. Pierce, 7 Mass. 381.
¹ See : Barrett v. French, 1 Conn. 354 ; s.c. 6 Am. Dec. 241 ;
 Caulk v. Florida, 13 Fla. 160 ;
 Drown v. Smith, 52 Me. 141 ;
 Jordan v. Stevens, 51 Me. 78 ; s.c. 81 Am. Dec. 356 ;
 Wyman v. Brown, 50 Me. 150 ;
 Dennett v. Dennett, 40 N. H. 499, 500 ;
 Cook v. Brown, 34 N. H. 477 ;
 Bell v. Scammon, 15 N. H. 381 ; s.c. 41 Am. Dec. 706 ;
 Underwood v. Campbell, 4 N. H. 393 ;
 French v. French, 3 N. H. 234 ;
 Casey v. Buttolph, 12 Barb. (N. Y.) 638 ;
 Jackson ex d. Wood v. Swart, 20 John. (N. Y.) 85, 87 ;
 Jackson v. Staats, 11 John. (N. Y.) 337 ; s.c. 6 Am. Dec. 376 ;
 Jackson v. Dunsbagh, 1 John. Cas. (N. Y.) 91, 96 ;
 Rogers v. Eagle Fire Ins. Co., 9 Wend. (N. Y.) 611, 641 ;
 Jackson v. McKenny, 3 Wend. (N. Y.) 233 ; s.c. 20 Am. Dec. 690 ;
 Wardwell v. Barrett, 8 R. I. 305 ;
 Davis v. Speed, 12 Mod. 39.
 In the case of Wallis v. Wallis, 4 Mass. 136 ; s.c. 3 Am. Dec. 210, it is said that "by a common-law conveyance a freehold cannot be conveyed *in futuro*," but no reference is made to the fact that a deed of bargain and sale derives its effect from the statute of uses. In the case of Welsh v. Foster, 12 Mass. 93, 96, it is held, that such a deed will not pass a freehold *in futuro*, and also in Parloe v. Nichols, 24 Mass. (7 Pick) 45. In this case it is said by Mr. Justice JACKSON, that the statute of uses, 27 Henry VIII., had not been adopted in Massachusetts. But it has been adopted in New Hampshire and elsewhere.
 Bell v. Scammon, 15 N. H. 381 ; s.c. 41 Am. Dec. 706 ;
 French v. French, 3 N. H. 234 ;
 New Parish of Exter v. Odwine, 1 N. H. 237 ;
 Chamberlain v. Crane, 1 N. H. 64 ;
 Rogers v. Eagle Fire Co., 9 Wend. (N. Y.) 625, 630, 631.
 In Rogers v. Eagle Fire Co., *supra*, decided in 1832, the chancellor says : "Although there does not appear to be any express adjudication on this point, I find that most, if not all, of the elementary writers take it for granted that a freehold *in futuro* may be created by a bargain and sale operating under the statute of uses. Barnes lays it down as a general rule, that a freehold may be created to commence *in futuro* by a limitation to a use under a common-law conveyance, or under any of the conveyances which have grown out of the statute of uses. Barnes' Real Property, 246. Burton says the only essential difference between a covenant to stand seized to uses and a bargain and sale, setting aside the external formalities required to give validity to the latter, that is, the enrollment thereof, is the nature of the consideration, and hence the deed may operate for the benefit of the different parties, both as a bargain and sale and as a covenant to stand seized. Burton on Real Property, 41, pl. 145. Cornish takes it for granted that there is no difference between a bargain and sale enrolled, and a covenant to stand seized, in conveying a future

not be made to take effect *in futuro* originated in the English statute of enrollments, heretofore referred to, and for that reason is not applicable to the peculiar conditions which obtain in this country.¹

SEC. 2295. **Same—Lease and re-lease.**—Lease and re-lease is a species of conveyance for the transfer of fee-simple estates, and consists theoretically of two distinct instruments, but practically they are united in one instrument, and have the joint operation of a single conveyance. In this form of conveyance the instrument first set out that the vendor, in consideration of some nominal sum, had bargained and sold the land to the purchaser for one year, to commence from the day previous to the date of the deed; then this was followed by a re-lease of the reversion to the purchaser, by which he was put into possession of the whole estate intended to be conveyed. For this reason a conveyance by lease and re-lease was said to amount to a feoffment.² This form of conveyance was in use in England until the early part of the reign of Queen Victoria,³ but has been employed in this country rarely.⁴

SEC. 2296. **Modern conveyances—By warranty deed.**—The

freehold under the statute of uses; hence he concludes that a grant of lands generally by either of these modes of conveyance, with an *habendum* limiting a freehold to commence *in futuro*, will be valid to convey such estate, although it could not be thus limited by a common-law conveyance. Cornish, Purch. Deeds, 35. Preston, too, lays it down as a general principle that conveyances operating under the statute may create a freehold to commence *in futuro*, although no such estate could be limited in a conveyance which could only operate by the common law, and he makes no distinction between a covenant to stand seized and a bargain and sale duly enrolled, or any other conveyance by which an

estate may be granted under the statute of uses. Chancellor Kent also says in express terms that a person may covenant to stand seized or bargain and sell, to the use of another at a future day. 4 Kent Com. 298."

¹ Jackson v. Dunsbagh, 1 John. Cas. (N. Y.) 91.

See: Jackson ex d. Wood v. Swart, 20 John. (N. Y.) 85;

Rogers v. Eagle Fire Ins. Co., 9 Wend. (N. Y.) 611;

Jackson v. McKenny, 5 Wend. N. Y. 233; s.c. 20 Am. Dec. 690.

² 2 Bl. Com. 339;

2 Co. Litt. (19th ed.) 270a.

³ Until the passage of the statute of 8 & 9 Vict. 106.

⁴ See: Lewis v. Beall, 4 Har. & McH. (Md.) 488; Craig v. Pinson, 1 Chev. (S. C.) L. 272.

deeds of general warranty at present in general use in the United States were derived from the ancient assurances, and those affecting leasehold estates are almost identical. While the forms of warranty deed in use in all the states have been borrowed from the common-law conveyances, they have all been more or less modified either by statute or by long usage in the various states of the Union, so that none of them are identical with the old common-law forms ; yet the ordinary common-law form will, it is thought, be sufficient to transfer the estate in all the states except where in conflict with the registry laws.¹ Most if not all of the states have passed statutes regulating the registration of deeds, and many of them have prescribed the form of instrument to be used ; but as already suggested, those special forms do not of themselves invalidate the common-law forms, and a deed of bargain and sale or a feoffment would be as valid and binding as formerly if the registry laws were complied with.²

SEC. 2297. **Same—By quit-claim deed.**—At common law a deed of re-lease made by one who has neither an estate in, nor possession of, the land was in valid, but in this country, by long-established practice, a quit-claim deed is as effective to pass title to land as any other, although in many respects it resembles the old deed of re-lease.³ In some of the states quit-claim deeds are expressly recognized by statute.⁴ The general doctrine of the courts is

¹ See : *Montgomery v. Sturdivant*, 41 Cal. 290.

² See : *Funk v. Creswell*, 5 Iowa 68 ;
Pritchard v. Brown, 4 N. H. 397 ;
 s.c. 17 Am. Dec. 431 ;
French v. French, 3 N. H. 234 ;
 s.c. 31 Am. Dec. 441 ;
Chamberlain v. Crane, 1 N. H. 64 ;
Redfern v. Middleton, 1 Rice (S. C.) L. 464 ;
Muller v. Muller, 1 Meigs (Tenn.) 484 ; s.c. 33 Am. Dec. 157.

³ See : *Thompson v. Spencer*, 50 Cal. 532 ;
Downer v. Smith, 24 Cal. 123 ;
 s.c. 76 Am. Dec. 148 ;
Touchard v. Crow, 20 Cal. 150 ;

s.c. 81 Am. Dec. 108 ;
Platt v. Brown, 30 Conn. 336 ;
Rogers v. Hillhouse, 3 Conn. 398 ;
Hamilton v. Doolittle, 37 Ill. 482 ;
 s.c. 38 Am. Dec. 124 ;
McConnel v. Reed, 5 Ill. (4 Scam.) 117 ;
Young v. Clippinger, 14 Kan. 148 ;
Boyer v. Cockerill, 3 Kan. 282 ;
Hunt v. Hunt, 31 Mass. (14 Pick.) 374 ; s.c. 25 Am. Dec. 400 ;
Kerr v. Freeman, 33 Miss. 292 ;
Bogy v. Shoab, 13 Mo. 380.

⁴ See : *Carpentier v. Williamson*, 25 Cal. 168 ;
Touchard v. Crow, 20 Cal. 150 ;
 s.c. 81 Am. Dec. 108 ;

that a quit-claim deed conveys only such title or interest as the grantor at the time, whether legal or equitable, possesses.¹ It does not confer on one claiming under it the rights of a *bona fide* purchaser without notice;² hence in the absence of fraud or mistake, on the failure of title, the grantee in a simple quit-claim deed has no remedy for the failure of title against the grantor, neither has he any defense to an action for the consideration on the ground of such failure.³ A quit-claim deed does not pass an after-acquired title, unless it be in those cases where a party having the equitable and is entitled to the legal title, quit-claims, and subsequently acquires the legal title, in which case the title subsequently acquired will issue to the benefit of the grantee.⁴ In any other case, should a grantee by quit-claim subsequently acquire the title, no estoppel arises against him in favor of the grantee or his assignee, and a court will not prevent the grantor from enforcing his title.⁵ The form of a quit-claim deed is not material, there being no technical words of sale and conveyance, provided only there be words

Dart v. Dart, 7 Conn. 255;
Rogers v. Hillhouse, 3 Conn. 398;
Hamilton v. Doolittle, 37 Ill.
428;

McConnell v. Reed, 5 Ill. (4 Scam.)
117;

Kerr v. Freeman, 33 Miss. 292;

Bogy v. Shoab, 13 Mo. 380;

Jackson v. Hubble, 1 Cow. (N. Y.)
613;

Jackson v. Bradford, 4 Wend.
(N. Y.) 619;

Hall v. Ashby, 9 Ohio 96; s.c. 34
Am. Dec. 424;

Brown v. Jackson, 16 U. S.
(3 Wheat.) 449, 452; bk. 4 L.
ed. 432.

¹ Carpentier v. Williamson, 25 Cal.
154;

Patterson v. Snell, 67 Me. 559;

Walker v. Lincoln, 45 Me. 67;

Coe v. Persons, 43 Me. 432;

Butcher v. Rogers, 60 Mo. 138;

— Jackson v. Hubble, 1 Cow. (N.
Y.) 613;

Smith v. Pollard, 19 Vt. 272;

Farmers' Loan & Trust Co. v.
McKinney, 6 McL. C. C. 1;
s.c. 8 Fed. Cas. No. 4667;

Field v. Columbet, 4 Sawy. C.
C. 523; s.c. 8 Fed. Cas. N.
4764.

² See: Stoffel v. Schroeder, 62 Me.
147;

Thorp v. Keokuk Coal Co., 48 N. Y.
253;

May v. Le Claire, 78 U. S. (11
Wall.) 217, 232; bk. 20 L. ed.
50, 53.

³ Thorp v. Keokuk Coal Co., 48 N.
Y. 253.

See: Sherwood v. Barlow, 19
Conn. 471;

Kyle v. Kavanagh, 103 Mass. 356;
s.c. 4 Am. Rep. 560;

May v. Le Claire, 78 U. S. (11
Wall.) 217, 232; bk. 20 L. ed. 50,
53.

⁴ See: Welch v. Dutton, 79 Ill.
465.

⁵ Bruce v. Luke, 9 Kan. 201; s.c.
12 Am. Rep. 491.

See: Gibson v. Chouteau's Heirs,
39 Mo. 536, 566;

Jackson v. Hubble, 1 Cow.
(N. Y.) 616;

McCrackin v. Wright, 14 John.
(N. Y.) 1494.

indicating a present intention to transfer the property.¹ Should a quit-claim deed contain all the formal and technical words of a general deed of conveyance, declaring that the grantor “grants, bargains, sells, aliens, releases, quit-claims, and conveys,” to the grantee, this will alter the real character of the transaction and estop the grantee to enforce a title subsequently acquired.²

SECTION V.—BY INVOLUNTARY ALIENATION.

- SEC. 2298. Introductory.
- SEC. 2299. Under exercise of eminent domain.
- SEC. 2300. Where person under disability.
- SEC. 2301. Where title is defective.
- SEC. 2302. Where owner dies intestate.
- SEC. 2303. Where owner fails or refuses to pay just debts.
- SEC. 2304. Where owner fails or refuses to pay taxes.

SECTION 2298. **Introductory.**—By involuntary alienation is understood taking away from a man his property without his consent or concurrence, and against his wishes. The rights of property being secured to every citizen by the organic law of the land, a man can thus be deprived of his property in a prescribed manner only—by legislative authority or judicial writ. The general rule is that the legislatures of the various states may enact laws for the contract of property and regulating the disposition thereof; but the legislature cannot authorize the property of one man to be taken from him and given to another,³ except in those cases where neces-

¹ *Fash v. Blake*, 38 Ill. 367;
Johnson v. Bantock, 38 Ill. 114.
² *Bruce v. Luke*, 9 Kan. 201; s.c.
 12 Am. Rep. 491;
Gibson v. Chouteau's Heirs, 39
 Mo. 536, 566;
Jackson v. Hubble, 1 Cow. (N. Y.)
 616;
McCrackin v. Wright, 14 John.
 (N. Y.) 194;
Doe v. Oliver, 3 Smith's Lead.
 Cas. (9th Am. ed.) 2010.

³ *Dentzel v. Waldie*, 30 Cal. 144;
Russell v. Ramsey, 35 Ill. 374;
Adams v. Palmer, 51 Me. 494;

Commonwealth v. Alger, 61
 Mass. (7 Cush.) 53;
New York & O. M. R. Co. v.
Van Horn, 57 N. Y. 477;
Hayward v. Mayor, 7 N. Y. 324;
Embury v. Conner, 3 N. Y. 511;
 s.c. 56 Am. Dec. 325;
Taylor v. Porter, 4 Hill (N. Y.)
 140, 147; s.c. 40 Am. Dec.
 274;
Varick v. Smith, 5 Paige Ch.
 (N. Y.) 137, 159;
Cochran v. Van Surley, 20
 Wend. (N. Y.) 365; s.c. 32 Am.
 Dec. 570;

sary to protect the substantial interest of individuals because of their own inability to do so, or because necessary to promote the general welfare or public good. In other words, no man can, in absence of blame or default on his part, be deprived of his property except for public good, and even then only by due process of law,¹ and adequate compensation in damages for the property taken.² This is founded on the principle of right and

- Re John and Cherry Sts.*, 19 Wend. (N. Y.) 659, 676;
Matter of Albany Street, 11 Wend. (N. Y.) 149;
Good v. Zeicher, 12 Ohio 368;
Bowman v. Middleton, 1 Bay (S. C.) L. 252;
Memphis Freight Co. v. Memphis, 4 Coldw. (Tenn.) 429;
Wilkinson v. Leland, 27 U. S. (2 Pet.) 627, 658; bk. 7 L. ed. 542, 553.
¹ *Lane v. Dorman*, 4 Ill. 238;
State v. Doherty, 60 Me. 509;
Parsons v. Russell, 4 Mich. 113;
Stuart v. Palmer, 74 N. Y. 183; s.c. 30 Am. Rep. 289; 10 Hun (N. Y.) 23;
New York & O. M. R. Co. v. Van Horne, 57 N. Y. 477;
Campbell v. Evans, 45 N. Y. 356;
Westervelt v. Gregg, 12 N. Y. 202; s.c. 62 Am. Dec. 160;
Wynehamer v. People, 13 N. Y. 378; s.c. 13 How. (N. Y.) Pr. 238; 2 Park. Cr. Cas. 421;
Burch v. Newbury, 10 N. Y. 374, 379;
Embury v. Connor, 3 N. Y. 511;
Re Commissioners Central Park, 63 Barb. (N. Y.) 282;
Hard v. Nearing, 44 Barb. (N. Y.) 472;
Thomas v. Woods, 4 Cow. (N. Y.) 173;
Woodcock v. Bennett, 1 Cow. (N. Y.) 711; s.c. 13 Am. Dec. 568;
Taylor v. Porter, 4 Hill (N. Y.) 140; s.c. 40 Am. Dec. 274;
People v. Quant, 12 How. (N. Y.) Pr. 83; s.c. 2 Park. Cr. Cas. 410;
Re Curry, 25 Hun (N. Y.) 321;
Varick v. Smith, 5 Paige Ch. (N. Y.) 137; s.c. 28 Am. Dec. 417;
Cochran v. Van Surlay, 20 Wend. (N. Y.) 365; s.c. 32 Am. Dec. 570;
Re John and Cherry Sts., 19 Wend. (N. Y.) 659;
Backus v. Shepherd, 11 Wend. (N. Y.) 629;
Hoke v. Henderson, 4 Dev. (N. C.) L. 15; s.c. 25 Am. Dec. 617;
Huber v. Reily, 53 Pa. St. 112;
Banning v. Taylor, 24 Pa. St. 289;
Ervine's Appeal, 16 Pa. St. 256; s.c. 55 Am. Dec. 542;
State v. Simons, 2 Speer (S. C.) L. 767;
State v. Staten, 6 Coldw. (Tenn.) 233;
Memphis Freight Co. v. Memphis, 4 Coldw. (Tenn.) 429;
Jones v. Perry, 10 Yerg. (Tenn.) 59; s.c. 30 Am. Dec. 420;
Walley's Heirs v. Kennedy, 2 Yerg. (Tenn.) 554; s.c. 24 Am. Dec. 511;
Commonwealth v. Byrne, 20 Gratt. (Va.) 165;
Rowan v. State, 30 Wis. 129; s.c. 11 Am. Rep. 559;
Davidson v. New Orleans, 96 U. S. 97; bk. 24 L. ed. 616;
Pennoyer v. Neff, 95 U. S. 714; bk. 24 L. ed. 565;
McMillen v. Anderson, 25 U. S. 37; bk. 24 L. ed. 335;
Dartmouth College v. Woodward, 17 U. S. (4 Wheat.) 518; bk. 4 L. ed. 629;
Bank of Columbia v. Okley, 17 U. S. (4 Wheat.) 235, 244; bk. 4 L. ed. 559;
Arrowsmith v. Burlingim, 4 McL. C. C. 489; s.c. 1 Am. L. J. N. S. 448; 1 Fed. Cas. No. 563.
² *Cairo & F. R. Co. v. Turner*, 31 Ark. 494;
Ex parte Martin, 13 Ark. 198;
Loughbridge v. Harris, 42 Ga. 501;
Parkham v. Justices of Decatur Co., 9 Ga. 341;
Young v. McKenzie, 3 Ga. 31;
Doe v. Georgia R. & B. Co., 1 Ga. 524;

justice inherent in the nature and spirit of the social compact, which restrained and set bounds to the authority of the Legislature, and beyond which it could not be allowed to pass.¹ But this limitation itself is said to be declaratory of a great fundamental principle of natural justice and equity, as expressly binding upon the legislatures of the various states as though incorporated into their written constitutions.² The cases in which the Legislature may provide for the involuntary alienation of a person's property are the following: 1. Where the property is necessary for the public good or convenience, in which case it may be taken under an exercise of the power of eminent domain; 2. Where the person is under

Harms v. Chesapeake & O. C. Co., 7 Md. Ch. 248;
Chicago v. Larned, 34 Ill. 276;
Moak v. Baltimore, 5 Md. 314;
 s.c. 61 Am. Dec. 276;
People v. Salem, 26 Mich. 479;
Commissioners v. Withers, 29 Miss. 21;
Haskell v. New Bedford, 108 Mass. 714;
Commonwealth v. Alger, 61 Mass. (7 Cush.) 92;
Weir v. St. Paul, S. & F. F. R. Co., 18 Minn. 155 (Gil. 139);
Arls v. Cummings, 5 N. H. 591;
State v. Franklin Falls Co., 49 N. H. 240, 251;
Eastman v. Amskeag Mfg. Co., 44 N. H. 134, 160; s.c. 82 Am. Dec. 201;
Re Mt. Washington R. Co., 35 N. H. 134, 141, 142;
Piscataqua Bridge Co. v. New Hampshire Bridge Co., 7 N. H. 35, 66, 70;
Buffalo R. Co. v. Brainard, 9 N. Y. 108;
Re Highway, 22 N. J. L. (2 Zab.) 293;
Carson v. Coleman, 11 N. J. Eq. (3 Stock.) 108;
Heyward v. Mayor, 7 N. Y. 324;
Clark v. Rochester, 24 Barb. (N. Y.) 481;
Pally v. Saratoga R. Co., 9 Barb. (N. Y.) 449;
Taylor v. Porter, 4 Hill (N. Y.) 143;
Bradshaw v. Rodgers, 20 John. (N. Y.) 103; s.c. Id. 735;
Johnston v. Rankin, 70 N. C. 550;

Raleigh & Garton R. Co. v. Davis, 2 Dev. & B. (N. C.) L. 451;
Geisy v. Cincinnati, W. & E. R. Co., 4 Ohio St. 308, 321.
 See: *Central R. Co. v. Hetfield*, 29 N. J. L. (5 Dutch.) 206;
Doe v. Morris Canal Co., 24 N. J. L. (4 Zab.) 587;
Scudder v. Trenton, etc., Co., 1 N. J. Eq. (1 Saxt.) 694; s.c. 23 Am. Dec. 756;
Lindsay v. Commissioners, 2 Bay (S. C.) L. 38;
Ex parte Withers, 3 Brev. (S. C.) 83;
State v. Dawson, 3 Hill (S. C.) L. 101;
White v. Nashville R. Co., 7 Heisk. (Tenn.) 518;
Moinquent v. Commissioners of Roads, 4 McC. (S. C.) L. 541;
Patrick v. Commissioners, 4 McC. (S. C.) L. 541;
Stark v. McGown, 1 Nott & McC. (S. C.) L. 387.
¹ *Harms v. Chesapeake & O. Canal Co.*, 1 Md. Ch. 248.
² See: *People v. Marshall*, 6 Ill. (1 Gilm.) 672;
City of Logansport v. Seybold, 59 Ind. 225;
Churchman v. Martin, 54 Ind. 380;
Quick v. Whitewater Township, 7 Ind. 570;
Slack v. Maysville & L. R. Co., 13 B. Mon. (Ky.) 1, 22;
People v. Gallagher, 4 Mich. 244;
People v. Toynbee, 2 Park. Cr. Cas. (N. Y.) 490;
Philadelphia v. Field, 58 Pa. St. 320.

some disability and not able to protect his own interests ; 3. Where the title to land is defective, in which case a sale may be made under the direction of a court of competent jurisdiction for the purpose of curing the defects of title ; 4. Where a man dies intestate and a sale is necessary in order to the settlement of his estate, a sale may be directed to be made by the administrator or executor ; 5. Where the owner fails and refuses to pay his just debts, his property may be ordered to be sold under execution for the satisfaction thereof ; and 6. Where a person fails or refuses to pay the taxes properly levied against his property, it may be ordered to be sold to satisfy the claim of the estate.

SEC. 2299. *Under exercise of eminent domain.*—It has been said that everything in the political society ought to tend to the good of the community ; and that, since even the persons of the citizens are subject to this rule, their property cannot be excepted ; that the state could not subsist, or constantly administer the public affairs in the most advantageous manner, if it had not a power to dispose occasionally of all kinds of property subject to its authority. This right, which belongs to society, or to the sovereign, of disposing in certain cases, and for the public welfare, of all the wealth contained in the state, is called the right or power of eminent domain.¹ All property is held subject to this right of eminent domain on the part of the state.² The state may exercise this right, or it may delegate it to a corporation of a

¹ Vattel's Law of Nations, bk. I., c. 20, § 244.

See : *Lake Merced Water Co. v. Cowles*, 31 Cal. 215 ;

Todd v. Austin, 34 Conn. 78 ;

Boston & Roxbury Mills Co. v.

Newman, 29 Mass. (12 Pick.) 467 ;

Orr v. Quimby, 54 N. H. 590, 611 ;

Geisy v. Cincinnati, W. & Z. R. Co., 4 Ohio St. 308.

² *Gilmer v. Lime Point*, 18 Cal. 229 ;

Weir v. St. Paul, S. & T. F. R. Co., 18 Minn. 155 (5 Gilm. 139) ;

Brown v. Beatty, 34 Miss. 227 ; s.c. 69 Am. Dec. 389 ;

American Print Works v. Lawrence, 28 N. J. L. (3 Zab.) 9 ;

Bailey v. Mittenberger, 31 Pa. St. 37 ;

Richardson v. Vermont Cent. R. Co., 25 Vt. 465 ; s.c. 9 Am. Dec. 283 ;

Pennsylvania v. Wheeling Bridge Co., 54 U. S. (13 How.) 518 ; bk. 14 L. ed. 249.

public character,¹ as well as individuals and agents of the state ;² but to enable a corporation to exercise the right of eminent domain, it must be one in whose maintenance the public is interested, and from whose existence the public is to derive a benefit, and where the power is delegated to an individual it must be exercised for the general public welfare, and for the accomplishment of a purpose from which the public will derive a benefit.³ The state cannot authorize a private person or a strictly private corporation to exercise the right of eminent domain for a strictly private purpose,⁴ even though full

¹ *Gilmer v. Lime Point*, 18 Cal. 229 ;

Hooker v. New Haven & N. Co., 14 Conn. 146 ; s.c. 36 Am. Dec. 477 ;

Cushman v. Smith, 34 Me. 247 ;

Reddall v. Bryan, 14 Md. 444 ; s.c. 74 Am. Dec. 550 ;

Burt v. Merchants' Ins. Co., 106 Mass. 356 ; s.c. 8 Am. Rep. 339 ;

Orr v. Quimby, 54 N. H. 171 ;

Re Townsend, 39 N. Y. 171 ;

Buffalo R. Co. v. Brainard, 9 Mass. 108 ;

Bloodgood v. Mohawk & H. R. Co., 18 Wend. (N. Y.) 9 ; s.c. 31 Am. Dec. 313.

² *Eastern R. Co. v. Boston & M. R. Co.*, 111 Mass. 125, 136 ;

Hawshill Bridge v. County Commissioners, 103 Mass. 120 ; s.c. 4 Am. Rep. 518 ;

Hingham & Quincy Bridge Co. v. County of Norfolk, 88 Mass. (6 Allen) 353, 360 ;

Commonwealth v. Essex Co., 79 Mass. (13 Gray) 239, 274 ;

Central Bridge Co. v. Lowell, 70 Mass. (4 Gray) 474 ;

Boston & L. R. Co. v. Boston & S. R. Co., 68 Mass. (2 Gray) 1 ;

Boston Water Power Co. v. Boston & W. R. Co., 40 Mass. (23 Pick.) 360 ;

Weir v. St. Paul & S. F. Co., 18 Minn. 155 ;

Ashe v. Cummins, 50 N. H. 591 ;

Re Fowler, 53 N. Y. 60 ;

People v. Smith, 21 N. Y. 595, 598 ;

Beekman v. Saratoga R. Co., 3 Paige Ch. (N. Y.) 45 ; s.c. 22 Am. Dec. 679 ;

Harbuck v. Toledo, 11 Ohio St.

219, 220 ;

Mercer v. Pittsburgh, etc., R. Co., 36 Pa. St. 99 ;

White River Turnpike Co. v. Vermont Cent. R. Co., 21 Vt. 590 ;

West River Bridge Co. v. Dix, 47 U. S. (6 How.) 507 ; bk. 12 L. ed. 535.

³ See : *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 365 ; s.c. 32 Am. Dec. 570.

⁴ *Sadler v. Langham*, 34 Ala. 311 ; *Hickman's Case*, 4 Harr. (Del.) 580 ;

Nesbitt v. Trumbo, 39 Ill. 110 ;

Blackman v. Holms, 72 Ind. 515 ;

Stewart v. Hartman, 46 Ind. 331 ;

Wild v. Deig, 43 Ind. 455 ; s.c. 13 Am. Rep. 399 ;

Bankhead v. Brown, 25 Iowa 540 ;

Robinson v. Swope, 12 Bush (Ky.) 21 ;

Central R. Co. v. Greely, 17 N. H. 47 ;

Re Middleton, 82 N. Y. 196 ;

Re Ryers, 72 N. Y. 1 ; s.c. 28 Am. Rep. 88 ;

New York & H. R. R. Co. v. Kip, 46 N. Y. 456 ; s.c. 7 Am. Rep. 385 ;

Embury v. Connor, 3 N. Y. 511 ;

White v. White, 5 Barb. (N. Y.) 474 ;

Taylor v. Porter, 4 Hill (N. Y.) 140 ; s.c. 11 Am. Dec. 274 ;

Varick v. Smith, 5 Paige Ch. (N. Y.) 127 ; s.c. 28 Am. Dec. 17 ;

Re John and Cherry Sts., 19 Wend. (N. Y.) 659 ;

Bloodgood v. Mohawk & H. R. Co., 18 Wend. (N. Y.) 9 ; s.c. 31 Am. Dec. 313 ;

compensation is made for the land taken.¹ From this it will be seen that the power of eminent domain can only be exercised to supply some existing public need, or to gain some present public advantage.² It is not the purpose in this place to enter fully into a discussion of the subject of the power of eminent domain; space will not permit. The reader is referred to the American and English Encyclopædia of Law,³ where the author of this treatise has discussed the subject fully.

SEC. 2300. **Where persons under disability.**—The Legislature of the state has supreme power except so far as it may be restricted by the Constitution of the state,⁴ and, as

- Re Albany Street*, 11 Wend. (N. Y.) 148;
Buckingham v. Smith, 10 Ohio 288;
Whitham v. Osburn, 4 Oreg. 318; s.c. 18 Am. Rep. 287;
Edgewood v. Railway Company, 79 Pa. St. 257;
Pittsburg v. Scott, 1 Pa. St. 309;
Clark v. White, 2 Swan (Tenn.) 540;
White v. Clark, 2 Swan (Tenn.) 230;
Tyler v. Beecher, 44 Vt. 648; s.c. 8 Am. Rep. 287;
Osborne v. Hart, 24 Wis. 89; s.c. 1 Am. Rep. 161;
Pratt v. Brown, 3 Wis. 603.
¹ *Wild v. Deig*, 43 Ind. 455; s.c. 13 Am. Rep. 399;
Scudder v. Trenton, etc., Co., 1 N. J. Eq. (1 Saxt.) 694; s.c. 23 Am. Dec. 756;
Osborn v. Hart, 24 Wis. 89; s.c. 1 Am. Rep. 161.
 See: *Sadler v. Langham*, 34 Ala. 311;
Adams v. Palmer, 51 Me. 494;
Hepburn's Case, 3 Bland (Md.) 95;
Flagg v. Flagg, 82 Mass. (16 Gray) 180;
Commonwealth v. Alger, 61 Mass. (7 Cush.) 53;
Concord R. Co. v. Greeley, 17 N. H. 47;
Ten Eyck v. Canal Co., 18 N. J. L. (3 Harr.) 200; s.c. 37 Am. Dec. 233;
New York & H. R. Co. v. Kip, 46 N. Y. 546; s.c. 7 Am. Rep. 385;
Heywood v. Mayor, 7 N. Y. 324;
Powers v. Bergen, 6 N. Y. 358;
Embury v. Connor, 3 N. Y. 511;
Varick v. Smith, 5 Paige Ch. (N. Y.) 159; s.c. 28 Am. Dec. 417;
Beekman v. Saratoga & F. R. Co., 3 Paige Ch. (N. Y.) 73; s.c. 22 Am. Dec. 679;
Re John and Cherry Streets, 19 Wend. (N. Y.) 659;
Bloodgood v. Mohawk & H. R. Co., 18 Wend. (N. Y.) 955;
Re Albany Street, 11 Wend. (N. Y.) 149; s.c. 25 Am. Dec. 618;
Reeves v. Treasurer of Wood Co., 8 Ohio St. 333;
Kramer v. Cleveland & P. R. Co., 5 Ohio St. 140;
Buckingham v. Smith, 10 Ohio 288;
Pittsburg v. Scott, 1 Pa. St. 309;
Cooper v. Williams, 5 Ohio 391; s.c. 24 Am. Dec. 299;
Pratt v. Brown, 3 Wis. 603;
Wilkinson v. Leland, 27 U. S. (2 Pet.) 627; bk. 7 L. ed. 542.
² See: *Edgewood R. Co.'s Appeal*, 79 Pa. St. 257.
³ Vol. 6, pp. 509-635.
⁴ *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185, 190;
Madison & J. R. Co. v. White-neck, 8 Ind. 217, 222;
Beebe v. State, 6 Ind. 501, 525, 540; s.c. 63 Am. Dec. 391;
Doe ex d. Chandler v. Douglass, 8 Blackf. (Ind.) 10; s.c. 44 Am. Dec. 732;
People v. Toynbee, 13 N. Y. 412; s.c. 2 Park. C. C. (N. Y.) 534;
Newell v. People, 7 N. Y. 109;
People v. New York Gas Light Co., 64 Barb. (N. Y.) 65;

parens patriæ, may prescribe such rules as it deems proper for the superintendence, management, and disposition of the property of infants, lunatics, and other incompetent persons.¹ The reason for this is because it is deemed indispensable that there should be a power in the Legislature to authorize the sale of the lands of such persons, and of persons not known or not in being, who cannot act for themselves. The best interest of these persons, and justice to other persons, often require that such sales should be made. It would be attended with incalculable mischiefs, injuries, and losses, if estates, in which persons are interested who have not the capacity to act for themselves, or who cannot be certainly ascertained, or are not in being, could under no circumstances be sold and perfect titles effected. In such cases the Legislature, as *parens patriæ*, can disentangle and unfetter the estate by authorizing the sale, taking precaution that the substantial rights of all parties are protected and secured.² But if no disability exists, the Legislature cannot provide for the compulsory sale of an estate.³ In those cases

People v. Quant, 12 How. (N. Y.)

Pr. 86 ; s.c. 2 Park. C. C. 42 ;

Cochran v. Van Surlay, 20 Wend.

(N. Y.) 365 ; s.c. 32 Am. Dec.

570 ;

Hoke v. Henderson, 4 Dev. (N.C.)

L. 1 ; s.c. 25 Am. Dec. 677.

¹ Sohler v. Mass. General Hospital,
57 Mass. (3 Cush.) 483, 497 ;

Davison v. Johannot, 48 Mass. (7
Met.) 388 ;

Rice v. Parkman, 16 Mass. 326 ;

Cochran v. Van Surlay, 20 Wend.
(N. Y.) 365 ; s. c. 32 Am. Dec.

570.

² Sohler v. Massachusetts General
Hospital, 57 Mass. (3 Cush.) 483,
497.

³ Powers v. Bergen, 6 N. Y. 368 ;
Jones v. Perry, 10 Yerg. (Tenn.)
59 ; s.c. 30 Am. Dec. 430.

In the case of Jones v. Perry, *supra*,
the courts say : " The Legislat-
ure cannot sit in judgment,
try causes, and apply the rules
of law to them, make decrees,
and much less can they make
decrees in the exercise of an
arbitrary power, independent
of and in opposition to the rules

of law. It is difficult to per-
ceive how an act which deter-
mines that the property of a
party is liable for a given debt,
and that it be sold for the pay-
ment of that debt, is not a
judicial act ; and yet in sub-
stance that is the case before
us. It is true, the sale is au-
thorized for the payment of
debts generally, but that can
make no difference as to its
judicial character. It is the
same thing in principle
whether there be ten creditors
or only one. We are aware
that the Supreme Court of the
United States, in the case of
Wilkinson v. Leland, 27 U. S.
(2 Pet.) 627 ; bk. 7 L. ed. 542,
and the Supreme Court of
Massachusetts, in the case of
Rice v. Parkman, 46 Mass.
326, in deciding upon acts
somewhat similar, determined
that those acts were no en-
croachment upon the judicial
power. But it is to be observed
as to the case of Wilkinson v.
Leland, that the law whose

where the power resides in the Legislature, it cannot be so extended as to authorize a transfer of the land, except where it can legally be presumed that the owner would have assented to the transfer if in a situation to act for himself.¹

SEC. 2301. **Where title is defective.**—Where there is a defect in the title to land because of some informality in the instruments of conveyance, courts of equity have jurisdiction to reform such instruments in those cases where the mistake is a mutual one, or where there has been a mistake of one party through fraud or other inequitable conduct of the other party.² Equity has also jurisdic-

constitutionality was involved was an act of the Legislature of Rhode Island. This state has no constitution, but is governed altogether by the charter of Charles II. In the argument of the case, Mr. Wirt put the power upon the ground that there was no constitutional restriction to legislative action. 'Is it necessary,' said he, 'to show the authority? The authority is that of the people.' Judge STORY, who delivered the opinion of the court, enters into no reasoning upon the subject. He says: 'We do not think that the act is to be considered as a judicial act, but as an exercise of legislation. It purports to be a legislative resolution and not a decree.' Now if this is the best reason which can be given why it was not a judicial act, with deference to the able judge who advances it, the opinion ought to have very little weight. If by making an act of this kind purport to be a legislative resolve, it thereby becomes a legislative and not a judicial act, all judicial power might be usurped by the Legislature and exercised constitutionally in the form of legislative resolves. In the case of *Rice v. Parkman*, Chief Justice PARKER puts it upon the ground that it was not a question in which different parties were interested, nor was

it a decree affecting the title to the property. The only object of the Legislature in that case was to grant the authority to transmute real into personal property for purposes beneficial to the owner. This view of the case, though constituting a broad distinction between that and the present case, is hardly satisfactory."

¹ *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 365; s.c. 32 Am. Dec. 570.

² *Robertson v. Walker*, 51 Ala. 484; *Sutherland v. Sutherland*, 69 Ill. 481;

Bradford v. Bradford, 54 N. H. 463;

Ramsey v. Smith, 32 N. J. Eq. (5 Stew.) 28;

Paine v. Upton, 87 N. Y. 327; s.c. 41 Am. Rep. 371;

Albany Savings Institution v. Burdick, 87 N. Y. 40;

Ford v. Joyce, 78 N. Y. 618;

Arthur v. Homestead Fire Ins. Co., 78 N. Y. 462; s.c. 34 Am. Rep. 550;

Steinbach v. Relief F. Ins. Co., 77 N. Y. 498; s.c. 33 Am. Rep. 665;

Kilmer v. Smith, 77 N. Y. 226; s.c. 33 Am. Rep. 613;

Whittemore v. Farrington, 76 N. Y. 452;

Paine v. Jones, 75 N. Y. 593;

Moran v. McLarty, 75 N. Y. 25;

Botsford v. McLean, 42 Barb. (N. Y.) 445; 45 Id. 478;

Real Estate Trust Co. v. Balch, 13 Jones & S. (N. Y.) 528;

tion to quiet title under certain other circumstances, as well as to remove clouds from title,¹ relief being granted in the latter case on the principle *quia timet*.² But it is said that the Legislature is not sovereign, that it is not a constituent of the courts, nor are they its agents, and that any assumption by the Legislature of powers conferred on the judiciary is destitute of authority.³ Thus

Evarts v. Steger, 5 Oreg. 147 ;
Snell v. Atlantic Fire & Marine
Ins. Co., 98 U. S. 85 ; bk. 25 L.
ed. 52.

Instances of the reformation of deeds
are numerous. See, among
other cases additional to those
already cited, the following :

Blackburn v. Randolph, 33 Ark.
119 ;

Leonis v. Lazzarovich, 55 Cal.
52 ;

Lestrade v. Barth, 19 Cal. 660 ;

Blakeman v. Blakeman, 39 Conn.
320 ;

Styers v. Robins, 76 Ind. 547 ;

Fly v. Brooks, 64 Ind. 50 ;

Nicholson v. Caress, 59 Ind. 39 ;

Randall v. Ghent, 19 Ind. 271 ;

Baker v. Massey, 50 Iowa 399 ;

Gerald v. Elley, 45 Iowa 322 ;

Heaton v. Fryberger, 38 Iowa
185 ;

Deford v. Mercer, 24 Iowa 118 ;
s.c. 92 Am. Dec. 460 ;

Mattingly v. Speak, 4 Bush (Ky.)
316 ;

Burr v. Hutchinson, 61 Me. 514 ;

Ballentine v. Clark, 38 Mich.
395 ;

Dart v. Barbour, 32 Mich. 267 ;

Cummings v. Freer, 26 Mich.
1267 ;

Michel v. Tinsley, 69 Mo. 442 ;

Brown v. Balen, 33 N. J. Eq. (6
Stew.) 469 ;

Weston v. Wilson, 31 N. J. Eq.
(4 Stew.) 51 ;

Albany Savings Inst. v. Burdick,
87 N. Y. 40 ;

Kilmer v. Smith, 77 N. Y. 226 ;
s.c. 33 Am. Rep. 613 ;

Bush v. Hicks, 60 N. Y. 298 ;

Jackson v. Andrews, 59 N. Y.
244 ;

Crippen v. Baums, 15 Hun (N.Y.)
136 ;

Gillespie v. Moon, 2 John. Ch.
(N. Y.) 585 ; s.c. 8 Am. Dec.
559 ;

Day v. Day, 84 N. C. 408 ;

Hunt v. Frazier, 6 Jones (N. C.)
Eq. 90 ;

Clayton v. Freet, 10 Ohio St.
544 ;

Purcell v. Goshorn, 17 Ohio 105 ;
s.c. 49 Am. Dec. 448 ;

Russ v. Morris, 63 Pa. St. 367 ;

Johnson v. Johnson, 8 Baxt.
(Tenn.) 261 ;

Parish v. Scott, 10 Heisk. (Tenn.)
438 ;

Sawyer v. Hanson, 49 Wis. 611 ;
s.c. 4 N. W. Rep. 479 ;

White v. White, L. R. 15 Eq. 247 ;
s.c. 5 Moak Eng. Rep. 834 ;

Bloomer v. Spittle, L. R. 13 Eq.
427 ; s.c. 2 Moak Eng. Rep. 372 ;

Harris v. Pepperell, L. R. 5 Eq. 1.

Pettit v. Shepard, 5 Paige Ch.
(N. Y.) 493, 501 ; s.c. 28 Am.
Dec. 437 ;

Apethorp v. Comstock, 2 Paige
Ch. (N. Y.) 482 ;

Peirsoll v. Elliot, 31 U. S. (6 Pet.)
95, 98 ; bk. 8 L. ed. 332, 333 ;

Hayward v. Dimsdale, 17 Ves.
111 ;

Mayor, etc., of Colchester v. Low-
ton, 1 Ves. & B. 226, 244 ; s.c.
12 Rev. Rep. 216.

² Shell v. Martin, 19 Ark. 139, 141 ;

Hager v. Schindler, 29 Cal. 47,
55 ;

Eckeman v. Eckeman, 55 Pa. St.
269, 273.

³ Jones v. Perry, 10 Yerg. (Tenn.)
59 ; s.c. 30 Am. Dec. 430.

**As to acts of the Legislature uncon-
stitutional because judicial in their
character, see :**

Crane v. Meginnis, 1 Gill & J.
(Md.) 463 ; s.c. 19 Am. Dec.
237 ;

King v. Deedham, 15 Mass. 447 ;
s.c. 8 Am. Dec. 112 ;

Ashuelot R. Co. v. Elliott, 52
N. H. 387 ;

Merrill v. Sherburne, 1 N. H. 199 ;
s.c. 8 Am. Dec. 52 ;

Hoke v. Henderson, 1 Dev. (N.C.)
L. 1 ; s.c. 25 Am. Dec. 677 ;

a special act providing for the sale of a decedent's land, without notice to the heirs, and for the application of the proceeds to the claims of the administrator and another person against the estate, for moneys advanced and liabilities incurred by them on its account, and requiring the administrator to make deeds to the purchasers of the land, and to give bond to the heirs for the application of the proceeds as provided by the act, is unconstitutional, because it is an exercise of judicial power, and also because the heirs are thereby disseized of their freehold, not by the judgment of their peers nor by the law of the land ;¹ but it has been held on the other hand that a special act authorizing a sale of the property of minors, to provide funds for their education and maintenance, is constitutional. The reason for this is thought to be because it is within the scope of the Legislature as *parens patrie*.² Statutes curing defective acknowledgments of deeds by married women are held to be constitutional, because they do not disturb existing rights, impair the obligations of contracts, nor assume the control or exercise judicial powers.³ Those cases where the defect is only an in-

Mayor v. Althrop, 5 Coldw. (Tenn.) 560 ;

Budd v. State, 3 Hemp. (Tenn.) 492 ; s.c. 39 Am. Dec. 189 ;

Mayor v. Darmon, 2 Sneed (Tenn.) 122 ;

Officer v. Young, 5 Yerg. (Tenn.) 320 ; s.c. 26 Am. Dec. 268 ;

Dupuy v. Wickwire, 1 D. Chip. (Vt.) 237 ; s.c. 6 Am. Dec. 729 ;

Planters' Bank of Mississippi v. Sharp, 47 U. S. (6 How.) 301 ; bk. 12 L. ed. 447.

¹ Lane v. Dorman, 4 Ill. (3 Scam.) 238 ; s.c. 36 Am. Dec. 543.

See : Rozier v. Fagan, 46 Ill. 404 ;

Davenport v. Young, 16 Ill. 548, 551 ; s.c. 63 Am. Dec. 320

Jones v. Perry, 10 Yerg. (Tenn.) 59 ; s.c. 30 Am. Dec. 430 ;

Dubois v. McLean, 4 McL. C. C. 488 ; s.c. 7 Fed. Cas. No. 4107.

But it is said in Kibby v. Chitwood's Admr., 4 T. B. Mon. (Ky.) 91 ; s.c. 16 Am. Dec. 143, that the Legislature has power to provide by special act for the sale of the property of a decedent to pay debts.

² Cochran v. Van Surlay, 20 Wend. (N. Y.) 365 ; s.c. 32 Am. Dec. 570.

³ Chestnut v. Shane's Lessee, 16 Ohio 599 ; s.c. 47 Am. Dec. 387 ; Savings Bank v. Allen, 28 Conn. 97 ;

Savings Bank v. Bates, 8 Conn. 505 ;

Norton v. Pettibone, 7 Conn. 319 ; s.c. 18 Am. Dec. 116 ;

Mather v. Chapman, 6 Conn. 55 ; Bridgeport v. Hubbell, 5 Conn. 237 ;

Goshen v. Stonington, 4 Conn. 209 ; s.c. 10 Am. Dec. 121 ;

Dairs v. The State Bank, 7 Ind. 316

Foster v. The Essex Bank, 16 Mass. 245 ; s.c. 8 Am. Dec. 135 ;

Clarke v. McCreary, 20 Miss. 347 ; State v. Newark, 27 N. J. L. (3

Dutch.) 185 ;

Chestnut v. Shane's Lessee, 16 Ohio 599 ; s.c. 47 Am. Dec. 387 ;

Tate v. Stooltzfoos, 16 Serg. & R. (Pa.) 35 ; s.c. 16 Am. Dec. 546 ;

Barnett v. Barnett, 15 Serg. & R. (Pa.) 72 ; s.c. 16 Am. Dec. 516 ;

formality, which does not go to the essence of the conveyance, and there is no doubt as to the intention of the party to make a valid conveyance, the power of the Legislature to interfere by special act to cure the defect has been sustained by the courts in those states where special acts are not inhibited by the Constitution.¹

SEC. 2302. Where owner dies intestate.—In all those cases where a person dies leaving debts, if the personal estate is insufficient to pay them, the courts of chancery have power to direct a sale of the real estate to enforce the payment of such debts, and this power is generally exercised by them upon the application of creditors, in those states in which such jurisdiction is not vested exclusively in the probate courts.² And in some courts it is held that the Legislature is also authorized by special act to direct the sale of the property of a decedent for the payment of his debts.³

SEC. 2303. Where owner fails or refuses to pay just debts.—In all the states of the Union there are statutes which provide for the sale of a debtor's lands where the creditor

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| <p>Hepburn v. Curts, 7 Watts (Pa.) 300 ;
 1 Kent Com. (13th ed.) 455.
 Lane v. Dorman, 4 Ill. (3 Scam.) 238 ;
 Adams v. Palmer, 51 Me. 494 ;
 Sohler v. Mass. Gen. Hospital, 57 Mass. (3 Cush.) 483 ;
 Bott v. Perley, 11 Mass. 169 ;
 Chestnut v. Shane's Lessee, 16 Ohio 599 ; s.c. 47 Am. Dec. 387 ;
 Jones v. Perry, 10 Yerg. (Tenn.) 59 ; s.c. 30 Am. Dec. 430 ;
 Florentine v. Barton, 69 U. S. (2 Wall.) 210 ; bk. 17 L. ed. 783 ;
 Kearney v. Taylor, 56 U. S. (15 How.) 494 ; bk. 14 L. ed. 787 ;
 Watson v. Mercer, 33 U. S. (8 Pet.) 88 ; bk. 8 L. ed. 876 ;
 Wilkinson v. Leland, 27 U. S. (2 Pet.) 627 ; bk. 7 L. ed. 542 ; s.c. 33 U. S. (10 Pet.) 294 ; bk. 9 L. ed. 430.
 ² See : Sharp v. Sharp, 76 Ala. 312, 317 ;
 Bragg v. Beers, 71 Ala. 151 ;
 Scott v. Ware, 64 Ala. 174 ;
 Wilson v. Crook, 17 Ala. 59 ;</p> | <p>Dean v. Central Pass. Co., 64 Ga. 670, 674 ;
 Waples v. Marsh, 19 Iowa 381, 383 ;
 Buford v. McKee, 3 B. Mon. (Ky.) 224 ;
 Gather v. Welch, 3 Gill & J. (Md.) 259, 263 ;
 Vernon v. Valk, 2 Hill (S. C.) Eq. 257, 260 ;
 Bloom v. Cate, 7 Lea (Tenn.) 471 ;
 Frazier v. Pankey, 1 Swan (Tenn.) 75, 79 ;
 Hurn v. Keller, 79 Va. 415 ;
 Tennent v. Pattons, 6 Leigh (Va.) 169 ;
 Ellett v. Reid, 25 W. Va. 550 ;
 German Bank v. Leyser, 50 Wis. 258, 265 ; s.c. 6 N. W. Rep. 258.
 ³ Kirby v. Chitwood's Admr., 4 T. B. Mon. (Ky.) 91 ; s.c. 16 Am. Dec. 143 ;
 Sohler v. Trinity Church, 109 Mass. 1 ;
 Watkins v. Holman, 41 U. S. (16 Pet.) 25 ; bk. 10 L. ed. 873 ;
 Wilkinson v. Leland, 27 U. S. (2 Pet.) 627 ; bk. 7 L. ed. 542.</p> |
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obtains judgment and causes a writ of execution to be issued thereunder, and the officer is authorized to levy upon and make sale of the real property of the judgment debtor, and to execute deeds of conveyance therefor. This method of transferring title was unknown to the common law, and is derived entirely from modern statutes.¹ But to acquire title in this manner the statutes must be strictly pursued,² and by pursuing the statute the judgment creditor acquires an interest in the debtor's lands, which is so far vested as to entitle him to the crops and fixtures on the land and to enable him to restrain their removal.³ These statutes vary in many particulars in the different states, but the object of all is substantially the same, which is to enable the creditor to reach the property of the debtor.

¹ *Hobart v. Frisbie*, 5 Conn. 592 ;
Duvall v. Waters, 1 Bland Ch.
 (Md.) 569 ; s.c. 18 Am. Dec.
 350 ;

Jones v. Jones, 1 Bland Ch. (Md.)
 443 ; s.c. 18 Am. Dec. 327 ;

Bruch v. Landy, 2 Rawle (Pa.)
 392 ; s.c. 21 Am. Dec. 458 ;

Parker v. Rule, 13 U. S. (9 Cr.)
 64 ; bk. 3 L. ed. 658.

In the case of *Duvall v. Waters*,
supra, the court say : " By the
 common law, land was not lia-
 ble to be taken in an execution
 and sold for the payment of
 debts. Under *fiery facias*,
 nothing, according to the com-
 mon law, could be taken but
 chattels, movable property, the
 industrial fruits of the earth
 then growing, such as corn,
 wheat, etc., or leases for years,
 of which the writ commanded
 the sheriff to levy the debt, by
 a sale, converting them into
 money. The sale of all per-
 sonal property, passing the
 right without any more solemn
 act than a mere delivery ; a
 sale and delivery, by the sheriff
 of such property, was held to
 be sufficient in all cases to vest
 a complete and absolute title in
 the purchaser, without any
 particular specification of the
 thing thus taken and sold. It
 was therefore unnecessary for
 the sheriff to make any return

of a *fiery facias*, either for his
 own justification, or as an evi-
 dence of the title of the pur-
 chaser of the goods ; although
 the sheriff might be required
 to make return of such an exe-
 cution, so as to compel him to
 show what he had done towards
 levying the debt as command-
 ed, and so as to enable the
 plaintiff, if necessary, to pro-
 ceed further against the de-
 fendant for the recovery of the
 whole or the residue of his
 claim."

² *Dickerman v. Burgess*, 20 Ill. 266 ;
Tyler v. Wilkinson, 27 Ind. 450 ;
Cox v. Joiner, 4 Bibb (Ky.) 94 ;
Pickering v. Reynolds, 111 Mass.
 83 ;

Chenery v. Stevens, 97 Mass. 77,
 84 ;

Donhaven's Appeal, 75 Pa. St. 237 ;
Kintz v. Long, 30 Pa. St. 501 ;
Emmons v. Williams, 28 Tex.
 776.

³ *Hand v. Fairbanks*, 46 Mass. (5
 Met.) 111 ; s.c. 38 Am. Dec. 394 ;
Goddard v. Chase, 7 Mass. 432 ;
Pennhollow v. Dwight, 7 Mass.
 34 ; s.c. 5 Am. Dec. 21 ;
Coolidge v. Melvin, 42 N. H. 537 ;
Farrar v. Chauffetete, 5 Den. (N.
 Y.) 527 ;

Whipple v. Foot, 2 John. (N. Y.)
 423 ; s.c. 3 Am. Dec. 442 ;

Pattison's Appeal, 61 Pa. St. 294,
 297 ; s.c. 100 Am. Dec. 637.

SEC. 2304. **Where owner fails or refuses to pay taxes.**—Another method in which title is created by enforced alienation is where the owner of lands fails or refuses to pay taxes and assessments levied upon his property; in which case a sale thereof is made under statute by some officer duly authorized.¹ The power of taxation is exclusively legislative, except in those cases where it is limited or restrained by constitutional provisions.² The power to tax real estate and to make the sale thereof for non-payment of such taxes, so as to convey a valid title to the purchaser, is a specially delegated one and must be strictly pursued.³ And the burden is on the party claiming such power to establish the regularity in the proceedings of the officers in the discharge of their duty.⁴ Neither the deed nor its recitals are *prima facie* evidence of compliance with the statutory requirements.⁵

¹ Boardman v. Bourne, 21 Iowa 134;

Polk v. Rose, 25 Md. 153; s.c. 89 Am. Dec. 773;

Coleman v. Anderson, 10 Mass. 105;

Stierlin v. Daly, 37 Mo. 483;

People v. Mayor of Brooklyn, 4 N. Y. 419, 424; s.c. 55 Am. Dec. 266;

Corman v. Merritt, 3 Barb. (N. Y.) 343;

Atkins v. Kinnan, 20 Wend. (N. Y.) 241, 249; s.c. 22 Am. Dec. 543.

² Porter v. Rockford, etc., R. Co., 76 Ill. 573;

State v. Graton, 32 Ind. 4;

People v. Home Ins. Co., 92 N. Y. 347;

People v. Supervisors of Montgomery Co., 67 N. Y. 115; s.c. 23 Am. Rep. 94;

Howell v. City of Buffalo, 3 N. Y. 270;

Clarke v. City of Rochester, 5 Abb. (N. Y.) Pr. 123;

Beusen v. Mayor of Albany, 24 Barb. (N. Y.) 257, 258;

Shepard v. Wood, 13 How. (N. Y.) Pr. 51;

Townsend v. Mayor, 16 Hun (N. Y.) 364;

Piqua Branch State Bank v. Knoop, 57 U. S. (16 How.) 369, 410; bk. 14 L. ed. 977, 994;

Poullan v. Kinsinger, 2 Abb. U. S. 112; s.c. 9 Am. L. Reg. N. S. 557; 11 Int. Rev. Rec. 197; 5 Am. L. Rev. 184; Fed. Cas. No. 11463.

³ Polk v. Rose, 25 Md. 153; s.c. 89 Am. Dec. 773.

See: Root v. State, 10 Gill & J. (Md.) 374; 11 Id. 56;

Farmers' Bank v. Duvall, 7 Har. & J. (Md.) 79.

⁴ Ferris v. Coover, 10 Cal. 589;

Morris v. Russel, 5 Cal. 249;

Sutton v. Calhoun, 14 La. An. 209;

Worthing v. Webster, 45 Me. 270; s.c. 71 Am. Dec. 543;

Polk v. Rose, 25 Md. 153; s.c. 89 Am. Dec. 773;

Sharp v. Speir, 4 Hill (N. Y.) 86;

Denning v. Smith, 3 John. Ch. (N. Y.) 344;

Rush v. Davidson, 16 Wend. (N. Y.) 550;

Jackson v. Estey, 7 Wend. (N. Y.) 148;

Langdon v. Poor, 20 Vt. 15; s.c. 89 Am. Dec. 773;

Thatcher v. Powell, 19 U. S. (6 Wheat.) 119; bk. 5 L. ed. 221.

⁵ McAllister v. Shaw, 69 Me. 548;

Hoyt v. Dillon, 19 Barb. (N. Y.) 644;

Hill v. Draper, 10 Barb. (N. Y.) 463;

Jackson v. Shepard, 7 Cow. (N. Y.) 88; s.c. 17 Am. Dec. 502;

In many of the states, however, the stringency of the common law has been relaxed by the statute in such a manner as to make tax-deeds *prima facie* evidence of the regularity of the preliminary proceedings in the levy of the assessment, as well as of the sale itself.¹

Brown v. Wright, 17 Vt. 97; s.c.

42 Am. Dec. 481;

Shearer v. Corbin, 1 McC. C. C.

306; s.c. 3 Fed. Rep. 705.

¹ O'Grady v. Bamshel, 23 Cal. 287;

Ferris v. Coover, 10 Cal. 589;

Steeple v. Downing, 60 Ind. 478;

Gardeline v. Michel, 21 Kan. 83;

Bowman v. Crockrill, 6 Kan. 311;

Person v. O'Neal, 32 La. An.

228, 229;

State v. Heron, 29 La. An. 848;

Madland v. Benland, 24 Minn.

372;

Johnson v. Elwood, 53 N. Y.

431;

Stanberry v. Sillon, 13 Ohio St.

571;

Lee v. Jeddo Coal Co., 84 Pa.

St. 74.

CHAPTER III.

DEEDS.

- SEC. 2305. Introductory.
- SEC. 2306. Essentials of deed.
- SEC. 2307. On what to be written.
- SEC. 2308. Sufficiency of writing.
- SEC. 2309. Same—Filling blanks.
- SEC. 2310. Who may convey by deed.
- SEC. 2311. Same—Persons blind, deaf, and dumb.
- SEC. 2312. Same—Corporations.
- SEC. 2313. Who may not execute deeds—Infants.
- SEC. 2314. Same—Same—Female infants.
- SEC. 2315. Same—Same—Male infants.
- SEC. 2316. Same—Idiots and lunatics.
- SEC. 2317. Same—Married women.
- SEC. 2318. Same—Persons attainted.
- SEC. 2319. Who may be grantees—Aliens.
- SEC. 2320. Same—The wife.
- SEC. 2321. Same—Corporations.
- SEC. 2322. Consideration for deed.
- SEC. 2323. Description of property.
- SEC. 2324. Orderly parts of a deed.
- SEC. 2325. Reading before signing.
- SEC. 2326. Signing and sealing.
- SEC. 2327. Delivery of deed.
- SEC. 2328. Same—Mode of delivery.
- SEC. 2329. Same—Delivery in escrow.
- SEC. 2330. Attestation.
- SEC. 2331. Formal parts of a deed.
- SEC. 2332. Same—The date.
- SEC. 2333. Same—The parties to the instrument.
- SEC. 2334. Same—Same—Description of the parties.
- SEC. 2335. Same—The description of the property.
- SEC. 2336. Same—The recital.
- SEC. 2337. Same—The consideration.
- SEC. 2338. Same—The granting clause.
- SEC. 2339. Same—The habendum.
- SEC. 2340. Same—The reddendum.
- SEC. 2341. Same—The covenants.
- SEC. 2342. Same—The testimonium clause.

SEC. 2343. Same—The acknowledgment.

SEC. 2344. Recording deeds.

SECTION 2305. **Introductory.**—A deed is understood to be an instrument in writing under seal, containing a contract or an agreement which has been delivered by the party to be bound, and accepted by the party in whose favor the instrument purports to be executed.¹ Any writing containing a contract sealed and delivered to the party beneficially interested, by which lands, tenements, or hereditaments are conveyed for an estate not less than a freehold, constitutes a deed.² In its largest sense a deed includes not only an absolute transfer of the land, but also a mortgage.³

SEC. 2306. **Essentials of deeds.**—There are certain requisites which must be observed in every written instrument to constitute a deed ; thus (1) the writing must be on paper or parchment ; (2) there must be proper and sufficient parties, that is, a grantor and grantee ; (3) there must be a thing granted ; (4) there must be a good and sufficient consideration ; (5) there must be the apt words required by law ; (6) there must be an execution, that is, a signing, sealing, attestation, and acknowledgment ; (7) there must be a delivery and an acceptance and a registration of the instrument.⁴ The forms and solemnities required for a valid deed must be faithfully observed in order to pass the title to land. In all cases the forms and solemnities prescribed by laws of the state in which the land conveyed is situated, and not the forms and solemnities prescribed in the state where the instrument is executed, will govern.⁵

¹ *McMurty v. Brown*, 6 Neb. 376 ;
Pierson v. Townsend, 2 Hill (N.
Y.) 551 ;

Master v. Miller, 4 Durnf. & E.
(4 T. R.) 315 ; s.c. 2 H. Bl. 140 ;
1 Anst. 225 ; 2 Rev. Rep. 399 ;
2 Bl. Com. 295 ;
2 Co. Litt. (19th ed.) 171a ;
Shep. Touch. 50.

² 2 Bl. Com. 294.

³ *Hellman v. Howard*, 44 Cal. 184 ;
People v. Caton, 25 Mich. 391.

⁴ *Chile v. Conley*, 2 Dana (Ky.) 21 ;
Jackson v. Schoonmaker, 2 John.
(N. Y.) 235 ;

Duncan v. Hodges, 4 McMul.
(S. C.) L. 239 ;
Lord v. Ramsey, 1 Serg. & R.
(Pa.) 72 ;

Sicard v. Davies, 31 U. S. (6 Pet.)
124 ; bk. 8 L. ed. 342 ;

2 Bl. Com. 296 ;

1 Co. Litt. (19th ed.) 35b.

⁵ *Mergher v. Strong*, 6 Minn. 177.

SEC. 2307. **On what to be written.**—In order to prevent frauds from erasures and alterations, deeds are required to be written or printed on leather, paper, or parchment, it being said that if written on stone, board, linen, leather, or the like, the instrument is not a deed.¹ The reason given for this rule is that a writing on paper or parchment is less likely to be altered, vitiated, or corrupted than on the other materials.²

SEC. 2308. **Sufficiency of writing.**—The matter in form of a deed must be written before the sealing and delivery of it.³ Because if a man seals and delivers an empty or blank piece of parchment or paper, it will not be a good deed, even though he at the same time give directions that an agreement shall be written above, which is accordingly done.⁴ But a deed may be signed and sealed, and then subsequently filled up, if this is done before delivery.⁵ In relation to the language used and the grammatical structure of the instrument, as well as to the orthography, the law is less strict, and the deed will be valid no matter in what language written, or how imperfect in grammatical structure or orthography,

See : *Baygents v. Beard*, 41 Miss. 531 ;

McCormick v. Sullivan, 13 U. S. (10 Wheat.) 192, 202 ; bk. 6 L. ed. 300, 303 ;

Clark v. Graham, 19 U. S. (6 Wheat.) 577 ; bk. 5 L. ed. 334 ;

Root v. Brotherson, 4 McL. C. C. 30 ; s.c. Fed. Cas. No. 12036 ;

Robinson v. Bland, 2 Burr. 1079.

¹ 2 Bl. Com. 297 ;

2 Bouv. Inst. 389 ;

2 Co. Litt. (19th ed.) 239a.

See : *Warren v. Lynch*, 5 John. (N. Y.) 246.

² 2 Bl. Com. 297.

³ *Bragg v. Tesseden*, 11 Ill. 544 ;

Bashford v. Pierson, 91 Mass. (9 Allen) 387 ;

Burns v. Linde, 88 Mass. (6 Allen) 305 ;

Enthoven v. Hoyle, 13 C. B. (4 J. Scott) 373 ; s.c. 76 Eng. C. L. 373 ;

Davidson v. Cooper, 11 Mees. &

W. 793, 754.

⁴ *Boardman v. Gore*, 1 Stew. (Ala.) 517 ;

Ingram v. Little, 14 Ga. 473 ;

McKee v. Hicks, 2 Dev. (N. C.) L. 379 ;

Hibblewhite v. Nivrine, 6 Mees. & W. 215 ;

Shep. Touch. 54.

See : *Bank of Buffalo v. Kortwright*, 22 Wend. (N. Y.) 348 ;

Knapp v. Maltby, 13 Wend. (N. Y.) 587 ;

Dailey v. Moor, 17 Serg. & R. (Pa.) 438 ;

Duncan v. Hodges, 4 McCord (S. C.) L. 239.

⁵ *Perminter v. McDaniel*, 1 Hill (S. C.) L. 267 ; s.c. 26 Am. Dec. 179 ;

Duncan v. Hodges, 4 McCord (S. C.) L. 239 ; s.c. 17 Am. Dec. 734 ;

Hudson v. Revett, 5 Bing. 368 ;

s.c. 15 Eng. C. L. 625.

provided only the intention of the party is clearly indicated.¹

SEC. 2309. **Same—Filling blanks.**—Although deeds are required to be in writing fully filled up before the time of delivery, yet a deed may be signed and sealed and subsequently filled up, provided only this is done before the delivery.² And it has been said that blanks in a deed may be filled even after execution in those cases where not very material ;³ but if there be blanks left in the instrument in places material, and filled up afterwards by the assent of the parties, the instrument is void for the reason that it is not the same contract that was sealed and delivered.⁴ It has been said in an Iowa case, however, that “where a grantee delivers a deed, executed in blank as to the grantee, under circumstances implying authority to the receiver of the instrument to insert the grantee’s name, such name may be inserted by him, or by another person authorized by him, so as to confer title on an innocent purchaser.”⁵ But it must be remembered that seals have been abolished in Iowa, and are therefore not necessary to validity of the conveyance of real estate in that state. Seals having been abolished, it is maintained that directions for the alteration of a deed without a seal may be given by parol.”⁶

¹ *Shrewsbury’s Case*, 9 Co. 48 ;
Shep. Touch. 55.

* *Perminster v. McDaniel*, 1 Hill
(S. C.) L. 267 ; s.c. 26 Am. Dec.
179 ;

Duncan v. Hodges, 4 McCord (S.
C.) L. 239 ; s.c. 17 Am. Dec.
734 ;

Hudson v. Revett, 5 Bing. 368 ;
s.c. 15 Eng. C. L. 625.

³ *Hudson v. Revett*, 5 Bing. 368 ;
s.c. 15 Eng. C. L. 625.

⁴ *Hudson v. Revett*, 5 Bing. 368,
388 ; s.c. 15 Eng. C. L. 625,
635 ;

Cromwell’s Case, 2 Co. 69 ;
Bull. N. P. 267.

⁵ *Swartz v. Ballou*, 47 Iowa 188 ;
s.c. 29 Am. Dec. 470.

⁶ *Devin v. Himer*, 29 Iowa 297.
It is said by the Supreme Court
of the United States in the case

of *Drury v. Foster*, 69 U. S. (2
Wall.) 24 ; bk. 17 L. ed., that,
“If a person competent to
convey real estate sign and
acknowledge a deed in blank,
and deliver the same to an
agent with an express or im-
plied authority to fill up the
blank and perfect the convey-
ance, its validity could not be
well controverted. Although
it was at one time doubtful
whether a parol authority was
adequate to authorize an alter-
ation or addition to a sealed
instrument, the better opinion
at this day is the power is suffi-
cient.”

See : *Clark v. Allen*, 34 Iowa
190 ;

Owen v. Perry, 25 Iowa 412 ;
Simms v. Hervey, 19 Iowa 273 ;

It is thought that this is going greater lengths than it is safe to follow.

SEC. 2310. Who may convey by deed.—The general rule is that all persons capable of holding real property, who have attained the age of twenty-one, are of sound mind and understanding, and capable of contracting, and are not under some disability or the power of others, may execute a deed.¹

SEC. 2311. Same—Persons blind, deaf, and dumb.—Persons who are blind, deaf, or dumb, or both deaf and dumb, may convey by deed in those cases where it appears that, notwithstanding those disabilities, they are capable of comprehending the nature and consequences of a deed, and can express their meaning by words or signs.²

SEC. 2312. Same—Corporations.—At common law a corporation sole might execute a deed, and so also could a corporation aggregate, although invisible, immortal, and existing only in supposition of law.³ All lay civil corporations could, at common law, alienate land as freely as individuals, but all ecclesiastical and eleemosynary corporations were restrained by statute⁴ from every

Field v. Staggs, 52 Mo. 534 ; s.c. 4 Am. Rep. 435 ;

Schintz v. McManamy, 33 Wis. 299 ;

Van Etta v. Evanson, 29 Wis. 33 ; s.c. 9 Am. Rep. 486.

Compare : Uplin v. Archer, 41 Cal. 85 ; s.c. 10 Am. Rep. 266.

¹ Dicken v. Johnson, 7 Ga. 484 ; Wait v. Wait, 22 Mass. (5 Pick.) 217 ;

Doe v. Clark, 2 Ired. (N. C.) L. 23 ;

Zouch v. Parsons, 3 Burr. 1805 ; 4 Cruise Dig. (4th ed.) 309.

² Brown v. Brown, 3 Conn. 299 ; s.c. 8 Am. Dec. 187 ;

2 Bl. Com. 497 ;

1 Co. Litt. (19th ed.) 42b ;

Swinb., pt. 290 ;

13 Vin. Abr. 12.

³ Statutes of mortmain were passed

in conformity to a policy prevailing in England, somewhat anterior to the Norman Conquest (1 Bl. Com. 479 ; 2 Id. 268-274 ; 1 Co. Litt. (19th ed.) 2b). These statutes arose from the desire to repress the grasping of the Romanish Church, which, preserving in perpetuity the best lands in the kingdom, prevented their transmission from man to man, and withdrew them from the feudal services which were important for the common defense.

Angel and Ames (11th ed.) 124, § 148 ;

2 Bl. Com. 260, 270 ;

1 Co. Litt. (19th ed.) 2b ;

2 Kent Com. (13th ed.) 228.

⁴ 1 Eliz., c. 19 ; 13 Eliz., c. 10.

right of alienation, except that of leasing; and in the exercise of the latter power they were placed under considerable restriction.¹ In this country all corporations may, through their agents, convey real property as freely as individuals,² but where the mode of execution is prescribed by the charter or by general statute it must be strictly pursued.³

SEC. 2313. **Who may not execute deeds—Infants.**—At common law there are several classes of persons who are incapable of conveying by deed, including those who want sufficient age or understanding, and those who cannot bind themselves by contract. Thus all deeds entered into by infants from which no benefit can arise to them are said to be either absolutely void or voidable; that is, the law allows the infant when he comes of age either to ratify and confirm his action while an infant, or to disavow and avoid. In those states where it is held that deeds of infants are not void, but voidable only, *non est factum* cannot be pleaded by them, because they have the form before the operation of deeds, and for this reason they are not void without there is some special matter shown to render them so.⁴ The result of

¹ Mayor, etc. v. Lowten, 1 Ves. & B. 226, 244; s.c. 12 Rev. Rep. 216, 221.

² Bellows v. Todd, 39 Iowa 209; Treadwell v. Salisbury Mfg. Co., 73 Mass. (7 Gray) 393;

Leggett v. New Jersey Mfg. & Bkg. Co., 1 N. J. Eq. (1 Saxt.) 541; s.c. 23 Am. Dec. 728;

Central Gold Min. Co. v. Platt, 3 Daly (N. Y.) 263;

White Water Valley Canal Co. v. Vallette, 62 U. S. (21 How.) 414, 424; bk. 16 L. ed. 154, 158.

See: Miners' Ditch Co. v. Zellerbach, 37 Cal. 588;

United States Bk. v. Huth, 4 B. Mon. (Ky.) 423;

State v. Bank of Maryland, 6 Gill & J. (Md.) 323;

Pierce v. Emery, 32 N. H. 486; De Ruyter v. St. Peter's Church, 3 N. Y. 238;

Clark v. Titcomb, 42 Barb. (N. Y.) 122;

Partridge v. Badger, 25 Barb. (N. Y.) 146;

Burr v. Phoenix Glass Co., 14 Barb. (N. Y.) 358;

Barrage v. Merchants' Ex. Co., 1 Sandf. Ch. (N. Y.) 280;

Reynolds v. Commrs. of Stark Co., 5 Ohio 205;

Dater v. Bank of United States, 5 Watts & S. (Pa.) 223.

³ See: Herzo v. San Francisco, 33 Cal. 184;

McCracken v. San Francisco, 16 Cal. 591;

Isham v. Bennington Iron Co., 19 Vt. 230;

Hill v. Manchester & Salford Water Works Co., 5 Barn. & Ad. 866; s.c. 27 Eng. C. L. 364.

⁴ Tucker v. Moreland, 35 U. S. (10 Pet.) 58, 71; bk. 9 L. ed. 345, 351;

2 Kent Com. (13th ed.) 235.

the American decisions is that an act or contract of an infant is not void unless, from its nature and solemnity, as well as from the operation of the instrument, it is manifestly and necessarily prejudicial to him. In those cases where the contract is for his benefit, it is at most simply voidable; and if it be an act which it is his duty to perform, or is manifestly for his benefit, it will bind him.¹ But it has been said that where a deed is executed by an infant without consideration, it is not voidable, but absolutely void.² The weight of judicial decision, however, is thought to show, with more or less force and directness, that the distinction between void and voidable contracts of infants, on the ground of benefit or prejudice, is not sound.³

¹ *Fant v. Cathart*, 8 Ala. 325;
Morey v. Abernathy, 7 Blackf. (Ind.) 442;
Phillips v. Green, 5 Mon. (Ky.) 344;
Best v. Givens, 3 B. Mon. (Ky.) 72;
Hardy v. Waters, 38 Me. 450;
Boody v. McKenny, 30 Me. (10 Shep.) 523;
Ridgeley v. Crandall, 4 Md. 435;
Breed v. Judd, 67 Mass. (1 Gray) 445;
Earle v. Reed, 51 Mass. (10 Met.) 387;
Reed v. Batchelder, 42 Mass. (1 Met.) 559;
Kendall v. Lawrence, 39 Mass. (22 Pick.) 540;
Boston Bank v. Chamberlain, 15 Mass. 220;
Whitney v. Dutch, 14 Mass. 457;
Heath v. West, 29 N. H. (8 Fost.) 101;
Carr v. Clough, 27 N. H. (6 Fost.) 280;
Dearborn v. Eastman, 4 N. H. 441;
Slocum v. Hooker, 13 Barb. (N. Y.) 536;
Eagle Fire Ins. Co. v. Lent, Edw. Ch. (N. Y.) 301;
Jackson v. Todd, 6 John. (N. Y.) 257;
Conroe v. Birdsall, 1 John. Cas. (N. Y.) 127;
Dominick v. Michael, 4 Sandf. (N. Y.) 374;
Moore v. Moore, 4 Sandf. Ch. (N. Y.) 37;

Everson v. Carpenter, 17 Wend. (N. Y.) 419;
Bool v. Mix, 17 Wend. (N. Y.) 119.
 See: *Goodsell v. Myers*, 3 Wend. (N. Y.) 479;
Buchill v. Clary, 3 Brev. (N. C.) L. 194;
Knox v. Flack, 22 Pa. St. 337;
Scott v. Buchanan, 11 Humph. (Tenn.) 468;
Wheaton v. East, 5 Yerg. (Tenn.) 41;
Fisher v. Jewitt, 1 Burton N. B. 35;
 2 Kent Com. (18th ed.) 234, 236.
² *Swafford v. Ferguson*, 3 Lea (Tenn.) 292; s.c. 34 Am. Rep. 639;
Wheaton v. East, 5 Yerg. (Tenn.) 41.
 In Tennessee the general rule is that when the court can pronounce the contract to be to the infant's prejudice, it is void; when for his benefit, as for necessities, it is good; and when the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant.
Scott v. Buchanan, 11 Humph. (Tenn.) 468;
McGan v. Marshall, 7 Humph. (Tenn.) 121;
Wheaton v. East, 5 Yerg. (Tenn.) 41.
³ *Horner v. Dipple*, 31 Ohio St. 72, 76; s.c. 27 Am. Rep. 496, 499.
 See: *Shropshire v. Burns*, 46 Ala. 108;

SEC. 2314. **Same—Same—Female infants.**—The common-law rule was that a female infant could not bind herself by a deed even though executed in consideration of marriage, unless on arriving at majority she assented to it after the death of her husband ;¹ neither could she bar her right of dower by accepting a jointure.²

SEC. 2315. **Same—Same—Male infants.**—It was also the rule at common law that a male infant could not in general bind his estate by any deed executed by him in consideration of marriage ;³ yet where a male infant, on marrying an adult female, covenanted that her estate should be limited to certain uses, he was bound by such covenant.⁴

SEC. 2316. **Same—Idiots and lunatics.**—By the early common law it was held that neither an idiot nor a lunatic could avoid his own deed ; but subsequently it became well settled that idiots were incapable of binding themselves by deed, and that lunatics were not bound by their deeds unless they agreed thereto upon recovering their understanding, the general rule being that the heir of an idiot or lunatic could void a deed executed by him by pleading his disability. But where an idiot or lunatic made a feoffment and delivered seisin in person, the conveyance was not void absolutely, but only voidable ;⁵ and the latter rule is the one that prevails in this country at

Vaughn *v.* Parr, 20 Ark. 600 ;
 Cole *v.* Pennoyer, 14 Ill. 158 ;
 Fetrow *v.* Wiseman, 40 Ind. 148 ;
 Breckenridge *v.* Ormsby, 1 J. J.
 Marsh. (Ky.) 236 ;
 Fonda *v.* Van Horne, 15 Wend.
 (N. Y.) 631 ;
 Hinely *v.* Margaritz, 3 Pa. St.
 428 ;
 Curtin *v.* Patton, 11 Serg. & R.
 (Pa.) 305 ;
 Scott *v.* Buchanan, 11 Humph.
 (Tenn.) 468 ;
 Cummings *v.* Powell, 8 Tex.
 80 ;
 Patchin *v.* Cromach, 13 Vt. 330 ;

Mustard *v.* Wohlford's Heirs, 15
 Gratt. (Va.) 329 ;
 Williams *v.* Moore, 11 Mees. &
 W. 256.
¹ Trollope *v.* Linton, 1 Sim. & S.
 477-481 ;
 Melner *v.* Herewood, 18 Vesey
 259.
² May *v.* Hook, 1 Bro. C. C. 112 ;
 s. c. 1 Inst. 246a, n. 1.
³ Hollings *v.* Head, 2 Pr. Wms.
 229.
⁴ See : 4 Cruise Dig. (4th ed.) 16.
⁵ Beverley's Case, 4 Co. 125a.
 See : Wait *v.* Maxwell, 22 Mass.
 (5 Pick.) 217.

the present time.¹ But a deed executed by a lunatic under guardianship is absolutely void.²

SEC. 2317. **Same—Married women.**—At common law deeds executed by married women for the purpose of conveying their estates were absolutely void at law, and not merely voidable.³ They were also void in equity, and could not be confirmed by the wife after the death of her husband, except in cases of leases.⁴ In many of the states, however, statutes have been passed enabling married women, if of lawful age, to convey their real estate by deeds executed jointly with their husbands;⁵ but to render her conveyance valid, the statute giving

¹ *Jackson ex d. Marritt v. Gumaer*, 2 Cow. (N. Y.) 552.

See: *Schuff v. Ransom*, 79 Ind. 458;

Somers v. Pumphrey, 24 Ind. 231;

Breckenridge v. Ormsby, 1 J. J. Marsh. (Ky.) 245;

Hovey v. Hobson, 53 Me. 451;

Arnold v. Richmond Iron Works, 67 Mass. (1 Gray) 434;

Allis v. Billings, 47 Mass. (6 Met.) 415;

Wait v. Maxwell, 18 Mass. (1 Pick.) 217;

Eaton v. Eaton, 37 N. J. L. (8 Vr.) 108; s.c. 18 Am. Rep. 717;

Ingraham v. Baldwin, 9 N. Y. 45.

As to when conveyance by a lunatic will be set aside, see:

Turner v. Rusk, 53 Md. 65;

Campbell v. Kuhn, 45 Mich. 513; s.c. 8 N. W. Rep. 523;

Curtis v. Brownell, 42 Mich. 165; s.c. 3 N. W. Rep. 936;

Riggs v. American Tract Society, 84 N. Y. 337;

Canfield v. Fairbanks, 63 Barb. (N. Y.) 461;

Jackson v. King, 4 Cow. (N. Y.) 207;

Wallis v. Manhattan, 3 Hall (N. Y.) 495;

Rice v. Pelt, 15 John. (N. Y.) 503;

Sprague v. Duel, 11 Paige Ch. (N. Y.) 480;

Loomis v. Spencer, 2 Paige Ch. (N. Y.) 153;

Crawford v. Scovell, 94 Pa. St. 48, 50.

² *Pearl v. McDowell*, 3 J. J. Marsh. (Ky.) 658;

Wait v. Maxwell, 22 Mass. (5 Pick.) 217; s.c. 16 Am. Dec. 391.

To render the deed of a lunatic void on his being restored to his right mind, he must surrender a price if it has been paid, or the contract for its payment if unpaid.

Arnold v. Richmond Iron Works, 67 Mass. (1 Gray) 434.

³ See: *Bressler v. Kent*, 61 Ill. 426; s.c. 14 Am. Rep. 67;

Warner v. Crouch, 96 Mass. (14 Allen) 163;

Ezelle v. Parker, 41 Mo. 520;

Dunham v. Wright, 53 Pa. St. 167;

Shep. Touch. 56.

⁴ 1 Inst. 42b, n. 4.

See: *Bellis v. Bellis*, 122 Mass. 414;

Weed Sewing Machine Co., 115 Mass. 554;

Warren v. Crouch, 96 Mass. (14 Allen) 163;

Lowell v. Daniels, 68 Mass. (2 Gray) 161;

Concord Bank v. Bellis, 4 Mass. (10 Cush.) 267;

Matthews v. Puffer, 19 N. H. 448.

⁵ *Whiting v. Stevens*, 4 Conn. (N. Y.) 44;

Emerson v. White, 30 N. H. (9 Fost.) 482.

her authority must be strictly pursued. Thus the certificate of the magistrate must show that she was examined separate and apart from her husband, where so directed by the statute.¹ At common law the acknowledgment by the wife after the death of her husband of a deed executed during her marriage, in some cases amounted to a re-delivery of it so as to render it valid.² There was, at common law, an exception to this general rule, and that was when the husband abjured the realm, or was banished ; he thereby became *civiliter mortuus*, and his wife was considered as a *feme sole*, capable of acting in all things as if her husband were naturally dead.³ According to the law in this country, even in those states in which married women's enabling statutes have not been passed, where a woman is driven by the cruelty and neglect of her husband to abandon her home and provide for herself, there is an exception to the common-law rule,⁴ as there is also where the husband has completely abandoned his wife.⁵

SEC. 2318. **Same—Persons attainted, etc.**—According to the common law persons attainted of treason, felony, or *præmunire*, were incapable of conveying their estates by deed or otherwise from the time when the offense was committed, for the reason that such conveyance by them subsequent to the event would tend to defeat the forfeit-

¹ Stevens v. Doe, 6 Blackf. (Ind.) 475 ;

Owen v. Norris, 5 Blackf. (Ind.) 479 ;

Jordan v. Corey, 2 Carter (Ind.) 385 ;

Sibley v. Johnson, 1 Mann. (Mich.) 380 ;

Ives v. Sawyer, 4 Dev. & B. (N. C.) L. 8, 51 ;

Robinson v. Fairfield, 2 Murph. (N. C.) L. 390.

² See : Miller v. Schackelford, 3 Dana (Ky.) 289 ;

Lithgow v. Kavanagh, 9 Mass. 161 ;

Doe ex d. De Peyster v. Howland, 8 Cow. (N. Y.) 277 ;

Jourdan v. Jourdan, 9 Serg. & R. (Pa.) 268.

³ 1 Inst. 132b.

See : Arthur v. Broadnax, 3 Ala. 357 ;

Gregory v. Paul, 45 Mass. (4 Met.) 478 ;

Abbot v. Bayley, 23 Mass. (6 Pick.) 89 ;

Gregory v. Paul, 15 Mass. 31 ;

King v. Paddock, 18 John. (N. Y.) 141 ;

Boyce v. Owens, 1 Hill (S. C.) L. 8 ;

Bean v. Morgan, 4 McC. (S. C.) L. 148 ;

Cusack v. White, 2 Rep. Const. C. (S. C.) 279 ;

Robinson v. Reynolds, 1 Aik. (Vt.) 174 ;

Valentine v. Ford, 2 Browne 193.

⁴ See : Ames v. Chew, 46 Mass. (5 Met.) 320 ;

Abbot v. Bayley, 23 Mass. (6 Pick.) 89.

⁵ See : Gregory v. Price, 45 Mass. (4 Met.) 478.

ure and escheat.¹ In the United States there is no forfeiture for felony, and in only a few of the states is there forfeiture for treason. Forfeiture for treason against the United States has been abolished by the federal government, but still exists by common law in several of the individual states which have not specially abolished it.²

SEC. 2319. **Who may be grantees—Aliens.**—To render a deed valid there must be a grantee competent to take.³ By the common law all persons may be grantees in a deed, for the reason that it is supposed to be for their benefit; although infants, married women, persons of unsound mind, might disagree to such deeds and waive the estates thereby conveyed to them.⁴ It was even held, that aliens might be grantees in deeds and hold the land against all the world except the state; for the reason that upon office found, the government will take the land by prerogative.⁵ If an alien be made a citizen, he thereby becomes capable of taking and holding lands purchased by him after his denization; but the act of naturalization may have a retrospective import and confirm a conveyance made by the alien previously to his naturalization, although the act of naturalization in the ordinary form will not or does not operate so as to confirm any prior conveyance.⁶

SEC. 2320. **Same—The wife.**—At common law a wife cannot be the immediate grantee of her husband, but she may take an estate from him through the medium of a statute of uses. Thus a man may covenant with others to stand seized for the use of his wife, and may make a feoffment or other conveyance to the use of his wife.⁷

¹ 1 Inst. 390b.

² 2 Kent Com. (13th ed.) 486.

³ See: *Hulick v. Scovil*, 4 Ill. 191; *Miller v. Chittenden*, 2 Iowa 368; *Boudy v. Birdsall*, 29 Barb. (N. Y.) 31.

⁴ 1 Inst. 2b, 3a;

1 Bac. Abr. 498.

⁵ The same rule prevails in this country.

See: *Elmendorf v. Carmichael*, 3 Litt. (Ky.) 472; s.c. 14 Am. Dec. 86;

Crane v. Reeder, 21 Mich. 24; s.c. 4 Am. Rep. 430;

Jackson v. Lunn, 3 John. Cas. (N. Y.) 109;

Sands v. Lynham, 27 Gratt. (Va.) 291; s.c. 21 Am. Rep. 548;

Orr v. Hodson, 17 U. S. (4 Wheat.) 453; bk. 4 L. ed. 613;

Fairfax v. Hunter, 11 U. S. (7 Cr.) 603; bk. 3 L. ed. 453.

⁶ *Fisher v. Klein*, 3 Meriv. 431; 1 Inst. 2.

⁷ 1 Inst. 112a.

The doctrine of the common law prevailed in all the states of the Union until the passage of married women's acts, enabling them to dispose of their real estate the same as though they were *feme sole*.¹

SEC. 2321. **Same—Corporations.**—At common law, in consequence of the several statutes against mortmain, all corporations, whether lay or civil, religious or eleemosynary, were rendered incapable of taking lands without express and positive license from the government, and it has even been said that a license from the government was not in all cases sufficient to enable them to do so.² But the statutes of mortmain did not extend to charitable uses, and for that reason lands might be given either for the maintenance of a school or hospital, or other purposes of that nature.³

SEC. 2322. **Consideration for deed.**—At common law consideration was not essentially necessary to the validity of a deed as between the parties,⁴ and neither is a consideration now necessary in the absence of any positive statute,⁵ but a deed entered into without any consideration might be void as to strangers; for this reason it may be laid down as a general rule, that consideration is necessary to render a deed valid as against all persons. Beyond this use of a consideration, the only purpose of the clause expressing consideration and admitting payment is to prevent a resulting trust to the grantor, and to estop him from denying the making and the effect of

¹ *Abbott v. Heard*, 7 Blackf. (Ind.) 510;

Martin v. Martin, 1 Me. (1 Greenl.) 394;

Sweat v. Hall, 8 Vt. 187;

Wallingford v. Allen, 35 U. S. (10 Pet.) 583; bk. 9 L. ed. 542.

² 1 Bl. Com. 479.

³ 4 Cruise Dig. (4th ed.) 21, § 34.

See: *Fontain v. Ravenel*, 58 U. S. (17 How.) 369; bk. 15 L. ed. 80;

Vidal v. Mayor, etc., Philadelphia, 43 U. S. (2 How.) 127; bk. 11 L. ed. 205.

⁴ 4 Cruise Dig. (4th ed.) 23.

⁵ *Rogers v. Hillhouse*, 3 Conn. 398. See: *Freune v. Thomas*, 12 Me. 318;

Jackson v. Dillon, 2 Overt. (Tenn.) 261.

Parol evidence is admissible in favor of the grantee for the purpose of showing that the consideration money actually paid was in excess of that named in the deed.

Curry v. Lyes, 2 Hill (S. C.) L. 404;

Jack v. Dougherty, 4 Watts (Pa.) 151.

the deed for the uses therein declared ; but it is not conclusive against the grantee, to prevent him, in an action against the grantor, from proving the payment of a greater sum of money than is expressed in the deed.¹ Where no consideration is expressed in the deed, any lawful consideration will be sufficient to sustain its validity ;² and where any consideration is expressed in the deed, any consideration not inconsistent with the consideration expressed therein may be averred and proved. Where a valuable consideration is expressed, a good consideration may be shown.³ Considerations are of two kinds, civil and moral. The first class, which is usually called a valuable consideration, is money, or any other thing that bears a known value. Among this class of consideration is marriage, a covenant to perform service, a compromise of a doubtful claim, and the like.⁴

¹ *Meeker v. Meeker*, 16 Conn. 383 ;
Selden v. Seymour, 8 Conn. 304 ;
Hurn v. Soper, 4 Har. & J. (Md.)
 276 ;

Graves v. Graves, 30 N. H. (9
 Fost.) 129 ;

Grout v. Townsend, 2 Den. (N.
 Y.) 336 ; s.c. 2 Hill (N. Y.) 554 ;
Beach v. Packard, 10 Vt. 96.

² *Stearns v. Barnett*, 18 Mass. (1
 Pick.) 443, 449 ;
Pott v. Todhurst, 2 Coll. Ch. Cas.
 76, 84.

³ See : *Johnson v. Boyles*, 26 Ala.
 576 ;
*Murphy v. Branch Bank of Mo-
 bile*, 16 Ala. 90 ;
Toulmin v. Austin, 5 Stew. & P.
 (Ala.) 410 ;
Bennett v. Solomon, 6 Cal. 134 ;
Hannah v. Wadsworth, 1 Root
 (Conn.) 458 ;
Renzie v. Penrose, 3 Ill. (2 Scam.)
 515 ;

Jones v. Jones, 12 Ind. 389 ;

Rockhill v. Spraggs, 9 Ind. 30 ;

Lawton v. Buckingham, 15 Iowa
 22 ;

Swafford v. Whipple, 3 Iowa 261 ;

Emmons v. Littlefield, 13 Me.
 233 ;

Betts v. Union Bank, 1 Har. & J.
 (Md.) 175 ;

Clagett v. Hall, 9 Gill & J. (Md.)
 80 ;

Spaulding v. Brent, 3 Md. Ch.
 Dec. 411, 461 ;

Ely v. Alcott, 86 Mass. (4 Allen)
 506 ;

Stearns v. Barnett, 18 Mass. (1
 Pick.) 443, 449 ;

Wallis v. Wallis, 4 Mass. 135 ;

Davidson v. Jones, 26 Mich. 26 ;

Keemler v. Ferguson, 7 Minn.
 442 ;

Morse v. Shattuck, 4 N. H. 229 ;

Morris, etc., Co. v. Ryerson, 27
 N. J. L. (2 Dutch.) 457 ;

Wooden v. Shotwell, 23 N. J. L.
 (3 Zab.) 465 ;

Robbins v. Love, 3 Hawks. (N. C.)
 82 ;

Swisher v. Swisher, Wright (Ohio)
 755 ;

Hayden v. Meintzer, 10 Serg. &
 R. (Pa.) 329 ;

Jack v. Dougherty, 3 Watts (Pa.)
 151 ;

Strawbridge v. Cartledge, 7
 Watts & S. (Pa.) 394 ;

Curry v. Lyles, 2 Hilt. (S. C.) L.
 404 ;

Halbrook v. Halbrook, 30 Vt.
 432 ;

Cromwell's Case, 2 Co. 76.

⁴ *Young v. Ringo*, 1 Mon. (Ky.)
 30 ;

Porter v. Robinson, 3 A.K. Marsh.
 (Ky.) 253 ;

Buffum v. Greene, 5 N. H. 71 ;

Rice v. Bixler, 1 Watts & S. (Pa.)
 445 ;

*Seward v. Jackson ex. d. Van
 Wyck*, 8 Cow. (N. Y.) 406 ;

The second class, which is known as good consideration, arises from an implied obligation, such as that subsisting between husband and wife, or a parent and his child.¹ The reason for this seems to be the fact that these parties are considered in equity as creditors claiming a debt, founded on the moral obligation of the husband and parent to provide for the child and wife. The love and affection which a man is naturally supposed to bear to his brothers and sisters, nephews and nieces, and heirs-at-law, is held to be good consideration.² The payment of a man's debts is also regarded as a good consideration, for the reason that every man is under a moral obligation to satisfy his lawful creditors ; but considerations which are against the policy of the law, the principles of justice, or the rules of morality are utterly void ; it being the rule both of law and equity, that *ex turpi contractu actio non oritur*.³ Considerations are said to be either expressed or implied. An express consideration is where the motive or inducement of the parties to a deed is distinctly declared ; an implied consideration is where the act is done or forborne at the request of another, without any express stipulation, in which case the law presumes an adequate compensation for the act of forbearance to have been the inducement of the one party and the undertaking to the other.

SEC. 2323. **Description of property.**—Another requisite necessary to a valid deed is that the property shall be sufficiently described, that is to say, there must be words sufficient to signify the terms and conditions of the agreement, and to bind the parties.⁴ Ancient deeds were extremely short, but complete. When deeds grew more complicated it became customary to divide them into several formal parts ; but it is not absolutely essen-

Whelan v. Whelan, 3 Cow. (N. Y.) 537.

Blount v. Blount, 2 Law Repos. (N. C.) 587.

¹ See : Hanson v. Buckner, 4 Dana (Ky.) 251 ;

² See : 1 Storey Eq. Jur. (13th ed.), § 354.

Stovell v. Bennett, 4 Litt. (Ky.) 207.

³ 4 Cruise Dig. (4th ed.) 24.

Illegitimate child not raise presumption.

⁴ See : 4 Cruise Dig. (4th ed.) 25, § 50.

tial that a deed should be divided in this manner, provided only there are sufficient words to show the meaning and intent to the parties.¹

SEC. 2324. **Orderly parts of a deed.**—The formal and orderly parts of a deed are as follows : 1. The premises, which contains all that part of the instrument preceding the habendum, that is, the date, the parties' names and the descriptions, the recital, the consideration and the receipt therefor, the grant, the description of the things granted and the exceptions, if any. 2. The habendum, which declares what estate or interest is granted, but this may also be done in the premises ; and the description of the thing granted need not be repeated in the habendum, where it is sufficiently described in the premises. 3. The tenendum, which was formerly used to express the tenure by which the estate granted was to be held, but since all freehold tenures have been converted into socage, is of no further use and is joined to the habendum. 4. The reddendum, which is that part whereby the grantor reserves some new thing to himself out of the estate granted. 5. The condition. 6. The warranty, which is described by Lord Coke to be “a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same ; and either upon voucher or judgment in a *warrantia chartæ*, to yield other lands and tenements, to the value of those that shall be evicted by a former title, or else may be used by way of rebutter.”² 7. The covenant, which is the agreement by which the grantor obliges himself to do something beneficial to the grantee, or to abstain from doing something which if done would be injurious to him. 8. The conclusion, which mentions the execution and the date, either expressly or by reference to the beginning.³

SEC. 2325. **Reading before signature.**—At common law, as well as under the statutes in the majority of the

¹ 1 Co. Inst. 6a.

² See : 4 Cruise Dig. (4th ed.)

³ 1 Co. Inst. 365a.

states, it is necessary to the validity of a deed that it should be read, if any of the parties so require.¹ If the reading is required and not complied with, the deed will be void as to the party so requiring. Where a party can do so he is required to read the deed himself ; but if he be blind or illiterate, another person should read it for him. Where the grantor is either blind or illiterate, if the deed is falsely read, it will be void, at least for so much as was misread, in the absence of an agreement that the deed should be falsely read.²

SEC. 2326. **Signing and sealing.**—One of the elements of a valid deed at common law is a signing and sealing thereof by the grantor.³ In England, after the establishment of the Normans, all written instruments were required to be by seal, and until the reign of Edward I. every freeman, and such of the most substantial villeins as were fit to be put upon the juries, had their individual seals.⁴ At common law a seal was a wax impression, *sigillum est cera impressa, quia, cera sine impressione non est sigillum*, and a scroll with the pen was not a seal ; but under the various modifications since the time of the Normans, a scroll seal is as effective as a wax seal. Until the time of King Charles II., sealing alone was sufficient to authenticate a deed. Under the practice and the statutes in the various states of the Union, signing and sealing is essential to the validity of a deed.⁵ Under the statutes of frauds, it was required that all deeds should be signed by the party to be charged or his agent duly authorized ; and the universal practice was

¹ *Suffern v. Butler*, 18 N. J. Eq. (3 C. E. Gr.) 220 ;

Hallenbeck v. Dewitt, 2 John. (N. Y.) 404 ;

Rossetter v. Simmons, 6 Serg. & R. (Pa.) 452 ;

Rex v. Longnor, 1 Nev. & M. 452.

² *Anonymous*, 2 Atk. 327 ; s.c. 1 Nev. & M. 576 ;

Shulter's Case, 12 Co. 90 ;

Manser's Case, 2 Co. 3 ;

Thoroughgood's Case, 2 Co. 14.

See : *Androscoggin Bank v. Kimball*, 64 Mass. (10 Cush.) 373.

³ See : *Clement v. Greenhouse*, 5 Esp.* 83.

⁴ 2 Bl. Com. 306.

⁵ *Chiles v. Conley*, 2 Dana (Ky.) 21 ; *Clark v. Graham*, 19 U. S. (6 Wh.) 577 ; bk. 5 L. ed. 334 ;

McDill v. McDill, 1 U. S. (1 Dall.) 64 ; bk. 1 L. ed. 38 ;

Smith v. Evans, 1 Wils. 213 ;

2 Bl. Com. 306.

* See *Ante*, page 150, footnote 1.

for every person so signing the deed to acknowledge the signing and sealing it to be for the uses and purposes therein named.¹

SEC. 2327. **Delivery of deed.**—At common law another circumstance necessary to the validity of a deed was that it should be delivered by the party executing the same, or by his attorney thereunto duly authorized.² This was for the reason that a deed only takes effect at common law from the date of delivery ; if the date be a false or impossible one, the delivery ascertains the time from which it takes effect.³

SEC. 2328. **Same—Mode of delivery.**—The formal mode of delivering a deed is for the grantor to take it up and hand it to the grantee, saying, “I deliver this as my act and deed ;” but a deed may be delivered without these words. A deed may also be delivered by mere words without any act of delivery, as where the instrument lies on a table and the grantor says to the grantee, “Go and take the deed, it is sufficient for you ;” or “It will serve your turn,” or “Take it and my deed,” or like words, this will be a sufficient delivery of the instrument.⁴ And it has been said that the death of the grantor, after parting with the instrument and before its delivery to the grantee, will not affect the title to the property.⁵

¹ 2 Bl. Com. 307.

² See : *Oliver v. Stone*, 24 Ga. 63 ;
Jackson v. Sheldon, 23 Me. 569 ;
Armstrong v. Sovall, 26 Mass.

275 ;
Cannon v. Cannon, 26 N. J. Eq.
(11 G. E. Gr.) 316 ;
Thatcher v. St. Andrew's Church,
37 Mich. 264.

³ *Goddard's Case*, 2 Co. 4b ; s.c. 1
Salk. 163.

See : *Fairbanks v. Metcalf*, 8
Mass. 230, 239 ;
Jackson v. Bard, 4 John. (N. Y.)
230 ;

Doe ex. d. Cox v. Day, 10 East
427 ; s.c. 10 Rev. Rep. 345 ;
Steele v. Mark, 4 Barn. & C. 272 ;
s.c. 10 Eng. C. L. 576.

⁴ 1 Co. Inst. 36a.

See : *Merrills v. Swift*, 18 Conn.
257 ;

Jones v. Jones, 6 Conn. 111 ;
Woodman v. Coolbroth, 7 Me. (7
Greenl.) 181, 184 ;

Porter v. Cole, 4 Me. (4 Greenl.)
25, 26 ;

Stewart v. Reditt, 3 Md. 67 ;
Harrison v. Phillips' Academy, 12

Mass. 456, 461 ;
Hatch v. Hatch, 9 Mass. 307,
310 ;

Goodrich v. Walker, 1 John. Cas.
(N. Y.) 250 ;

Dayton v. Newman, 19 Pa. St.
194.

⁵ *Foster v. Mansfield*, 44 Mass.
(3 Met.) 312 ;

Chapell v. Bull, 17 Mass. 220 ;
Hatch v. Hatch, 9 Mass. 307 ;

SEC. 2329. **Same—Delivery in escrow.**—A delivery of a deed may be absolute, that is, to the grantee himself, or to some person for him, to take immediate effect; or it may be a conditional delivery, that is, to another person to keep until something is done by the grantee. In the latter case it is not delivered as a deed, but as an escrow, that is, a scroll in writing, which is not to take effect until the condition is performed, when it becomes a good deed.¹ Where a deed is delivered as an escrow, it is of no force or effect until the condition is performed.²

SEC. 2330. **Attestation.**—At common law it is necessary to the validity of a deed that it shall be attested by witnesses; this is not a thing essential to the deed itself, but simply constitutes evidence of authenticity. This doctrine of the common law is generally recognized in the United States, in all cases where there have not been enacted statutes governing. Yet a deed of conveyance is seldom if ever met with in this country without at least one attesting witness, and ordinarily two.³ At common law it was not necessary that the witness

Wheelwright v. Wheelwright, 2 Mass. 447;

Bouffam v. Green, 5 N. H. 71;

Canning v. Pinkham, 1 N. H. 353;

Souverbye v. Arden, 1 John. Ch. (N. Y.) 240, 254, 255;

Govdell v. Pierce, 2 Hill (N. Y.) 659;

McLain v. Nelson, 1 Jones (N. C.) L. 367.

¹ Johnson v. Baker, 4 Barn. & Ald. 440; s.c. 6 Eng. C. L. 551;

Murray v. Stair, 2 Barn. & C. 82; s.c. 9 Eng. C. L. 45;

Thorough's Case, 9 Co. 196b.

See: Wheelwright v. Wheelwright, 2 Mass. 447;

Gibson v. Partee, 2 Dev. & B. (N. C.) L. 530;

Simonton's Estate, 4 Watts (Pa.) 180.

² See: Evans v. Gibbs, 6 Humph. (Tenn.) 504;

Carr v. Hoxie, 5 Mas. C. C. 60; s.c. 5 Fed. Cas. No. 2438.

Delivery to the person to whom the land is conveyed, to hold until a

certain thing is done, will not constitute an escrow.

Jordan v. Pollock, 14 Ga. 145;

Dawson v. Hall, 2 Mich. 390;

Worloll v. Munn, 5 N. Y. 229;

Lawton v. Sager, 11 Barb. (N. Y.) 349;

Haygood v. Harley, 8 Rich. (S. C.) L. 325;

Johnson v. Branch, 11 Humph. (Tenn.) 521.

³ Sharp v. Orme, 61 Ala. 263;

Lord v. Folmer, 56 Ala. 615;

Goodlett v. Hansell, 56 Ala. 346;

Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 429;

Price v. Haynes, 37 Mich. 487;

Crane v. Reader, 21 Mich. 24.

See: Shirley v. Terne, 33 Miss. 653;

Kingsley v. Holbrook, 45 N. H. 320;

Genter v. Morrison, 31 Barb. (N. Y.) 155;

Vermont Mining Co. v. Windham Bank, 44 Vt. 489;

Day v. Adams, 42 Vt. 510.

should actually see the party execute the deed, it being sufficient that the party thus executing acknowledged the execution, and requested the witness to subscribe his name in evidence thereof.¹

SEC. 2331. **Formal parts of a deed.**—We have already enumerated the orderly parts of a deed,² and it remains for us to consider these formal parts of a deed in the order in which they have been mentioned.

SEC. 2332. **Same—The date of instrument.**—The date of the year and month on which a deed is executed may be inserted either at the beginning or at the end of the instrument, it being immaterial where it appears, as it is not essential to the validity of the instrument, provided only the date of the delivery can be proved.³ It is the usual practice, however, to insert the date in a deed as indicating the time of its execution and delivery.⁴ The custom of dating deeds was introduced about the time of King Edward II., and has been practiced ever since.⁵ The instrument, however, takes effect not from the date of its execution, but from the time of its delivery.⁶ The natural presumption arising from the date of the deed is that it was delivered on that day, in the absence of positive averments in the acknowledgment showing that it was subsequently executed.⁷

SEC. 2333. **Same—The parties to the instrument.**—One of the requisites of a valid deed is that the parties

¹ Parke v. Mears, 2 Bos. & P. 217.

² See: *Ante*, § 2324.

³ Thompson v. Thompson, 9 Ind. 323;

1 Co., Litt. (19th ed.) 46a.

⁴ County of Henry v. Bradshaw, 20 Iowa 355 ;

Woodman v. Smith, 37 Me. 25 ;

Blake v. Fish, 44 Hill (N. Y.) 302 ;

McKinney v. Rhodes, 5 Watts (Pa.) 325 ;

Osborn v. Rider, Cro. Jac. 135.

⁵ 1 Co. Inst. 6a ;

Shep. Touch. 55.

⁶ Meech v. Fowler, 14 Ark. 29 ;

Costigan v. Gould, 5 Den. (N. Y.) 290 ;

Jackson v. Schoonmaker, 3 John. (N. Y.) 225 ;

Lylerly v. Wheeler, 12 Ired. (N. C.) L. 290 ;

Nevlin v. Osborn, 4 Jones (N. C.) L. 157 ;

Colquhoun v. Atkinson, 4 Munf. (Va.) 550.

⁷ Clark v. Akres, 16 Kan. 166 ;

Loomis v. Pingree, 43 Me. 299 ;

Henderson v. Baltimore, 8 Md. 353 ;

Blanchard v. Tyler, 12 Mass. 339.

thereto shall be truly and sufficiently described in the instrument.¹ The parties to a deed are either active or passive. The active parties are those who grant, demise, or re-lease ; and passive parties are those to whom lands are granted, demised, or re-leased.² Where several parties join in a deed, some of whom are capable of conveying³ or taking lands,⁴ and others are incapable, the instrument will be construed as the deed only of those who are capable of conveying, and will carry the title only to those who are capable of taking. The incapacity of some of the parties will not render it invalid as to those who are capable.⁵

SEC. 2334. **Same—Same—Description of the parties.**—The description of the parties to a deed should be by their proper description and surnames and place of residence ; yet a mistake in the description of the parties will not render the deed void, unless it is very gross ; for if the description, however imperfect, is sufficient to distinguish the person described from all others, it will be good. *Nihil facit errore nominis, cum de corpore constat.*⁶

SEC. 2335. **Same—The description of the property.**—Another important part of a deed is a description of the property or thing granted. This description should be minute and accurate, sufficiently definite to indicate what the one party grants and what the other party receives by the deed.⁷ Everything intended to be con-

¹ See: *Newton v. McKay*, 29 Mich. 1 ;
Boone v. Moore, 14 Mo. 420 ;
Hornbeck v. Westbrook, 9 John.
 (N. Y.) 73 ;

Hoffman v. Porter, 2 Brock. C. C.
 156 ; s.c. Fed. Cas. 6577.

² 4 Cruise Dig. (4th ed.) 261.

³ See : *Ante*, § 2313, *et seq.*

⁴ See : *Ante*, § 2319, *et seq.*

⁵ *Scott v. Whipple*, 5 Me. (5 Greenl.)
 336 ;

Green v. Beals, 5 Cai. (N. Y.)
 254 ;

Fleming v. Brush, 3 John. Cas.
 (N. Y.) 180 ;

Gerard v. Basse, 1 U. S. (1 Dall.)

119 ; bk. 1 L. ed. 68 ;

Elliot v. Davis, 2 Bos. & P. 338 ;
Fletcher v. Dyche, 2 Durnf. & E.
 (2 T. R.) 32 ; s.c. 1 Rev. Rep.
 414 ;

Underhill v. Horwood, 10 Ves.
 225.

⁶ *Bacon's Maxims*, Reg. 13, p. 55 ;
Id., Reg. 25, p. 86 ;
Shep. Touch. 233.

⁷ *Massie v. Long*, 2 Ohio 287 ;
Raymond v. Longworth, 3 McL.
 C. C. 481 ; s.c. Fed. Cas. No.
 11595 ;

Barlow v. Rhodes, 1 Crompt. S. &
 M. 569.

veyed should be particularly mentioned, and set down in its proper order. Where the premises to be conveyed are composed of several parts, all of which are necessary to ascertain the subject of the grant, nothing will pass except that which agrees with every part of the description.¹ In those cases where the grant cannot be ascertained by the description given of the premises conveyed, the grant itself becomes void;² but inasmuch as the intention of the parties to a deed control the instrument, it will guide the court in determining what land is conveyed.³ The description of lands to be conveyed should either be by metes and bounds, or by the division of the public survey. Where description by metes or bounds is uncertain or impossible, a general description in the same conveyance will govern.⁴ Description may also be made by way of reference to the public records, or former deeds to the same premises.⁵ Any description

¹ 23 Am. Jur. 281.

Where part of the description is to be rejected as false or repugnant to the grant, it must appear that the part retained completely fits the subject claimed, and that the rejected part does not; and that the whole description, including the part to be rejected, is applicable to no other thing. It must be shown, at least to the degree of moral probability, that there is no *corpus* that will answer the description in every particular.

Wing v. Burgis, 21 Me. 111;

Keith v. Reynolds, 3 Me. (3 Greenl.) 393;

Cate v. Thayer, 3 Me. (3 Greenl.) 71;

Vose v. Handy, 2 Me. (2 Greenl.) 322;

Mayo v. Blount, 1 Ind. (N. C.) L. 283;

Jackson v. Sprague, 1 Paine C. C. 494; s.c. Fed. Cas. No. 7148.

² Campbell v. Johnson, 44 Mo. 247;

Bailey v. White, 41 N. H. 337;

Wofford v. McKenna, 23 Tex. 44;

United States v. King, 44 U. S. (3 How.) 779.

³ Mulford v. Laframe, 26 Cal. 88;

Park v. Hawkins, 3 Bibb (Ky.) 502; s.c. 6 Am. Dec. 666;

Bosworth v. Sturtevant, 56 Mass.

(53 Cush.) 392;

Stevens v. Mayor, 14 Jones & S. (N. Y.) 274;

Wendell v. Jackson, 8 Wend. (N. Y.) 183; s.c. 23 Am. Dec. 635;

Basse v. Mitchell, 22 Tex. 285;

Newson v. Pryor, 20 U. S. (7 Wheat.) 7; bk. 5 L. ed. 382.

⁴ Sawyer v. Kendall, 64 Mass. (10 Cush.) 241;

Peaslee v. Gee, 19 N. H. 273.

⁵ See: Hall v. Leonard, 18 Mass. (1 Pick.) 87.

Several deeds relating to the same subject-matter, between the same parties, and delivered at the same time, will be construed together, even though the parties in each are not the same.

See: Gammon v. Freeman, 31 Me. 243;

Cloyes v. Sweetser, 58 Mass. (4 Cush.) 403;

Perry v. Holden, 39 Mass. (22 Pick.) 277;

Casey v. Rawson, 8 Mass. 159;

King v. King, 7 Mass. 499;

Quarles v. Quarles, 4 Mass. 687;

Holbrook v. Finney, 4 Mass. 566;

Stetson v. Massachusetts Mut.

Fire Ins. Co., 4 Mass. 330, 336;

Clap v. Draper, 4 Mass. 266;

Doe v. Bernard, 15 Miss. (7 Smed. & M.) 319;

which affords sufficient means to identify the land will be sufficient to sustain the conveyance, regardless of errors or inconsistencies in some particulars.¹

SEC. 2336. **Same—The recital.**—The recital in a deed is a narrative of such facts, assurances, and agreements as are necessary to explain the grantor's title, and the motives and reasons upon which the deed is founded. While this recital of the deed is not absolutely necessary, it is usually inserted, for the purpose of showing the origin and derivation of title, or stating such facts as are connected with, or related to, the subject-matter of the deed. It is not infrequently the case that such facts are of the first and most essential importance, and without which the recital of title would appear defective. But such recitals are not evidence of the facts contained where the fact requires proof,² unless made especially so by statute;³ yet a person, being a party to the deed, giving the history of the title, will be estopped from denying it.⁴ Recitals are usually relied upon as affording reasonable presumption of the correctness of the statement found therein, and especially is this true in ancient deeds.⁵ But any mis-recital of a former grant will not invalidate a deed.⁶ The general rule is that a man

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| Pepper v. Haight, 20 Barb. (N. Y.) 429 ; | Harris v. Gilbert, 50 Tex. 350 ; |
| Connoll v. Todd, 2 Den. (N. Y.) 130 ; | Berry v. Rigler, 14 Tex. 270. |
| Stow v. Tift, 15 John. (N. Y.) 458 ; | ² Watson v. Gregg, 10 Watts (Pa.) 289. |
| Jackson ex d. Trowbridge v. Dunsbagh, 1 John. Cas. (N. Y.) 91 ; | ³ Johnson v. Beazley, 65 Mo. 250. |
| Jackson v. McKenney, 3 Wend. (N. Y.) 233 ; | ⁴ Clark v. Baker, 14 Cal. 629 ; |
| Everitt v. Thomas, 1 Ired. (N. C.) L. 252 ; | Stow v. Wyse, 7 Conn. 214 ; |
| Thompson v. McClenachan, 17 Serg. & R. (Pa.) 110. | Douglass v. Scott, 5 Ohio 599 ; |
| ¹ Andrews v. Pearson, 68 Me. 19 ; | Henrose v. Griffith, 4 Binn. (Pa.) 231 ; |
| Von v. Brashead, 27 Me. 156 ; | Green v. Clark, 13 Vt. 158 ; |
| Bosworth v. Strickhart, 56 Mass. (2 Cush.) 392 ; | Van Rensselaer v. Kearney, 52 U. S. (11 How.) 297 ; bk. 13 L. ed. 703 ; |
| Lyman v. Seames, 5 N. H. 488 ; | Goodtitle v. Bailey, 1 Cowp. 597 ; |
| Mason v. White, 11 Barb. (N. Y.) 173 ; | Bensley v. Burdon, 2 Sim. & S. 524 ; |
| Eggleston v. Bradford, 10 Ohio 312 ; | Merchant v. Errington, 8 Scott 210. |
| | ⁵ Hunt v. Johnson, 19 N. Y. 279. |
| | ⁶ Wyther v. Casson, 1 Hob. 128 ; |
| | Lewin v. Mody, 3 Len. 135 ; s.c. Cro. Jac. 127 ; |
| | Jerman v. Orchard, 1 Show. P. C. 199. |

accepting a deed with the recital of title is bound thereby, whether actually read or not.¹ The reason for this is the fact what whatever is sufficient to put the purchaser on inquiry is sufficient to charge him with notice of whatever an ordinarily diligent search would have disclosed.²

SEC. 2337. **Same—The consideration.**—We have already seen that no consideration is necessary as between the parties to the validity of a deed at common law,³ but it was necessary as between third parties to the validity of a deed.⁴ This consideration may be either a good or a valuable one. Good considerations are such as arise from an implied obligation, such as the love and affection subsisting between a husband and wife, a parent and child, and the like.⁵

SEC. 2338. **Same—The granting clause.**—The grant or release by which lands are transferred is an important part of the instrument. The technical words, where necessary, by which the transfer is made must be carefully

¹ *Sigourney v. Munn*, 7 Conn. 324 ;
Lamar v. Turner, 48 Ga. 329 ;
Anderson v. Layton, 3 Bush (Ky.)

87 ;
Gibett v. Peteler, 38 Barb. (N. Y.)

448 ;
Jacques v. Short, 20 Barb. (N. Y.)

269 ;
Jackson v. Neeley, 10 John. (N. Y.)

373 ;
Reeder v. Barr, 4 Ohio 446 ;
Rankin v. Warner, 2 Lea (Tenn.)

302 ;
Robertson v. McAfee, 50 Tex.

317 ;
Fisk v. Flores, 43 Tex. 340 ;
Pringle v. Dunn, 37 Wis. 450 ;

Brush v. Ware, 40 U. S. (15 Pet.)
 93 ; bk. 10 L. ed. 672.

² *Hamilton v. Nutt*, 34 Conn. 501 ;
Mosle v. Kuhlman, 40 Iowa 108 ;

Cambridge Valley Bank v. Dilam,
 48 N. Y. 326 ;

Acer v. Westcott, 46 N. Y. 384 ;
Baker v. Matcher, 25 Mich. 53 ;

Ward v. Egmont, 31 Eng. L. &
 Eq. 89.

³ See : *Ante*, § 2322.

⁴ See : *Life Ins. Co. v. Cole*, 4 Fla.
 359 ;

Chiles v. Coleman, 2 A. K.

Marsh. (Ky.) 296 ; s.c. 12 Am.
 Dec. 396 ;

4 Kent Com. (13th ed.) 492.

⁵ See : *Ante*, § 2322.

Good consideration, as to what constitutes.

See : *Blackerby v. Holton*, 5
Dana (Ky.) 520 ;

Hansen v. Buckner, 4 *Dana (Ky.)*
 251 ;

Stovall v. Barnett, 4 *Litt. (Ky.)*
 207 ;

Randall v. Ghent, 19 *Ind.* 271 ;
Pierson v. Armstrong, 1 *Iowa*

282 ;
Wallis v. Wallis, 4 *Mass.* 135 ;

Bell v. Scannan, 15 *N. H.* 381 ;
 s.c. 41 *Am. Dec.* 706 ;

Blount v. Blount, 2 *Law Repos.*
 (N. C.) 389 ;

Eckman v. Eckman, 68 *Pa. St.*
 460 ;

Stafford v. Stafford, 41 *Tex.* 111.

The natural love and affection subsisting between a grandparent and a grandchild is sufficient to sustain a deed.

Blount v. Blount, 2 *Law Repos.*
 (N. C.) 587 ;

Cains v. Jones, 5 *Yerg. (Tenn.)*
 249.

inserted. These differ according to the different kinds of instruments of conveyance. At common law the word "grant" was absolutely necessary in all cases of conveyance by feoffment, but was not necessary in conveyance under the statute of uses;¹ and the words, "grant, bargain, and sell," were necessary in a deed of bargain and sale. These words are no longer absolutely essential to a conveyance of land; any words which show an intention to transfer an estate, or to exercise a power, will be effectual, if the other circumstances required by law concur. Thus it is said that the words "make over and grant" in a deed are sufficiently operative to convey lands by way of a use.² Where anything is granted all the means to attain it, and all the fruits and effects of it, are also granted, and will pass inclusive, together with the thing itself, without the use of the word "appurtenant," on the principle of the maxim, *cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*.³ Thus where a person grants to another a piece of land in the middle of his estate, he at the same time impliedly grants a way to and from it, and the grantee may pass over the lands of the grantor for the purpose of reaching the land thus granted without being a trespasser.⁴ On this principle it has been held in Massachusetts that a license from the united corporation of town and parish to build a tomb in the burying yard, carries with it a right of suitable access thereto, and that the removal of any obstruction thereto by the owner of the tomb will not be trespass.⁵

SEC. 2339. **Same—The habendum.**—The habendum is a formal and an essential part of a deed at common law, but has been dispensed with by statute in some of the states, and in others it is practically obsolete.⁶ The office

¹ 4 Cruise Dig. (4th ed.) 264, 265.

² Pierson v. Armstrong, 1 Iowa 282;

Jackson ex d. Hudson v. Alexander, 3 John. (N. Y.) 484; s.c. 3 Am. Dec. 517.

³ See: Larkin v. Ames, 64 Mass. (10 Cush.) 198;

Rood v. New York & E. R.

Co., 18 Barb. (N. Y.) 80.

⁴ 4 Cruise Dig. (4th ed.) 265; Shep. Touch. 89.

⁵ Larkin v. Ames, 64 Mass. (10 Cush.) 198.

See: Damon v. Granby, 19 Mass. (2 Pick.) 345, 351.

⁶ See: Montgomery v. Sturtevant, 41 Cal. 290;

of the habendum is simply to limit the certainty of the estate granted, and consequently no person can take an immediate estate by the habendum of a deed who is not named in the premises,¹ for it is in the premises of a deed that the thing is really granted;² yet the words of the habendum may sometimes enlarge or diminish the previous words of grant, when the intention to do so is clearly apparent.³

SEC. 2340. **Same—The reddendum.**—The office of the reddendum is to designate what is reserved out of the thing granted. The essentials of a reddendum or reservation are: (1) that the reservation be made to a grantor;⁴ (2) the reservation must be part of the estate granted;⁵ (3) the reservation must be equal to a grant and contain words of limitation, in order to extend the reservation beyond the life of the grantor.⁶ In the case of an exception, however, no words of limitation are required.⁷

SEC. 2341. **Same—The covenants.**—The covenants in a deed are the promises, under seal, which the grantor makes to the grantee,⁸ and consist of those clauses therein whereby the grantor stipulates as to the truth of certain facts, or binds himself to do or to forbear from doing

Magor's Administrator v. Buckley, 51 Mo. 227.

¹ **Exceptions to the rule.**—There are, however, some exceptions to this rule, to wit: (1) If lands are given in frank marriage, the wife, who is the object of the gift, may take by the habendum, though not named in the premises. (2) A person not named in the premises may take an estate in remainder by the habendum. (3) If no name whatever be mentioned in the premises, then a person named in the habendum may take.

⁴ Cruise Dig. (4th ed.) 273, § 69; 1 Co. Inst. 21a.

² Manning v. Smith, 60 Mass. (6 Cush.) 289.

³ Higgins v. Wasgutt, 3 Me. (3 Greenl.) 305;

Sumner v. Williams, 8 Md. 162.

⁴ Illinois R. Co. v. Indiana A. R.

Co., 85 Ill. 211;

Bridger v. Pierson, 1 Lans. (N. Y.) 481;

Hornbeck v. Westbrook, 9 John. (N. Y.) 74;

Petition of Young, 11 R. I. 636;

Salter v. Kidgley, Carth. 76;

Whitlock's Case, 8 Co. 69.

⁵ Mooney v. Cooledge, 30 Ark. 640;

Jewett v. Ricker, 68 Me. 377;

Woodcock v. Estey, 43 Vt. 515.

⁶ Ashcroft v. Eastern R. Co., 126 Mass. 196, 198;

Handy v. Foley, 121 Mass. 158;

Dennis v. Wilson, 107 Mass. 591;

Bean v. Coleman, 44 N. H. 542;

Hornbeck v. Westbrook, 9 John. (N. Y.) 73.

⁷ Winthrop v. Fairbanks, 41 Me. 307.

⁸ See: Greenleaf v. Allen, 127 Mass. 248, 253.

certain things.¹ Such covenants are of two kinds, either express or implied. An express covenant is one that is created by the express words of the instrument ; an implied covenant is one that is raised by the implication of law.² No particular form of words is necessary to create a covenant on the part of the grantor. Whatever shows his intention to bind himself to the performance of a stipulation, may be deemed a covenant, without regard to the form of words in which that intention is expressed.³ The words and forms of expression from which the law implies a covenant are "demise,"⁴ "give,"⁵ "grant,"⁶ "lease,"⁷ "grant, bargain, and sale,"⁸ "yielding and paying,"⁹ and the like. Covenants usually contained in a deed of full covenants are those of seisin, right to convey, against incumbrances, warranty, for quiet enjoyment, and for further assurance.¹⁰

SEC. 2342. **Same—The testimonium clause.**—Deeds are usually executed with a clause declaring that "in witness whereof the parties hereto have hereunto set their

¹ *Randel v. Chesapeake Canal Co.*, 1 Harr. (Del.) 233 ;

Greenleaf v. Allen, 127 Mass. 248 ;

Debolle v. Pennsylvania Insurance Co., 4 Whart. (Pa.) 68 ; s.c. 33 Am. Dec. 38.

² *Emerson v. Wyley*, 27 Mass. (10 Pick.) 310 ;

Parker v. Smith, 17 Mass. 413.

Taylor v. Hepper, 62 N. Y. 649 ;

Prey v. Johnson, 22 How. (N. Y.) Pr. 323 ;

Williams v. Burrell, 1 Man. Gr. & S. (1 C. B.) 402, 429 ; s.c. 50 Eng. C. L. 401, 427.

³ *Gardinier v. Corson*, 15 Mass. 504 ;

Jackson ex d. Wood v. Swart, 20 Paige Ch. (N. Y.) 85 ;

Trutt v. Spotts, 87 Pa. 339 ;

Taylor v. Preston, 79 Pa. St. 436.

⁴ *Sumner v. Williams*, 8 Mass. 201 ;

Bruce v. Fulton National Bank, 79 N. Y. 154, 162 ;

Gammis v. Clark, 8 Cow. (N. Y.) 36 ;

Holder v. Taylor, Hob. 12 ;

Williams v. Burrell, 1 Man. Gr. & S. (1 C. B.) 402, 429 ; s.c. 50

Eng. C. L. 401, 427 ;

Hayes v. Bickerstaff, Vaugh. 118.

⁵ *Frost v. Raymond*, 2 Cai. Cas. (N. Y.) 188, 192 ;

Vanderkarn v. Neuderkan, 11 John. (N. Y.) 22 ;

Kent v. Welsh, 7 John. (N. Y.) 258 ;

Noke's Case, 4 Co. 80.

⁶ *Grannis v. Clark*, 8 Cow. (N. Y.) 36 ;

Barber v. Harris, 9 Ad. & E. 532 ; s.c. 36 Eng. C. L. 287.

⁷ *Maule v. Ashmead*, 20 Pa. St. 482 ;

Bandy v. Cartwright, 2 El. & B. 331 ; s.c. 20 Eng. L. Eq. 88.

⁸ See : *Busch v. Cooper*, 26 Miss. 599 ;

Dickson v. Desire, 23 Mo. 151 ;

Gratz v. Ewoldt, 2 Binn. (Pa.) 95.

⁹ *Kimpton v. Walker*, 9 Vt. 191.

¹⁰ 4 Kent Com. (13th ed.) 471.

See : *Kingdon v. Noddle*, 1 Maule & S. 355.

hands (or subscribed their names) and affixed their seals," etc. This was the form at common law, and is still the appropriate form under those statutes authorizing the substitution of scroll seals for the waxen seals of the common law. Where a scroll seal is authorized the instrument must show that it was so intended;¹ but unless especially made so by statute, a scroll in ink or other device will not constitute a seal, even in those cases where it clearly appears that it was so intended.²

SEC. 2343. Same—The acknowledgment.—The acknowledgment of the signing, sealing, and delivering of a deed is necessary to its validity. Statutes in the various states of the Union provide that a deed not so acknowledged shall not be recorded.³ In some of the states it is required that the certification of a deed be endorsed thereon before it will operate to pass title;⁴ but a deed is generally good as between the parties although without

¹ See : *Lee v. Adkins*, 1 Minor (Ala.) 187 ;

Armstrong v. Pearce, 5 Harr. (Del.) 351 ;

Long v. Long, 1 Morris (Iowa) 43 ;

Bell v. Keefe, 13 La. An. 524 ;

Hudson v. Poindexter, 42 Miss. 304 ;

Glasscock v. Glasscock, 8 Mo. 577 ;

Walker v. Keile, 8 Mo. 301 ;

Grimley v. Riley, 5 Mo. 280 ;

Boynton v. Reynolds, 3 Mo. 79 ;

Cromwell v. Tate, 7 Leigh (Va.) 301 ;

Norvell v. Walker, 9 W. Va. 447 ;

Haseltine v. Donahue, 42 Wis. 576.

In Alabama, an instrument purporting in its body to be under seal is considered as a deed even though no scroll seal is attached to the signature.

Shelton v. Armor, 13 Ala. 647.

A similar doctrine prevails in other of the states.

See : *Starkweather v. Martin*, 28 Mich. 471 ;

Hudson v. Poindexter, 42 Miss. 304 ;

Mitchell v. Parkham, 1 Harp.

(S. C.) 1.

In Indiana, the conclusion of a written instrument, "Witness our hands," with a scroll following with the word "seal" therein, has been said to be a simple contract and not a deed.

Demers v. Bullett, 1 Blackf. (Ind.) 241.

In Tennessee, the word "seal" affixed to the signature is held to be sufficient.

Whitley v. Davis, 1 Swan (Tenn.) 135.

² See : *Perrine v. Cheesman*, 11 N. J. L. (3 Stock.) 174 ;

Warren v. Lynch, 5 John. (N. Y.) 239.

³ See : *Stubbs v. Kahn*, 64 Ala. 186 ;

Carter v. Chadron, 21 Ala. 72 ;

Clark v. Troy, 20 Cal. 219 ;

Anderson v. Dugas, 29 Ga. 440 ;

Thomas v. Le Baron, 49 Mass. (8 Met.) 355 ;

Sterlien v. Daley, 37 Me. 483 ;

Chamberlain v. Sprague, 22 How. (N. Y.) 437 ;

Catlin v. Washburn, 3 Vt. 25.

⁴ *Hunt v. Hunt*, 20 Ohio St. 119 ;

Smith v. Hunt, 13 Ohio 260, 268.

acknowledgement,¹ but not as to subsequent purchasers in good faith, for a valuable consideration and without notice.² The reason for this is thought to be because the acknowledgment has reference to the proof of the execution of the instrument, and not its force or effect.³ The purpose of the statutes requiring an acknowledgment to a deed is twofold, to-wit: To prove its execution (1) in order that it may be entered of record, and (2) that it may be used in evidence. Such acknowledgments must show affirmatively that all the requirements of the statute have been substantially complied with.⁴ The certificate must be subscribed by the officer; his name written in the body of the certificate is not suffi-

- ¹ *Jackson v. Allen*, 30 Ark. 110;
Floyd v. Ricks, 14 Ark. 286; s.c. 58 Am. Dec. 374;
Hastings v. Vaughn, 5 Cal. 315;
Henrison v. Cloud, 5 Blackf. (Ind.) 92;
Simpson v. Mundee, 3 Kan. 172;
Fitzhugh v. Creghan, 2 J. J. Marsh. (Ky.) 433; s.c. 19 Am. Dec. 139;
Webster v. Hall, 2 Harr. & M. (Md.) 19;
Kellogg v. Loomis, 82 Mass. (16 Gray) 48;
Gibbs v. Swift, 66 Mass. (12 Cush.) 398;
Dale v. Thurlow, 53 Mass. (12 Met.) 157;
Marshall v. Fiske, 6 Mass. 30; s.c. 4 Am. Dec. 76;
Hill v. Samuel, 21 Miss. (13 Smed. & M.) 307;
Stevens v. Hampton, 46 Mo. 404;
Brown v. Mauler, 22 N. H. 468;
Wark v. Willard, 13 N. H. 389;
Turner v. Stip, 1 Wash. (Va.) 319;
Wiles v. Peck, 26 N. Y. 48;
Wood v. Chapin, 13 N. Y. 509; s.c. 67 Am. Dec. 62;
Jackson v. Post, 9 Cow. (N. Y.) 123;
White v. Leslie, 54 How. (N. Y.) Pr. 398;
Payne v. Wilson, 11 Hun (N. Y.) 305;
McMahon v. McGraw, 26 Wis. 614;
Strong v. Smith, 3 McL. C. C. 362; s.c. Fed. Cas. No. 13544;
Goodenough v. Warren, 5 Sawy. C. C. 494; s.c. 11 Chicago L. News 289; 7 Bost. Rep. 772; 25 Int. Rev. Rec. 279; 7 Am. L. Rec. 751; Fed. Cas. No. 5534.
² *Ricks v. Reed*, 19 Cal. 571;
Lake v. Gray, 35 Iowa 459; s.c. 30 Iowa 415;
Blain v. Stewart, 2 Iowa 383;
Douglas v. Shumway, 79 Mass. 498, 502;
Stetson v. Gulliver, 56 Mass. (2 Cush.) 494, 497;
Dale v. Thurlow, 53 Mass. (12 Met.) 156, 163;
Blood v. Blood, 40 Mass. (23 Pick.) 80;
Pitcher v. Barrows, 34 Mass. (17 Pick.) 361;
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Ryan v. Carr, 46 Mo. 483;
Bishop v. Schneider, 46 Mo. 472; s.c. 2 Am. Rep. 533;
Frey v. Rockefeller, 63 N. Y. 268;
White v. Denman, 1 Ohio St. 110.
³ *Gray v. Ulrich*, 8 Kan. 112.
⁴ See: *Sharpe v. Orme*, 61 Ala. 263;
Fipps v. McGehee, 5 Port. (Ala.) 413;
Jacoway v. Gault, 20 Ark. 190;
Fogarty v. Finley, 10 Cal. 224;
Henderson v. Grewell, 8 Cal. 584;
Bryan v. Ramirez, 8 Cal. 461; s.c. 68 Am. Dec. 340;
Kelsey v. Dunlap, 7 Cal. 162;
Wolf v. Fogarty, 6 Cal. 224; s.c. 65 Am. Dec. 509;
Comuleet Co. v. Russell, 68 Ill. 426;
Carpenter v. Dexter, 75 U. S. (8 Wall.) 513; bk. 19 L. ed. 426.

cient,¹ and his official seal must be affixed, when the statute so requires.²

SEC. 2344. *Recording deeds.*—In the various states of the Union there are statutes requiring all instruments affecting the title to land to be recorded ;³ but even in these states recording is not necessary to the validity of the deed as between the parties ;⁴ it is void only as to creditors and subsequent purchasers for value without notice.⁵ Where a deed is duly recorded as required by statute, it is constructive notice and conclusive, upon all subsequent purchasers and incumbrancers ;⁶ but in

- ¹ *Marston v. Brashaw*, 18 Mich. 81 ; s.c. 100 Am. Dec. 152.
See : *Watson v. Clendenin*, 6 Blackf. (Ind.) 477 ;
Barney v. Sutton, 2 Watts (Pa.) 31 ;
Duncan v. Duncan, 1 Watts (Pa.) 322.
- ² *Little v. Dodge*, 32 Ark. 453 ;
Hastings v. Vaughn, 5 Cal. 315 ;
Holbrook v. Nichol, 36 Ill. 161 ;
Booth v. Cook, 20 Ill. 129 ;
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Miller v. Henshaw, 4 Dana (Ky.) 325 ;
Kemper v. Hughes, 7 B. Mon. (Ky.) 255 ;
Buell v. Irwin, 24 Mich. 145 ;
Barney v. Sutton, 2 Watts (Pa.) 31 ;
Duncan v. Duncan, 1 Watts (Pa.) 322 ;
McCreary v. McCreary, 9 Rich. (S. C.) Eq. 34 ;
Texas Land Co. v. Williams, 51 Tex. 51 ;
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Wetmore v. Laird, 5 Biss. C. C. 160 ; s.c. Fed. Cas. No. 17467 ;
Richards v. Randolph, 5 Mas. C. C. 115 ; s.c. Fed. Cas. No. 11772.
- ³ See : *Morton v. Robard*, 4 Dana (Ky.) 258 ;
Sinclair v. Slawson, 44 Mich. 123 ; s.c. 38 Am. Dec. 235 ;
Peck v. Mallams, 10 N. Y. 518 ;
Fort v. Burch, 6 Barb. (N. Y.) 60 ;
Dawson v. Thurston, 2 Hen. & M. (Va.) 132 ;
West v. Randall, 2 Mas. C. C. 181 ; s.c. Fed. Cas. No. 17424.
- ⁴ *McCaskle v. Amarine*, 12 Ala. 217 ;
- Wood v. Chapin*, 13 N. Y. 509 ; s.c. 67 Am. Dec. 62 ;
Walker v. Coltraine, 6 Ired. (N. C.) Eq. 79 ;
Hill v. Epley, 31 Pa. St. 335 ;
Belk v. Massey, 11 Rich. (S. C.) L. 614.
- ⁵ *Snodgrass v. Ricketz*, 13 Cal. 359 ;
McConnell v. Reed, 3 Ill. (2 Scam.) 374 ;
Philips v. Green, 3 A. K. Marsh. (Ky.) 7 ; s.c. 13 Am. Dec. 124 ;
Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 429 ; s.c. 19 Am. Dec. 139 ;
Derbes v. Romero, 32 La. An. 927 ;
Losey v. Simpson, 11 N. J. Eq. (3 Stock.) 246 ;
Van Rensselaer v. Clark, 17 Wend. 25 ; s.c. 31 Am. Dec. 280 ;
Grimstone v. Carter, 3 Paige Ch. (N. Y.) 421 ; s.c. 24 Am. Dec. 230 ;
Bellas v. McCarty, 10 Watts (Pa.) 13 ;
Vance v. McNairy, 3 Yerg. (Tenn.) 471 ;
Newman v. Chapman, 2 Rand. (Va.) 93 ; s.c. 14 Am. Dec. 766.
- ⁶ *Tilton v. Hunter*, 25 Me. 11 ;
Flynt v. Arnold, 43 Mass. (2 Met.) 619 ;
Bates v. Norcross, 31 Mass. (14 Pick.) 231 ;
Schutt v. Large, 6 Barb. (N. Y.) 373 ;
Johnson v. Stagg, 2 John. (N. Y.) 510 ;
Rogers v. Burchard, 34 Tex. 453 ; s.c. 7 Am. Rep. 283 ;
Godfrey v. Beardsley, 2 McL. C. C. 412 ; s.c. Fed. Cas. No. 5497.

the absence of statutory regulation such recording is of no effect as notice, and not binding upon subsequent purchasers and incumbrancers,¹ because the placing of a deed on record in a manner not provided for or authorized by law gives it no additional validity or effect.² From this it follows as a natural consequence that where registration of deeds and other instruments affecting the title to land is provided for by statute, the law must be strictly pursued not only in the act of recording, but the instrument must have all the pre-requisites prescribed by law to entitle it to be recorded, otherwise it will not afford notice or bind any one,³ except the parties to the instrument and such as have actual notice of the deed and of its contents.⁴

¹ *Tatum v. Young*, 1 Port. (Ala.) 298;

Baker v. Washington, 5 Stew. & P. (Ala.) 142;

Barney v. Little, 15 Iowa 527;

Burton v. Martz, 38 Mich. 762.

² *Tillman v. Cowand*, 20 Miss. (12 Smed. & M.) 262;

Oatman v. Fowler, 43 Vt. 462.

See also authorities cited in next footnote.

³ *Herndon v. Kimball*, 7 Ga. 432;

Chouteau v. Jones, 11 Ill. 300;

Reynolds v. Kingsbury, 15 Iowa 238;

Brinton v. SeEVERS, 12 Iowa 389;

Suiter v. Turner, 10 Iowa 517;

Edwards v. Brinker, 9 Dana (Ky.) 69;

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s.c. Fed. Cas. No. 8316.

⁴ *Bass v. Estill*, 50 Miss. 300;

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